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## **REPORT No. 75/15**

### **CASE 12.923**

REPORT ON MERITS

ROCÍO SAN MIGUEL SOSA AND OTHERS

Venezuela

Approved by the Commission at its session No. 21 held on October 28, 2015  
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Venezuela. October 28, 2015.



Organization of  
American States

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**I. SUMMARY**

1. On March 7, 2006, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission" or "the IACHR") received a petition lodged by Ligia Bolívar Osuna and Héctor Faúndez Ledesma (hereinafter "the petitioners") alleging that the Bolivarian Republic of Venezuela (hereinafter "the State" or "the Venezuelan State") is responsible for the violation of several provisions of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña (hereinafter "the alleged victims").

2. The petitioners claim that in 2004 the alleged victims were dismissed from their posts in the National Border Council (hereinafter "CNF", for its initials in Spanish) in retaliation for signing the petitions to carry out a recall referendum on the term of office of the President of the Republic, Hugo Chavez Frías in 2003. They also noted that the alleged victims were not heard by a court that met the minimum requirements of independence and impartiality, and that would hear them with the due guarantees for the restitution of their rights.

3. For its part, the Venezuelan State did not present observations on the merits. The State's submissions available to the Commission correspond to the admissibility stage. In those communications, in addition to issues of admissibility, that are not relevant to the merits analysis, having already been resolved, the State argued that there is no causal link between the signatures and the termination of the alleged victims, because said termination was carried out in application of the seventh clause of their respective contracts, under which the employer is empowered to terminate the services without any motivation. The State also indicated that the alleged victims filed various remedies, which were duly resolved by the judicial authorities.

4. After examining the positions of the parties, the Commission concluded that the Venezuelan State is responsible for the violation of the rights enshrined in Articles 8 (right to a fair trial) , 13 (freedom of conscience and religion), 23 (right to participate in government), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof, to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña. In addition, the Commission concluded that it has no evidence in its possession to declare the State responsible for the violation of article 5 (humane treatment) of the American Convention, separately. Finally, the Commission made the respective recommendations.

**II. PROCEEDINGS BEFORE THE COMMISSION**

**A. Processing of the case subsequent to the admissibility report**

5. On March 7, 2006, the Commission received the petition and registered it under the number 212-06. The procedure until the decision on admissibility is explained in detail in Report No. 59/13 of July 16, 2013<sup>1</sup>. In said report, the IACHR declared the petition admissible as to the possible violation of the rights enshrined in Articles 5, 8, 13, 23, 24 and 25 of the American Convention in connection with Articles 1.1 and 2 thereof.

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<sup>1</sup> IACHR, Report No. 59/13 (Admissibility), Petition 212-06, Rocío San Miguel Sosa et al, Venezuela, July 16, 2013, paras 5-7.

6. On August 21, 2013, the Commission notified the admissibility report to the parties. Also, in accordance with Article 38.2 of its Rules, the Commission made itself available to the parties to reach a friendly settlement and asked the petitioners to submit additional observations on the merits within four months. On January 30, 2015, the petitioners submitted their observations on the merits. These observations were forwarded to the Venezuelan State on March 31, 2015 requesting to submit any additional observations on the merits within the statutory period of four months. At the date of approval of this report, the Venezuelan State has not submitted its additional observations on the merits.

### III. POSITION OF THE PARTIES

#### A. Position of the petitioners

7. During the merits stage the petitioners ratified in all its parts the content of their initial complaint of March 7, 2006. In this regard, they noted that the alleged victims Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña worked at the CNF, under the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela. They noted that: i) Thais Coromoto Peña had worked at the service of the Public Administration for 20 years, nine of them working for the CNF; ii) Rocío San Miguel Sosa had done so for a total of 13 years, seven of which he served in the CNF; and iii) Magally Chang Girón, on its part, had worked six years at the service of the CNF.

8. The petitioners reported that in March 2004, Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña were informed of the decision of the President of the National Border Council to terminate their employment contract with that institution. In their view, that decision was based on "purely political reasons" linked to the decision of the alleged victims to sign the petition to carry out the recall referendum on the term of office of the President of the Republic, under Article 72 of the Constitution of that country.

9. By way of background, the petitioners indicated that, in August 2002, several organizations submitted a list of signatures to the National Electoral Council (hereinafter "the CNE" for its initials in Spanish) requesting to carry out an advisory referendum to achieve the resignation of the President of the Republic. On December 3, 2002, the referendum on the presidential term was convened, however afterwards the Acting Chamber for Electoral Matters of the Supreme Court of Justice called off the above-mentioned referendum process until the National Assembly appointed new members to the CNE. In February 2003 a new gathering of signatures got underway popularly known as "*El Firmazo*", presenting on August 20, 2003 more than 3 million signatures before the CNE. However, on this occasion the CNE found the petition inadmissible because it had been filed tardily and established over thirty technical conditions to carry out the referendum.

10. Finally, the CNE convened and organized a new period for collection of signatures, which ran from November 28 to December 1, 2003, and that was popularly known as "*El reafirmazo*". The petitioners contended that in the weeks prior to this signature collection drive, both the President of the Republic and other high-ranking government officials made threatening public statements to intimidate citizens into not participating in the signature collection process.

11. On December 2, 2003, the Ministry of Infrastructure reported to the country that the signatures gathered during "*El Reafirmazo*" would be posted at the collection centers so that all Venezuelans could verify them. They added that the signatures collected were submitted to the CNE on December 19, 2003 for validation.

12. The petitioners underscored that on January 30, 2004, prior to the CNE validating the signatures turned over to it, the President of the Republic filed a request with the CNE to hand over to congressman Luis Tascón a copy of the original signature sheets of all persons signing the petition, who after obtaining them published them on its website along with allegations of fraud of the signatories. They asserted that on February 15, 2004, on the Sunday television program of the President of the Republic, he urged the consult the "*Tascón List*", indicating the Web site where people could view who had signed the petition to remove him from office. The petitioners alleged that the Web featured a built-in signature browser function

that made it possible to investigate the names of the signers by entering a signer's national identity card number. They also contended that this browser function included accusation that signers had committed fraud and were traitors to the nation. In view of the petitioners, after the creation of this website, public employees and officials began to be pressured to disavow their signatures in the referendum or retract them in the process of challenge. According to the information provided, the signatures of more than one million citizens were challenged in this process.

13. The petitioners argued that, precisely in this particular context, Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña were advised of the decision of the Chairman of the National Border Council to terminate their labor contract with said institution. According to the petitioners, of the 22 individuals who were employed at the National Border Council at that time, the only ones who appeared on the list that was released to the public by congressman Tascón as signers of the recall referendum petition on the term of office of the President of the Republic were Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña and Jorge Guerra Navarro; and that those four persons were notified of the early termination of their contracts.

14. The petitioners asserted that the written dismissal notification did not state the reason for the action. They claimed, however, that at the time they were served the written notice, the Executive Secretary of the institution orally informed the alleged victims, separately, that their dismissals were the consequence of signing the petition for the recall of the term of office of the President of the Republic. The petitioners alleged that the offer was made to Mrs. Thais Coromoto Peña that the measure would be vacated in exchange for disavowing her signature on the day of challenge called by the National Electoral Council. They also contended that the dismissal of Mr. Guerra Navarro did not actually occur because he accepted the pledge to not validate his signature before the election authorities.

15. The petitioners alleged that on April 20, 2004, the Chairman of the CNE announced that more than one million signatures would undergo the process of challenge, noting that during the "day of challenge," in addition to the validation of signatures, the signatures of any of the signers of the petition, who may have changed their minds, could be retracted. They indicated that the abovementioned day of challenge was convened by the CNE and was held on June 27, 2004. The petitioners noted that Rocío San Miguel, whose signature had been challenged, validated her signature on that occasion. They added that the actual presidential term recall referendum was held on August 15, 2004, as convened by the CNE, and that Rocío San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña participated in it.

16. The petitioners alleged that the referendum was followed by retaliation of those who signed and that, particularly, "at the end of 2004, Mrs. Rocío San Miguel was also expelled from the Advanced Air Force Academy and the Advanced Naval War School, where she had been serving as a professor." Furthermore, her husband, an active-duty officer of the National Armed Forces, with the rank of "Aviation Colonel" had not been assigned to any position in the Military Aviation unit since August 18, 2004 as of the date of submission of the initial claim by the petitioners.

17. The petitioners asserted that on April 15, 2005, then President of the Republic, Hugo Chávez Frías, publically ordered Congressman Luis Tascón's list to be "buried." They further noted that on April 26, 2005, the Attorney General of the Republic commissioned Prosecuting Attorney Number 49 of the Metropolitan Area of Caracas to investigate the complaints of political discrimination; nonetheless, the alleged victims were never called by said prosecutor, even though a complaint had been filed by them since May 2004.

18. The petitioners asserted that on August 24, 2005, the Association for the Defense of the Signers of the Petition reported that there was a "second Tascón List" called the "Maisanta List" or "Maisanta Program," which had been copied onto a compact disc and distributed throughout the different agencies of the Public Administration for discriminatory purposes.

19. As to the procedures followed by the alleged victims under the domestic legal system, the petitioners noted that on May 27, 2004, Rocío San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña filed charges with the Attorney General of the Republic of Venezuela regarding the facts that are the subject of

the initial petition. They noted that on April 4, 2005, Control Court 21 of the Criminal Judicial Circuit of the Metropolitan Area of Caracas gave its judgement dismissing the charges on the grounds that the facts stated in the complaint were not criminal offenses under the law, adding that on May 12, 2005, the appellate court upheld the dismissal of the case. The petitioners indicated that the appeal remedy (*casación*) was also dismissed.

20. The petitioners also argued that the alleged victims reported the incidents on May 27, 2004, to the Office of the People's Ombudsman. According to the account of the petitioners, the complaint was lost by this Office and after resubmitting the documents, this office officially opened a case on June 29, 2004. On August 7, that same year, the Office of the People's Ombudsman archived the case file.

21. Additionally, the petitioners noted that on July 22, 2004, the alleged victims filed an appeal for constitutional relief through an *amparo* proceeding with the Fourth Trial Court for Labor Matters of the Metropolitan Area of Caracas; said appeal was found to be groundless on the merits on July 27, 2005. This trial court judgment was upheld on September 9, 2005, by the Third Superior Court for Labor Matters of the Labor Circuit Court of the Judicial District of the Metropolitan Area of Caracas.

22. As for the merits issues raised by the State during the admissibility stage, the petitioners indicated that while Venezuela claims that the Tascón list was a citizen tool to verify the legality of the signatures for the recall referendum, since 17 October 2003, then-President Hugo Chavez threatened to take political reprisals against the signatories in a televised public event.

23. As for the argument according to which a contractual provision allowed for the State to terminate such contracts, the petitioners pointed out that this should not be construed as an authorization for arbitrariness or that it absolves the State from invoking legitimate and rational reasons, other than any form of discrimination prohibited by Article 1.1 of the Convention.

24. The petitioners argued that given the facts described above, the State violated Articles 5, 8, 13, 16, 23, 24, 25 and 26 of the American Convention, in conjunction with Articles 1 (1), 2 and 29 thereof, to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña.

25. As to the alleged violation of the **right to humane treatment**, the petitioners assert that the Venezuelan State subjected the alleged victims to cruel, inhuman and degrading treatment, by punishing them for exercising a legitimate right, which deprived them of their livelihood, and stigmatized them in the eyes of the rest of society, upsetting their spiritual and family life, leading to feelings of frustration, which severely affected their life plans.

26. As to the alleged violation of their **right to a fair trial**, the petitioners contended, first and foremost, that the dismissal of the alleged victims from their positions of employment was an actual administrative sanction for exercising their rights. In the view of the petitioners, if the State was charging the alleged victims with having committed an offense, it had the duty to properly serve notice of the charges to them, bring the evidence against them to their attention and to hear their defense. Secondly, the petitioners alleged that both the criminal proceeding and the *amparo* proceeding for constitutional relief were marred by many irregularities and that the State did not fulfill the minimum standard of due diligence to investigate this type of. They added that, in the proceeding to seek constitutional relief through *amparo*, the alleged victims were not heard by an independent and impartial tribunal, within a reasonable time and under the guarantees of due process.

27. As for the criminal complaint, the petitioners contended that the Office of the Public Prosecutor failed to take the necessary measures in the investigation, such as an on-site inspection to where the incidents occurred, or interviews to staff members assigned to the National Border Council. They further claimed that the decision to dismiss the case took place "behind the backs of the [alleged] victims." In this regard, the petitioners argued that the Control Court did not summon the parties to the oral hearing that was held to receive their arguments on the motion for dismissal of the case filed by the Office of the Public Prosecutor, as required by Venezuelan legislation. They asserted that they appealed to the Chamber for

Appeals on Criminal Matters of the Supreme Court of Justice, to order the case to be reheard, because a hearing on the dismissal had not be conducted, which was denied even though a consistent legal precedent supporting their claim existed.

28. As for the alleged violation of **freedom of thought and expression**, the petitioners argued that the alleged victims were dismissed as punishment for expressing their political opinion by signing the petition for the recall referendum and, in so doing, their own opinion on the performance of the Venezuelan government. The petitioners also believed that the aforementioned punishment has a chilling effect. They stressed that there must be a wide margin of tolerance for statements about public officials, when matters of public interest are involved.

29. Concerning the **right to association**, the petitioners noted that a transitory association of citizens with the legitimate aim of revoking the mandate of President of the Republic, should not have been interfered by the State as it happen when the alleged victims were remove from their posts.

30. With regard to the alleged violation of the **right to participate in government**, the petitioners claimed that the alleged victims were the target of pressure to not exercise their political right to participate in the process of convening a recall referendum on the president's term in office, and that their subsequent dismissal from their job amounted to a punishment for exercising said right. The petitioners also alleged that when the list of people who signed the petition to call for the referendum was made public, the right to vote by secret ballot, as provided for by Article 23.1.b of the Convention, was infringed. The petitioners further claimed the violation to Article 23.1.c of the Convention, given that excluding people from government jobs who do not share the official ideology of the government, fosters a system of political *apartheid*.

31. With regard to the **right to equal protection and the principle of nondiscrimination**, the petitioners stated that unlike the alleged victims, public officials who were committed to the political project of the then President of the Republic could freely express their views without being fired. They also alleged that the case is a clear example of political discrimination since the publication of the "Tascon list" had the effect of exposing to public hatred and contempt to those who signed the petition for the recall referendum. They added that the signatories of the list suffered various reprisals, like watching their access to public facilities being prevented, the cancelation of their contracts with the public administration, obstacles in obtaining identity documents, as well as the publication of their names on billboards of public offices and their classification as "traitors to the nation".

32. As for the **right to judicial protection**, the petitioners claimed that the alleged victims did not occupy positions of trust, inasmuch as: (i) the State had not complied with the provisions of Article 53 of the Law of the Public Service Statute, which sets forth that positions of trust must expressly be listed in the organic regulations of the entities of the civil service; (ii) the alleged victims were never invited to take part at high-level meetings; and (iii) all of them had served in the civil service on the National Border Council for more than two administrations, without being replaced due to the change in government. Based on this classification, the petitioners contended, the alleged victims did not have access to a simple and prompt remedy to provide relief to them from the decisions of the administration. In general, they contended that "in the absence of the rule of law, in which independent and impartial tribunals operate, any remedy providing relief before the Venezuelan courts would have proven to be ineffective."

33. Concerning the **progressive development of economic, social and cultural rights**, the petitioners argued that the dismissal of the victims from their jobs was an infringement of their right to work, set forth in Article 45 of the OAS Charter, to which Article 26 the Convention refers to They added that the principle of non-discrimination is fundamental in terms of economic, social and cultural rights.

## **B. Position of the State**

34. The State did not submit additional observations on the merits. In that sense, this section is based on the arguments of the State on the admissibility stage, as far as relevant for the analysis of the merits.

35. In addressing the petition process to gather signatures for convening the recall referendum of the President of the Republic, the State explained that the process requires the signatures of at least twenty per cent of all voters, as set forth in Article 72 of the Constitution of that country. Accordingly, the CNE examined the signatures it had received and challenged some of them citing irregularities. According to the State, this is what led the CNE to create the database questioned by the petitioners, which was intended to be a citizens' instrument to help verify whether or not signatures had been fraudulently included in the petition.

36. The State explained that on March 2, 2004, the CNE issued rules to regulate the challenge process in order to verify the legitimacy of the signatures and that this process was to take place on April 20, 2004. The State contends that the signature verification day was actually held on June 27, 2004, and that because the signature of Rocío San Miguel was one of the ones that had been challenged for alleged irregularities, the contract of Rocío San Miguel could not have been decided on the basis of a signature that took legal effect as of the time of the challenge, in other words, once the whole petition process on the presidential referendum had concluded.

37. By the account of the State, the processes of rescission of contracts of the alleged victims were conducted with strict adherence to the law and respecting the principle of the will of the signatory parties to said contracts. According to the State, on December 31, 2003, the alleged victims signed a new contract with the National Border Council, which went into effect on January 1, until December 31, 2004. The State asserted that on March 12, 2004, the chairman of the National Border Council decided to terminate the contracts of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña invoking the seventh clause of those contracts.

38. The State indicated that by the time the alleged "calls for political discrimination" began, the contracts of the alleged victims had already been terminated; therefore there is no link of cause and effect between their taking part in the process of collecting signatures and the termination of the contracts.

39. The State claimed that, as a consequence of the termination of their contracts, the alleged victims filed on June 22, 2004, for constitutional relief via the *amparo* proceeding. The State asserted that on July 27, 2005, the *amparo* claim was found groundless on the merits of the matter, and that on September 9, 2005, the Third Superior Trial Court upheld the original trial court decision.

40. The State contended that the alleged victims filed a complaint before the Office of the People's Ombudsman on May 27, 2004, and that on August 17, 2004, the Office of the People's Ombudsman issued an official certificate of closure of the proceeding for lack of sufficient evidence to establish that there was a violation of the human rights of the complainants. The State further noted that the alleged victims never went to the CNE to lay out their case so that this agency could determine whether there had been a violation of their political rights.

41. The State claimed that on July 6, 2004, the alleged victims filed a complaint with the Office of the Public Prosecutor, but on January 1, 2005, the Office of the Thirty-Seventh Prosecuting Attorney of the Office of the Public Prosecutor with Full Jurisdiction nationwide moved for the dismissal of the case, a decision upheld at the appeals level. The State also noted that the alleged victims filed a direct appeal to the highest court of review (*casación*), which was also denied.

42. As for the violation of the right to humane treatment, the State contended that applying a clause of a contract can hardly be viewed as "cruel" treatment. The State also asserted that the complainants were unsuccessful at proving that they had been threatened, and noted that because the relevant labor law, the alleged victims were eligible to apply for civil service positions through a competitive process.

43. With regard to the charge of violation of the right to a fair trial, the State asserted that the alleged victims were not the target of administrative sanctions, but of the application of a contractual clause that granted the power to the employer, as well as to the employee, to terminate the work relationship simply by giving notice to cease their activities, without cause. In this regard, the State considered that the complainants were not "removed from office" (*'destituido'* a term reserved for public officials) but rather the



legal provision that was applicable to them was the terms of their respective contracts and, supplementarily, the Organic Labor Law, which provides for the payment of certain amounts of money to cover the time that the dismissed employee is engaged in securing new employment. The State claimed that the amounts of money that the alleged victims were entitled to under the law were made available to them. Furthermore, the State asserted that the Law does not prescribe any procedure prior to terminating a contract and it was not necessary to give cause for the acts of dismissal. In this regard, it noted that the alleged victims were not public officials, as defined by the Constitution and the Public Service Statute.

44. The State contended that the alleged victims wrongly filed a criminal complaint with the Office of the Public Prosecutor on May 27, 2004. On this issue, it argued that the complainants “intend to confuse the IACHR with the filing of non-suitable remedies for the restoration of their allegedly violated right, without distinguishing between [on the one hand] the criminal responsibility that civil servants have as a consequence of their duties and of the public property they are in charge of, and, on the other hand, the consequences and obligations arising from termination of a labor relationship, which is settled in the labor rather than the criminal courts.”

45. As for the alleged violation of the right to freedom of expression, the State reiterates that the rescission of the contracts of the alleged victims was not a punishment, but rather involved the simple application of a contractual clause pursuant to the law. The State stressed that no court proceedings were brought against the complainants for issuing statements of a political nature, nor has the media been sanctioned or censured for being a vehicle of expression of citizens who supported the petition for the recall referendum.

46. Likewise, according to the Venezuelan State, there was no violation of the right to freedom of association, because the exercise of that right on a subject of such great national consequence as a referendum on a presidential recall, must be duly regulated. In support of this claim, the State argued that on September 25, 2003, the CNE issued the “Guidelines Regulating Processes of Recall Referenda of the Terms in Office of Popularly Elected Positions,” which ensures compliance of the State with the obligation to the democratic exercise of the will of the people. The State asserted that several different referenda processes carried out in Venezuela are of public knowledge and are widely known internationally, in which the participation of the citizenry, the collaboration of the CNE and of State authorities was evident.

47. With regard to the violation of the right to participate in government, the State contended that the complainants did not provide adequate and legally sound evidence to prove that they were the targets of political pressure to not exercise their political rights. In this regard, they contended that the rescission of a labor contract is not regarded in Venezuelan law as a sanction. They further asserted that the complainants can hardly contend that the State has infringed their right to have equal access to public service, since what occurred was the resolution of a work contract, in which the alleged victims lacked the status of public officials. It argued that there is nothing on record to prove that these citizens have ever taken part in a competitive process to apply for positions in the civil service.

48. Concerning the violation of the right to equal protection, the State reiterated its arguments on the nature of the contract of the alleged victims, indicating that they intended to link the termination of an employment relationship with the exercise of a political right, departing from inaccurate deductions, as well as illegally obtained recordings, rejected by Venezuelan national courts. The State argued that the alleged victims were aware of the nature of their contracts, which is reflected in the authority before which they presented their *amparo* proceeding for constitutional relief.

49. As for the violation of the right to judicial protection alleged by the petitioners, the State argued that the fact that the *amparo* claim for constitutional relief was found groundless did not mean that there has been a violation of the provisions of the Convention, because despite the existence of the ordinary labor procedure before the labor courts, the *amparo* claim, an action of a special nature, was admitted and processed in keeping with the law. According to the State, the judge who heard the case, based on the standard of free and reasoned judgment (*sana crítica*) examined the evidence introduced by the parties and ruled pursuant to the law. Additionally, the State believed that the alleged victims had a suitable remedy available to

them in the labor courts, but they chose to pursue the least suitable remedy of the *amparo* claim for constitutional relief as a mechanism to gain access “recklessly” to international bodies.

50. The State also believed that it had not transgressed Article 26 of the Convention, inasmuch as Venezuelan law sets forth criteria to provide monetary reparation to workers when they are dismissed, as well as payment of unemployment benefits as provided by the Organic Labor Law. The State considered the termination of the labor relationship to have taken place under a contractual clause that allowed it, and that it does not entail a violation of the workers’ rights or an abridgment of the guarantees protecting them, because it is not an obligation of the employer to maintain a life-long work relationship with the employee.

51. In addressing the alleged violations of Article 1.1 of the Convention, the State reiterated that the alleged victims were not discriminated against for political reasons or any reasons of another nature. It reiterated that the alleged victims simply did not have the status of public officials and were subject to the Organic Labor Law. In this regard, it emphasized that the termination of the labor relationship under the contractual termination clause cannot be viewed as discriminatory.

#### **IV. PROVEN FACTS**

52. Taking into account the information available in the file, as well as publicly available information, the proven facts will be described in the following order: A) Preliminary issue on the use of certain evidence; B) Context of the petition for signatures for convening the consultative and recall referendum for the President of the Republic; C) The work relationship and termination of contracts of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña; and D) Internal processes initiated in relation to the termination of the contracts.

##### **A. Preliminary issue on the use of certain evidence**

53. The Commission notes that the State asserted that the recordings constituted evidence obtained illegally, which led to its rejection in the domestic proceedings. The Commission recalls that according to the jurisprudence of the Inter-American System, the standard of proof are less formal in an international legal proceeding than in a domestic one and it has held that its bodies can “weight the evidence freely”<sup>2</sup>. In this regard, the Inter American Court has stated that they “must apply an assessment of the evidence that takes into account the gravity of attributing international responsibility to a State and that, despite this, is able to create confidence in the truth of the facts that have been alleged”<sup>3</sup>. The Court has considered that “it is legitimate to use circumstantial evidence, indications and presumptions to found a judgment, provided that conclusions consistent with the facts can be inferred from them”<sup>4</sup>.

54. Although the Inter-American Court has ruled that telephone conversations are protected under Article 11 of the American Convention<sup>5</sup>, the constant jurisprudence of the of the Inter-American system has also established that “the right to privacy is not an absolute right and can be restricted by the States, provided interference is not abusive or arbitrary; to this end, it must be established by law, pursue a legitimate purpose and be necessary in a democratic society”<sup>6</sup>.

<sup>2</sup> 1/a Court H.R., Case of Velasquez Rodriguez. Merits. Judgment of July 29, 1988. Series C No. 4, para. 127 and 128.

<sup>3</sup> 1/a Court H.R., Case of Gonzalez Medina and family v. Dominican Republic. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 27, 2012. Series C No. 240, para. 132

<sup>4</sup> 1/a Court H.R., Case of Gonzalez Medina and family v. Dominican Republic. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 27, 2012. Series C No. 240, para. 134.

<sup>5</sup> 1/A Court H.R., Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para. 114.

<sup>6</sup> 1/A Court H.R., Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para. 116.

55. In this case the content of the conversations do not refer to matters relating to private life or reputation of the participants in the conversation. By contrast, the talks revolve around the reasons that supported the dismissal, particularly, whether the signature to convene a recall referendum was the real motivation. In that sense, the use of the conversation in this report does not disclose aspects of the private life of the people involved but rather could legitimately be described as matters of public interest, taking into special consideration the allegations regarding the existence of a generalized context of retaliation.

56. The European Court has ruled on sanctions against media for spreading the recording of a telephone conversation between senior state officials. In the case of *Radio Twist v. Slovakia*<sup>7</sup>, this Court noted that from the context and content of the conversation, the political and public interest character of it was evident, without it being possible to determine a dimension related to the private lives of such persons. Consequently, the European Court found that the special standard of tolerance established in its case law was applicable, and found that the sanction imposed was not necessary in a democratic society.

57. Another element that the Commission considers relevant to take into account relates to the characteristics of this case. The main debate that the Commission must resolve is whether the dismissal of the three alleged victims was based on their signatures to convene a recall referendum of the then President of the Republic. In that sense, what is argued is that there is an alleged covert discrimination behind a veil of legality consistent in a contractual clause. In such cases, by its very nature, there is generally no direct evidence about the presence of a prohibited ground of discrimination, in this case, political opinion. This explains the reasons why the Commission must consider indicia and circumstantial evidence in such cases. The recordings of the telephone conversation are another element of the evidence provided to the Commission.

58. Considering all the above elements as a whole, the Commission considers that the use of the transcripts and the recordings of the telephone conversations is justified in this case and, therefore, will proceed to consider the, on the subsequent factual determinations.

## **B. Context of the petition for signatures for convening the consultative and recall referendum of the President of the Republic**

### **1. The first collection of signatures for the presidential consultative referendum**

59. The Venezuelan Political Constitution, enacted in 1999, enshrines under Articles 71 and 72 the possibility to withdraw all charges and magistrates elected by popular vote after half of the period for which the civil servant was elected for has passed, by the request to convene a referendum by no fewer than twenty percent of voters registered in the pertinent circumscription<sup>8</sup>.

<sup>7</sup> Radio Twist v. Slovakia. Paras. 56 – 65.

<sup>8</sup> Article 71 of the Constitution establishes that: Matters of special national transcendence may be referred to a consultative referendum, on the initiative of the President of the Republic, taken at a meeting of the Cabinet; by resolution of the National Assembly, passed by a majority vote; or at the request of a number of voters constituting at least 10% of all voters registered on the national, civil and electoral registry. Matters of special state, municipal and parish transcendence may also be referred to a consultative referendum. The initiative shall be taken by the Parish Board, the Municipal Council and to the Legislative Council, by the vote of two third of its members; by the Mayor and the Governor or by a number of voters constituting at least 10% of the total number of voters registered in the pertinent circumscription. In turn, Article 72 stipulates that: All magistrates and other offices filled by popular vote are subject to revocation. Once half of the term of office to which an official has been elected has elapsed, a number of voters constituting at least 20% of the voters registered in the pertinent circumscription may extend a petition for the calling of a referendum to revoke such official's mandate. When a number of voters equal to or greater than the number of those who elected the official vote in favor of revocation, provided that a number of voters equal to or greater than 25% of the total number of registered voters have voted in the revocation election, the official's mandate shall be deemed revoked, and immediate action shall be taken to fill the permanent vacancy in accordance with the provided for in this Constitution and by law. The revocation of the mandate for the collegiate bodies shall be performed in accordance with the law. During the term to which the official was elected, only one petition to recall may be filed. See Constitution of the Bolivarian Republic of Venezuela, Extraordinary Official Gazette no. 36,380 of December 30, 1999, available at: [http://www.cne.gob.ve/web/normativa\\_electoral/constitucion/titulo3.php#cap4](http://www.cne.gob.ve/web/normativa_electoral/constitucion/titulo3.php#cap4).

60. During 2001 and 2002 Venezuela faced a serious institutional and political crisis under which opposition parties and civil society organizations promoted a consultative referendum to request the resignation of President Hugo Chavez. To this end, the organizations collected signatures and on 4 November, 2002 handed to the National Electoral Council over two million signatures<sup>9</sup>.

61. In November 2002, during a television program, President Chavez said he would not resign his position by stating that "not even assuming that the National Electoral Council decreed that the question (of the consultative referendum) is valid. Nor in the event that the Supreme Court says so. Nor in the event that they do the referendum and draw 90% of the votes, I will not resign!"<sup>10</sup>.

62. On December 3, 2002, by Resolution 021203-457, the National Electoral Council called for voters to participate in the national advisory referendum on the presidential term set for February 2, 2003<sup>11</sup>.

63. Then, on December 30, 2002, three members of the Fifth Republic Movement political party filed a claim for "annulment with request for constitutional *amparo*" against Resolution No. 021203-457 of December 3, 2002, published in the Electoral Gazette No. 168 of December 5, 2002<sup>12</sup>.

64. On January 22, 2003, 10 days before the date for carrying out the consultative referendum, the Acting Chamber for Electoral Matters of the TSJ resolved the request for constitutional *amparo* and the annulment claim, and ordered the CNE to: a) refrain from initiating electoral or referenda processes and suspend those already initiated; b) refrain from conduction sessions with the participation of Leonardo Pizani; and c) suspend the effects of Resolution No. 021203-457<sup>13</sup> given that in the approval of that decision a person who had already resigned to his position as deputy participated in the Board, therefore that decision is detrimental to "the right to participate in public affairs of both the appellants, and in generally all voters (...)"<sup>14</sup>. In light of the above, the CNE suspended the call for a consultative referendum and restricted its activities to those of an administrative nature<sup>15</sup>.

## 2. The second collection of signatures: "El Firmazo"

65. In view of the decision of the Electoral Chamber of the TSJ, political parties and members of civil society determined to carry out on February 2, 2003 a second collection of signatures known as "El Firmazo", this time for a referendum with a recall nature for the Presidential term. In said collection drive, more than three million signatures were collected<sup>16</sup>.

<sup>9</sup> Project *Súmate*, available at: <http://www.sumate.org/proyectos.html>.

<sup>10</sup> Analytics, Chavez: I will not resign even if they get 90% of the votes in the referendum, November 25, 2002, available at: <http://analitica.com/actualidad/actualidad-nacional/chavez-no-renunciare-aunque-logren-90-de-votos-en-el-referendum/>. *El Día* ["The Day"], The Supreme Court annuls the February 2 referendum, November 29, 2002, available at: <http://eldia.es/venezuela/2002-11-29/2-Tribunal-Supremo-Justicia-anula-referendum-febrero.htm>.

<sup>11</sup> National Electoral Council Resolution No. 021203-457, Electoral Gazette No. 168, available at: [http://www.cne.gob.ve/web/gaceta\\_electoral/gaceta\\_electoral\\_detallado.php?tg=1&num\\_gac=168](http://www.cne.gob.ve/web/gaceta_electoral/gaceta_electoral_detallado.php?tg=1&num_gac=168).

<sup>12</sup> Acting Chamber for Electoral Matters of the Supreme Court of Justice, Decision that grants the constitutional precautionary *amparo*, January 22, 2003, available at: <http://historico.tsj.gob.ve/decisiones/selec/enero/3-220103-X-0002.HTM>, *Súmate* Progress Report "The Presidential Recall Referendum", September 7, 2004, page 14, available at: <http://infovenezuela.org/democracy/attachments-spanish/T3%20ST03%20N8%20Avance%20Sumate%20RRP1-1.pdf>.

<sup>13</sup> Acting Chamber for Electoral Matters of the Supreme Court of Justice, Decision that grants the constitutional precautionary *amparo*, January 22, 2003, available at: <http://historico.tsj.gob.ve/decisiones/selec/enero/3-220103-X-0002.HTM>.

<sup>14</sup> Acting Chamber for Electoral Matters of the Supreme Court of Justice, Decision that grants the constitutional precautionary *amparo*, January 22, 2003, available at: <http://historico.tsj.gob.ve/decisiones/selec/enero/3-220103-X-0002.HTM>.

<sup>15</sup> *Súmate* Progress Report "The Presidential Recall Referendum", September 7, 2004, page 14, available at: <http://infovenezuela.org/democracy/attachments-spanish/T3%20ST03%20N8%20Avance%20Sumate%20RRP1-1.pdf>.

<sup>16</sup> *Súmate* Progress Report "The Presidential Recall Referendum", September 7, 2004, page 15, available at: <http://infovenezuela.org/democracy/attachments-spanish/T3%20ST03%20N8%20Avance%20Sumate%20RRP1-1.pdf>.

66. The Carter Center and the OAS, as observers, said that "*El Firmazo*" developed normally. However, government officials branded as fraudulent the drive, and denied that they had collected enough signatures to hold the referendum<sup>17</sup>.

67. Considering that a decision of the Constitutional Chamber ruled that "the signatures for the recall must be recorded before the National Electoral Council (CNE), once President Chavez or any elected official meets midterm"<sup>18</sup>, the obtained signatures were submitted to the CNE on August 20, 2003<sup>19</sup>.

68. On September 12, 2003 by resolution No. 030912-461 the CNE declared inadmissible the petition for a recall referendum against President Hugo Chávez Frías, arguing among other things: 1) the untimeliness of the signatures since they were collected six months and 18 days before the President's midterm was reached, therefore "signatures to accompany an application with a purpose to which the undersigned has not the right yet, cannot be collected"<sup>20</sup>; and 2) that the request was not addressed to the CNE and "the text refers to an alleged initiative that the signatories have to convene the referendum themselves, when they only have [such initiative] to activate [the referendum] through the Electoral Body with the ability to summon it"<sup>21</sup>.

### 3. The third collection of signatures: "*El Reafirmazo*"

69. After the inadmissibility of the petition for a recall referendum "*El Firmazo*", in September 2003, the CNE approved the legislation to regulate recall referenda processes by establishing various technical conditions to carry out a recall referendum<sup>22</sup> and decided to call for a new collection of signatures for a presidential recall referendum, to be held between November 28 and December 1, 2003<sup>23</sup>.

70. Also, [the CNE] issued the Resolution 031027-710 by which it "urged both public sector bodies in any of the territorial political levels of government (national, state and municipal) and private agencies with staff at its service, to refrain from implementing any direct or indirect measure that seeks to influence or prevent the free and peaceful enjoyment of the constitutional right to political participation tangled in each of the procedural stages of the recall referendum, governed by rules to regulate the Processes for Recall Referenda for Terms of Office Mandates of Popularly Elected Positions"<sup>24</sup>; and Resolution No. 031120-794 through which it dictates the "Guidelines on criteria for the validation of signatures and of the forms to collect signatures for the recall referendum process for terms of office of popularly elected positions"<sup>25</sup>.

71. In the months prior to the dates set by the CNE for the collection of signatures drive, as reported by various media, some officials suggested that collection of signatures may be fraudulent or threatened those

<sup>17</sup> *El País*, opposition claims victory in the *firmazo* against Chavez, December 3, 2003, available at: [http://elpais.com/diario/2003/12/03/internacional/1070406013\\_850215.html](http://elpais.com/diario/2003/12/03/internacional/1070406013_850215.html).

<sup>18</sup> *El Universal*, Order to deliver signatures after 19A, August 14, 2003, available at: [http://www.eluniversal.com/2003/08/14/pol\\_art\\_14104AA](http://www.eluniversal.com/2003/08/14/pol_art_14104AA).

<sup>19</sup> *Súmate* Progress Report "The Presidential Recall Referendum", September 7, 2004, page 14, available at: <http://infovenezuela.org/democracy/attachments-spanish/T3%20ST03%20N8%20Avance%20Sumate%20RRP1-1.pdf>.

<sup>20</sup> National Electoral Council Resolution No. 030912-461, September 12, 2003, available at: [http://www.cne.gob.ve/web/sala\\_prensa/noticia\\_detallada.php?id=1629](http://www.cne.gob.ve/web/sala_prensa/noticia_detallada.php?id=1629).

<sup>21</sup> National Electoral Council Resolution No. 030912-461, September 12, 2003, available at: [http://www.cne.gob.ve/web/sala\\_prensa/noticia\\_detallada.php?id=1629](http://www.cne.gob.ve/web/sala_prensa/noticia_detallada.php?id=1629).

<sup>22</sup> National Electoral Council, Resolution 030925-465, September 25, 2003.

<sup>23</sup> National Electoral Council, Resolution 031015-539, October 15, 2003.

<sup>24</sup> Annex 1. National Electoral Council Resolution No. 031027-710 of 27 October 2003 (Annex A to the State's submission within the admissibility process before Commission of January 16, 2008).

<sup>25</sup> Annex 2. National Electoral Council Resolution No. 031027-710 of 27 October 2003 (Annex A to the State's submission within the admissibility process before Commission of January 16, 2008).

who would participate in the referendum<sup>26</sup>. For example, in October 2003 President Chavez stated "those who signed against Chavez, your name will be registered for history, because you will have to put your name and surname and signature and ID number and your fingerprint"<sup>27</sup>.

72. In turn, on November 22, 2003, Lina Ron, Coordinator of the Bolivarian Circles and then President of the Single Social Fund, a public institution responsible for managing resources for financing and regulating social programs, stated that "I will not allow that in any collection post people sign against my commander, against the greatest man of this country, against the messiah of this land, against the kindest man the nation ever had, whoever does [sign] it, either they kill me or I kill them"<sup>28</sup>. Also, again, on December 1, 2003 President Hugo Chávez referring to "*The Reafirmazo*" said "are you sure that there won't be fraud against us? As the people say, here in these streets of God "cheating comes out"<sup>29</sup>.

73. On the specified dates, the collection drive was carried out again, and on December 19, 2003 over 3 million signatures were presented to the CNE requesting the presidential recall referendum<sup>30</sup>.

#### 4. The "Tascón List"

74. On January 30, 2004 the President asked the president of the National Electoral Council, to hand over to Congressman Luis Tascón "certified copies of the forms used during the April 4 event in which a group of citizens requested a recall referendum of my mandate"<sup>31</sup>. Prior to receiving copies of the forms, Congressman Luis Tascón said that "now with the forms we will have the opportunity to give a face to fraud (...)"<sup>32</sup>.

75. After the CNE gave copies of the forms to Congressman Tascón, he published these lists on the website [www.luistascon.com](http://www.luistascon.com), accusing the signatories of participating in a "mega-fraud". On the website you could access the list of signatories of the petition for a presidential recall referendum by entering the ID number after a text that read "Enter your ID here (only numbers) to see if it appears in the ... MEGA FRAUD ...!". Referring to the website, parliamentary Tascón said that "this is a service also for people in the opposition who signed, if they signed, congratulations! OK? But unfortunately you participated, and that's why the website says so. You participated in the fraud"<sup>33</sup>.

<sup>26</sup> In its Annual Report 2004, the Commission indicated that it was informed "of growing tensions and polarization between opposition sectors and the government. This was evident in the events surrounding the process of verifying and validating signatures collected by the National Electoral Council (CNE), as well as in the charges voiced by senior government officials and the President himself about instances of "mega-fraud", and in the wave of peaceful street protests in some of which there were acts of violence involving the disproportionate use of force by the security apparatus responsible for public safety. See IACHR, Follow-up report on compliance by the State of Venezuela with the recommendations made by the IACHR in its report on the situation of human rights in Venezuela, February 23, 2005, available at: <http://www.cidh.org/annualrep/2004eng/chap.5b.htm>.

<sup>27</sup> Documentary "The List, a people under suspicion, available at: <https://www.youtube.com/watch?v=2Lu00jhg8BU>; The Universal, The infamous list, what's upsetting is how millions of people came out of the slums to vote without fear, February 25, 2012, available at: <http://www.eluniversal.com/opinion/120225/la-lista-infame-imp>.

<sup>28</sup> Active Citizenship, Documentary "The List, a people under suspicion" available at: <https://ciudadaniaactivavzla.wordpress.com/2015/03/26/documental-la-lista-tascon/>.

<sup>29</sup> Active Citizenship, Documentary "The List, a people under suspicion" available at: <https://ciudadaniaactivavzla.wordpress.com/2015/03/26/documental-la-lista-tascon/>.

<sup>30</sup> The Carter Center, Observation of the presidential recall referendum in Venezuela, February 2005, page 28, available at: <https://www.cartercenter.org/documents/2021.pdf>.

<sup>31</sup> ABC, Chavez placed on a blacklist all who participated in the primaries of the opposition, April 10, 2012, available at: <http://www.abc.es/20120410/internacional/abci-chavez-coloca-lista-negra-201204092159.html>, *El Universal*, 42 public bodies engaged in discrimination, November 11, 2006, available at: [http://www.eluniversal.com/2006/11/11/imp\\_pol\\_art\\_65474](http://www.eluniversal.com/2006/11/11/imp_pol_art_65474).

<sup>32</sup> Active Citizenship, Documentary "The List, a people under suspicion" available at: <https://ciudadaniaactivavzla.wordpress.com/2015/03/26/documental-la-lista-tascon/>.

<sup>33</sup> Active Citizenship, Documentary "The List, a people under suspicion" available at: <https://ciudadaniaactivavzla.wordpress.com/2015/03/26/documental-la-lista-tascon/>.

76. Also referring to the website, in a television program, President Hugo Chávez Frías said "I've been informed that Congressman Luis Tascón has a website. On his website, well, the list of all these things, especially the ID numbers of those who supposedly signed, I call on the Venezuelan people to check, and let the faces come out! There it is [www.luistascon.com](http://www.luistascon.com). Go in there"<sup>34</sup>.

##### **5. Complaints of dismissal and threats of dismissal to employees who signed the requests for a presidential referendum**

77. According to publicly available information, after the publication of the Tascón list, various media reported layoffs of public workers in retaliation for their signature on the presidential recall referendum began<sup>35</sup>. Some of the layoffs were preceded by statements by public officials accusing the signatories of treason.

78. In this regard, on March 20, 2004, Roger Capella, then Minister of Health and Social Development stated that "a traitor cannot be in a position of trust and this State has a policy and correspondence with the government it has, where there's no room for traitors. Those who have signed are dumped"<sup>36</sup>. The same official said that "those who signed against President Chávez" will be dismissed "because it is an act of terrorism"<sup>37</sup>.

79. On March 29, 2004 the Minister of Foreign Affairs stated to the media that: "I consider logical that an official with a position of trust that has signed against Hugo Chávez, makes his position available; otherwise they will be transferred to other duties within the Ministry of Foreign Affairs. They will not be dismissed, but they cannot be a close collaborator, because they don't believe in the policy set out by the President"<sup>38</sup>.

80. Also, the then president of Petroleum of Venezuela (PDVSA) warned that "it would be no surprise if the workers who signed the petition to call [for the referendum] were dismissed from their jobs"<sup>39</sup>. According to a report by Human Rights Watch "some employees of PDVSA reported later to the press that they had been dismissed, and when they asked why, they were told it was because they had signed the referendum petition"<sup>40</sup>.

81. The same report, as well as a report prepared by a Venezuelan organization, documented a number of cases of alleged layoffs motivated by the participation of public employees in the recall referendum petition<sup>41</sup>. Among them it was highlighted the case of 80 public employees of the Fund of Deposit Guarantee and Banking Protection, allegedly dismissed for being included in "a list, partly based on the Tascón list,

<sup>34</sup> Active Citizenship, Documentary "The List, a people under suspicion" available at: <https://ciudadaniaactivavzla.wordpress.com/2015/03/26/documental-la-lista-tascon/>.

<sup>35</sup> See Annex 3. Compiling press articles on allegations of retaliation for the signing of the petition for a presidential recall referendum, Annex M of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>36</sup> *El Universal*, To sign against Chávez is an act of terrorism, March 21, 2004, available at: <http://www.eluniversal.com/2004/03/21/pol art 21108A>.

<sup>37</sup> *El Universal*, To sign against Chávez is an act of terrorism, March 21, 2004, available at: <http://www.eluniversal.com/2004/03/21/pol art 21108A>.

<sup>38</sup> IACHR, Report No. 59/13, Petition 212-06. Admissibility. Rocío San Miguel Sosa et al. Venezuela. July 16, 2013, para 16.

<sup>39</sup> Human rights watch, A decade of Chávez Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela, p.20. Available at: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf).

<sup>40</sup> Human rights watch, A decade of Chávez Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela, p.20. Available at: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf).

<sup>41</sup> Human rights watch, Una década de Chávez, Intolerancia política y oportunidades perdidas para el progreso de los derechos humanos en Venezuela, Pág.20. Disponible en: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf); Asociación Civil Sumate, Apartheid del Siglo XXI. La informática al servicio de la discriminación política en Venezuela, capítulo 3. Disponible en: <http://sumate.org/documentos/ApartheidSigloXXI/Apartheid%20del%20Siglo%20XXI%20Capitulo3.pdf>.

circulated within the institution"<sup>42</sup>. In this regard, some employees had stated that in the list distributed within the organization, appeared the name of each employee, his political profile (starting at 1 for *Chavistas* militants, up to 6 for radical political opposition) and an initial indicating whether the employee had signed the petition for advisory referendum, or for the recall referendum according to data from the Tascón list<sup>43</sup>. According to discharged employees, all of them were classified as government opponents in the list circulated<sup>44</sup>. According to publicly available information, the Director of that public institution, referring to the dismissal stated that "we were dealing with officials of free removal who dragged a culture that was not consonant with the project that is contemplated for socioeconomic development"<sup>45</sup>.

82. Also in March 2004, Froilan Barrios, member of the Executive Committee of the Confederation of Workers of Venezuela reported that the oil industry "has a list of 1999 active and retired workers who bear the threat of a possible removal or transfer of charge having participated in the *reafirmazo*"<sup>46</sup>.

83. In turn, some media documented other allegations of reprisals to employees who participated in the referendum process in other state institutions such as the National Center of Information Technologies, the Miranda State Government, the Ministry of Popular Economy, the Institute for Welfare and Social Assistance for the Personnel of the Ministry of Education, the Board of Education of Miranda, and the National Electoral Council<sup>47</sup>.

## 6. Results of the recall procedure "*El Reafirmazo*" and conducting the recall referendum

84. After receiving the signatures for the "*Reafirmazo*" on March 2, 2004 the National Electoral Council issued Resolution No. 040302-131 with the preliminary results of the recall procedure initiated regarding President Hugo Chávez Frías<sup>48</sup>. On April 20, 2004 the National Electoral Council, following the rules on the right to challenge the recall procedures for office terms elected by popular vote<sup>49</sup> determined that 1,192,914 signatures should undergo the process of challenge<sup>50</sup> on a date to be indicated by the electoral

<sup>42</sup> Human rights watch, A decade of Chávez Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela, p.24. Available at: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf)

<sup>43</sup> Human rights watch, A decade of Chávez Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela, p.24. Available at: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf)

<sup>44</sup> Human rights watch, A decade of Chávez Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela, p.24. Available at: [https://www.hrw.org/sites/default/files/reports/venezuela0908spweb\\_0.pdf](https://www.hrw.org/sites/default/files/reports/venezuela0908spweb_0.pdf)

<sup>45</sup> *El Universal*, Illegal dismissals impact Fogade accounts, February 23, 2008. Available at: [http://www.eluniversal.com/2008/02/23/eco\\_art\\_despidos-ilegales-im\\_726634](http://www.eluniversal.com/2008/02/23/eco_art_despidos-ilegales-im_726634). According to another report, the following gradation of 1 to 6 was stated: "hard *chavista*", "light *chavista*", "nini" (nor opposition nor *chavista*), "radical political opposition", "radical opposition" and "light opposition". See *Súmate*, and more lists: from hard *Chavismo* to light "opposition", p. 120. Available at: <http://www.sumate.org/documentos/ApartheidSigloXXI/Apartheid%20del%20Siglo%20XXI%20Capitulo7.pdf>

<sup>46</sup> *El Universal*, *Reafirmazo* throes, 1909 oil workers under pressure, March 18, 2004, available at: [http://www.eluniversal.com/2004/03/18/imp\\_eco\\_art\\_18166A](http://www.eluniversal.com/2004/03/18/imp_eco_art_18166A).

<sup>47</sup> *El Nacional*, Summary of cases collected by *El Nacional*, April 24, 2005, available at: <http://infovenezuela.org/democracy/attachments-spanish/T5%20ST02%20N2%20Y%20T5ST02N3.pdf>.

<sup>48</sup> Annex 4. National Electoral Council resolution No. 040302-131 of March 2, 2004 (Annex C to the State submission within the admissibility process before the IACHR on January 16, 2008). In the resolution the following results were reported: a) Total forms processed subjected to physical verification by the agency: three hundred eighty-eight thousand one hundred and eight (388 108), b) empty and / or unused forms on the day of signature collection: seven thousand two hundred ninety-seven (7297) forms, c) Returned forms invalidated for breach of the " Guidelines on criteria for the validation of signatures and of the forms to collect signatures for the recall referendum process for terms of office of popularly elected positions", in particular paragraphs 2, 3, 4 and 5: thirty-nine thousand and sixty (39060) forms, d) Total number of requests processed of the universe of validated forms according to the records: three million eighty-six thousand and thirteen (3086013) applications.

<sup>49</sup> Annex 5. National Electoral Council resolution No. 040420-563 of 27 October 2003, Annex D to the State submission within the admissibility process before the IACHR on January 16, 2008.

<sup>50</sup> National Radio of Venezuela, ruled out possibility of including invalid signatures for challenge, May 4, 2004, available at: <http://www.rnv.gob.ve/descartada-posibilidad-de-incluir-firmas-ivnlidas-para-reparos/>.



authority. The process of challenge required the revalidation of signatures subject to challenge and allowed the withdrawal of signatures of applicants who had changed their minds. This day of challenge was held on June 27, 2004.

85. On June 25, 2004 by resolution 040615-852 the National Electoral Council decided to ratify the call to hold the presidential recall referendum on August 15, 2004<sup>51</sup>. This call was conducted and resulted in a total of 3, 989, 008 votes in favor of the recall of the term of the President, and 5, 800, 629 votes against the recall, so the CNE ratified the mandate the President of the Republic<sup>52</sup>. The OAS and the Carter Center observers of this process, declared the legitimacy of the results<sup>53</sup>.

## 7. Public Ministry's investigation regarding complaints of discrimination

86. Considering the allegations described in various media about political discrimination and dismissals of public officials as an alleged retaliation for their appearance on the lists of signatories that requested the presidential recall referendum, the General Prosecutor's Office ordered Prosecutor 49 of the Caracas Metropolitan Area to open an investigation<sup>54</sup>. By statement of 27 April 2005, the Public Ministry reported that Prosecutor 49 of the Caracas Metropolitan Area began the "legal investigations to ascertain whether there were specific offenses that both officials and individuals may have incurred in with the use of the aforementioned lists". In the same statement he added that no rule "states that the lists of signatories cannot be spread and, on the contrary, one of the reasons for its distribution is, precisely, to prevent misuse of signatures that could harm the authenticity and transparency of the process"<sup>55</sup>. The Commission has no information on the results of that investigation.

## 8. The end of the "Tascón List" and the beginning of the "Maisanta list"

87. According to information received by the Commission on April 15, 2005 the then President of the Republic Hugo Chávez, referring to the Tascón List stated that "this episode is behind us now. If anyone resorts to the list in order to make a personnel decision about someone, he or she is carrying the past into the present and perpetuating situations that we have moved beyond. [...] The famous list certainly played an important role at a given point in time, but that's over now. We call upon all our citizens to build bridges. I say this because some letters have been sent to me that lead me to believe that in some quarters the Tascón list is still being used to determine whether a person will or will not work. Let's bury the Tascón list"<sup>56</sup>.

88. In its 2009 report on Democracy and Human Rights in Venezuela, the IACHR took note of the acknowledgement of President of the Republic that the list was used for political discrimination, to dismiss employees, or block applications for employment, among other things, and whereby the President called upon the regional authorities and their supporters to do away with and bury the so-called "Tascón list"<sup>57</sup>. However,

<sup>51</sup> CNE, Resolution No. 040615-852 of June 25, 2004, available at: [http://www.cne.gob.ve/web/gaceta\\_electoral/gaceta\\_electoral\\_detallado.php?tg=1&num\\_gac=202](http://www.cne.gob.ve/web/gaceta_electoral/gaceta_electoral_detallado.php?tg=1&num_gac=202). See also, *Súmate*, Progress Report "Presidential Recall Referendum", Annexes, available at: [http://sumate.org/Elecciones/2004Revocatorio/200409\\_informe\\_avance\\_anexos\\_referendo\\_revocatorio\\_presidencial.pdf](http://sumate.org/Elecciones/2004Revocatorio/200409_informe_avance_anexos_referendo_revocatorio_presidencial.pdf).

<sup>52</sup> CNE Resolution No. 040826-1118, August 30, 2004, available at: [http://www.cne.gob.ve/web/gaceta\\_electoral/gaceta\\_electoral\\_detallado.php?tg=1&num\\_gac=210](http://www.cne.gob.ve/web/gaceta_electoral/gaceta_electoral_detallado.php?tg=1&num_gac=210).

<sup>53</sup> OAS, Statement of OAS Electoral Observation Mission on Venezuelan Presidential Referendum, August 18, 2004, available at: [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-130/04](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-130/04); OAS, OAS adopts resolution on the results of the Venezuelan referendum, August 26, 2004, available at: [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-138/04](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-138/04)

<sup>54</sup> Annex 6. *El Universal*, Prosecutor opens investigation for discrimination of signatories of the RR, April 28, Annex M of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>55</sup> Annex 7. Public Ministry statement: Public Prosecution starts investigation regarding the use of lists to petition for referendums in 2004. Annex III to the complaint filed before the IACHR on March 7, 2006.

<sup>56</sup> Statement by Venezuelan President Hugo Chávez at the V Mobile Cabinet Meeting, April 15, 2005, in the city of Puerto Ordaz, quoted in IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54. December 30, 2009, chapter II.a, para. 99.

<sup>57</sup> IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54. December 30, 2009, chapter II.a, para. 99.

the Commission also noted that according to reports that the list was still being used at the public and private level, as a tool to discriminate against hundreds of persons on political grounds, and showed concern in regards to information referring to an even more sophisticated tool that was created during the 2005 legislative elections, known as the “Maisanta list,” which includes not just the names of the persons who signed the presidential recall referendum petition, but also detailed information on the more than 12 million registered voters and their political preferences, the Commission considered that the creation of this list affects the guarantee of vote by secret ballot contained in Article 23 of the American Convention<sup>58</sup>.

### **C. The work relationship and termination of contracts of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña**

89. The three alleged victims in this case, Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, were working for the National Border Council under a professional services contract. According to a report by the Office of Analysis and Legal Assessment of the Vice President, the use of such contracts without guarantees of stability common to permanent officials, was due to the lack of approval of the Organic Law on Borders, which would create an agency to direct the State border affairs and allow the stability of its officials<sup>59</sup>.

90. Rocío San Miguel Sosa began working as a legal adviser at the National Border Council in July 1996 and continued through the renewal of her service contract<sup>60</sup>, working at the institution until the end of May 2004. Her last contract was elaborated for a period of one year from January 1 to December 31, 2004<sup>61</sup>.

91. Magally Chang Girón began her work as Staff Assistant and then as Staff Coordinator of the National Border Council in May 1997, holding monthly, quarterly and annual contracts with the institution to continue providing professional services to the institution<sup>62</sup>. Her last contract was elaborated for the period of one year from January 1 to December 31, 2004<sup>63</sup>.

92. Thais Coromoto Peña served as Public Relations Executive or Secretary of the National Border Council between April 1 2000 and March 12, 2004, holding several annual contracts with said institution<sup>64</sup>. Her last contract was elaborated for a period of one year from January 1 to December 31, 2004<sup>65</sup>.

<sup>58</sup> IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54. December 30, 2009, chapter II.a, para. 101.

<sup>59</sup> Annex 8. Report of the Coordinator of Analysis and Legal Assessment of the Vice President addressed to the Vice President of Venezuela, December 8, 2003, Annex H of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>60</sup> Within the file, records show the conclusion of various contracts of Rocío San Miguel with the National Border Council: From July 1, 1996 until December 31, 1996, from 1 January 1997 to 31 December 1997, 1 January 1998 to December 31, 1998, from January 1, 2000 to March 31, 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2002, the January 1, 2003 to December 31, 2003 and January 1, 2004 to December 31, 2004. See Annex 9. Rocío San Miguel contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>61</sup> Annex 10. Labor contract between the head of the National Border Council with Rocío San Miguel Sosa on December 31, 2003, Annex F of the State submissions within the admissibility process before IACHR on January 16, 2008.

<sup>62</sup> Within the file, records show the conclusion of various contracts of Magally Chang with the National Border Council: from May 1, 1997 to December 31, 1997, from 1 January 1998 to 31 December 1998, from 1 January 1999 to March 31, 1999, from April 1, 1999 to May 31, 1999, from June 1, 1999 to June 30, 1999, from July 1, 1999 to December 31, 1999, 1 January 2000 to March 31, 2000, from April 1, 2000 to December 31, 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2002, 1 January 2003 to December 31, 2003 and January 1, 2004 to December 31, 2004. See Annex 11. Magally Chang contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>63</sup> Annex 12. Labor contract between the head of the National Border Council with Magally M. Chang Girón on December 31, 2003, Annex F of the State submission within the admissibility process before IACHR on January 16, 2008.

<sup>64</sup> Within the file, records show the conclusion of contracts to provide services from April 1, 2000 to December 31, 2000, January 1, 2002 to December 31, 2002, January 1, 2003 to December 31, 2003, 1 January 2004 to 31 December 2004. See Annex 13. Thais Coromoto Peña contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006

<sup>65</sup> Annex 14. Labor contract between the head of the National Border Council with Thais Coromoto Peña on December 31, 2003, Annex F of the State submission within admissibility the process before IACHR on January 16, 2008.

93. In the months of November and December 2003, the three alleged victims chose to participate in the "*reafirmazo*" and signed the recall referendum petition for the then President of the Republic Hugo Chávez Frías<sup>66</sup>. Also Mr. Jorge Guerra signed the request for a referendum, who worked as a photographer of the National Border Council<sup>67</sup>.

94. By communication dated March 12, 2004<sup>68</sup>, the President of the National Border Council communicated to Rocío San Miguel Sosa, Magally Chang Girón, Thais Coromoto Peña and Jorge Guerra, his decision to terminate their contracts as of April 1 2004<sup>69</sup>. In the case of Jorge Guerra the Commission has information that indicates that he was not the one who signed [the petition], but that "the old ID he had in his house had been manipulated by a woman who lives there to sign in his name"<sup>70</sup>. He had also indicated that he would disavow his signature in the challenge process<sup>71</sup>. The State of Venezuela did not dispute the facts that Mr. Jorge Guerra signed the "*reafirmazo*", that he had been notified of the termination of his contract, that he had disavowed his signature in the challenge process and, that unlike the three alleged victims who did not challenged their signatures, he had kept his job.

95. On March 29, 2004 Rocío San Miguel Sosa sent a letter to the President of the National Border Council expressing her disagreement with the dismissal and indicating that "you are doing the dismissal directly, in your capacity of Chairman of the Agency; but not without having first sent the Executive Secretary of the Board, nineteen days before the formal act of notification, to warn me that the reasons [for dismissal] are none other than my signature requesting the presidential recall referendum"<sup>72</sup>.

96. The Commission notes that the decision to terminate the contracts with the alleged victims lacks motivation, indicating in the text of the letters only the following: "I am writing to you, in order to announce my decision to terminate your employment contract (...) as from April 1 this year"<sup>73</sup>. However, afterwards the

<sup>66</sup> Annex 15. Form to collect signatures, August 19, 2000, Annex C of Annex IV of the complaint filed before the IACHR on March 7, 2006. Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>67</sup> Annex 16. Appeal remedy (*casación*), filed by Rocío San Miguel, Magally Chang Girón and Thais Coromoto Peña against the decision of the Seventh Chamber of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, July 6, 2005. Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>68</sup> The notification of Rocío San Miguel contains a signature of receipt dated March 25, 2004. In turn, the notification of Magally Chang Girón contains a receipt of acknowledgment signed on 22 March 2004. For Thais Coromoto Peña said communication contains a signature of receipt dated March 31, 2004.

<sup>69</sup> Annex 17. Letter from the Chairman of the National Border Council to Rocío San Miguel, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before the IACHR on January 16, 2008; Annex 18. Letter from the Chairman of the National Border Council to Magally Chang Girón, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before the IACHR on January 16, 2008; Annex 19. Letter from the Chairman of the National Border Council to Thais Coromoto Peña, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before the IACHR on January 16, 2008. In accordance with communication of the then Executive Secretary of the National Border Council, the alleged victims worked for the National Border Council until April 30, 2004. See Annex 20. Letter from the Executive Secretary of the National Border Council to Prosecutor 37 of the Public Prosecutor's Office, July 13, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>70</sup> Annex 21. Telephone conversation between Feijoo Colomine and Rocío San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>71</sup> Annex 22. Transcript of the interview with Rocío del Carmen San Miguel Sosa, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>72</sup> Annex 23. Rocío San Miguel letter to the President of the National Border Council, March 29, 2004, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>73</sup> Annex 24. Letter from the Chairman of the National Border Council to Rocío San Miguel, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before the IACHR on January 16, 2008; Annex 25. Letter from the Chairman of the National Border Council to Magally Chang Girón, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before the IACHR on January 16, 2008; Annex 26. Letter from the Chairman of the National Border Council to Thais Coromoto Peña, communicating the termination of the employment relationship, March 12, 2004, Annex F to the State's submission within the admissibility process before

President of the National Border Council informed within the context of the internal processes, that the decision to terminate these contracts had been taken under their seventh clause, where it's states that "the contractor reserves the right to terminate this contract when deemed appropriate, upon notice to the 'contracted' made at least one month in advance"<sup>74</sup>.

97. The Executive Secretary of the National Border Council said in a communication registered on the file that "at no time the President of the Agency stated that the grounds for the termination of contracts were due to an alleged 'gesture of distrust', in which San Miguel Sosa, Chang Girón y Peña would have incurred by signing the petition for the presidential recall referendum, and therefore a reckless interpretation of that decision has no basis"<sup>75</sup>. In a radio interview, the Executive Secretary said that the three alleged victims were dismissed by order of the Vice President as a result of a restructuring<sup>76</sup>.

98. Also, in his statement given to the Prosecutor, on July 14, 2004, the then Executive Secretary of the National Border Council denied having said to some of the victims of this case that their dismissal was due to a gesture of distrust that they had committed by signing the request for the presidential recall referendum<sup>77</sup>.

99. In contrast to this, in the context of the legal proceedings described below, several elements emerged indicating that the termination of contract of the alleged victims was related to the signing of the petition for the presidential recall referendum.

100. In her testimony before the Prosecutor's Office, on July 15, 2004, Rocío San Miguel Sosa stated that on March 11, 2004 Feijoo Colomine Rincones, Executive Secretary of the National Border Council, verbally informed her of her possible dismissal, explaining to her that in a conversation held with José Vicente Rangel Vale, President of the National Border Council, he ordered him to "proceed to the dismissal of Rocío San Miguel and Thais Peña because these people had petitioned for the presidential recall"<sup>78</sup>. In said interview, Rocío San Miguel also said the on March 31, 2004 she spoke with Ilia Azpúrua, legal advisor of the Vice President and Secretary of the Cabinet, and that person told her "it was not possible that working at the White Palace I had signed [the petition], that I was a person of trust, and that by signing I had shown a gesture of distrust"<sup>79</sup>. In this statement Rocío San Miguel stressed that of over twenty people working in the National Border Council, they only dismissed the four people who signed the petition for the recall referendum, however Mr. Jorge Navarro Guerra was able to keep his job by disavowing his signature in the challenge process<sup>80</sup>. She also stated

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the IACHR on January 16, 2008. In accordance with communication of the then Executive Secretary of the National Border Council, the alleged victims worked for the National Border Council until April 30, 2004. See Annex 20. Letter from the Executive Secretary of the National Border Council to Prosecutor 37 of the Public Prosecutor's Office, July 13, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>74</sup> Annex 27. Communication of the Executive Secretary of the National Border Council addressed to the Office of the Ombudsman of the Metropolitan Area of Caracas in relation to the termination of the employment relationship with the victims in this case, page 1, Annex E to the State's submission within the admissibility process before the IACHR on January 16, 2008.

<sup>75</sup> Annex 27. Communication of the Executive Secretary of the National Border Council addressed to the Office of the Ombudsman of the Metropolitan Area of Caracas in relation to the termination of the employment relationship with the victims in this case, page 2, Annex E to the State's submission within the admissibility process before the IACHR on January 16, 2008.

<sup>76</sup> Annex 28. Interview by Ybellize Pacheco to Feijoo Colomine on August 3, 2004, Annex G of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>77</sup> Annex 29. Transcript of the interview with Feijoo Colomine Rincones, before the Office of the Thirty-Seventh Prosecuting Attorney on July 14, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>78</sup> Annex 22. Transcript of the interview with Rocío del Carmen San Miguel Sosa, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>79</sup> Annex 22. Transcript of the interview with Rocío del Carmen San Miguel Sosa, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>80</sup> Annex 22. Transcript of the interview with Rocío del Carmen San Miguel Sosa, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

that in the conversation with Feijoo Colomine he told her that "he had managed to stop the dismissal of Jorge Guerra and would not deliver the communication of José Vicente Rangel, because Guerra's case was different as "the old ID he had in his house had been manipulated by a woman who lives there to sign in his name"<sup>81</sup>.

101. Moreover, on July 16, 2004, Magally Chang Girón declared before the Prosecutor that "I was notified on March 22 this year by Mr. Feijoo Colomine of my dismissal as Personal Assistant of the National Border Council, by instructions of the Council President Dr. José Vicente Rangel Vale, and that the reason was for having signed the presidential recall petition. That's it"<sup>82</sup>. In the same statement she said that three of the four people who signed the request for a referendum were dismissed, and that she saw the letter of dismissal of the fourth person, Mr. Jorge Guerra but is unknown to her why he was not dismissed<sup>83</sup>.

102. For her part, in her testimony before the Prosecutor rendered on July 15, 2004, Thais Coromoto Peña, said that Feijoo Colomine Rincones made a verbal notification to her of the dismissal, and that the Secretary of that person told her that Feijoo "was upset because they were against the President and against the process"<sup>84</sup>. She also indicated that after being notified of the dismissal "Feijoo Colomine told me to withdraw my signature, that he could send me to Jesse Chacon to do so, to what I replied that I was a woman of self-belief and conscience, that it was my decision and that it will remain that way, as I do not have any reason to take it back; then I told him that we shouldn't talk anymore about it"<sup>85</sup>.

103. Likewise, in the context of the alleged victims' *amparo* proceeding, the transcripts of telephone conversations with two officials to whom they referred in the abovementioned interviews were presented. The Commission has in its power the recordings of these conversations, their relevant contents are detailed below.

104. Below are the transcripts of the relevant parts of the telephone conversation between the then Executive Secretary of the National Border Council Feijoo Colomine and Rocio San Miguel Sosa:

FC: One has some limitations, for exercising this, this position of trust.

RSM: Mhmm

FC: One has limitations

RSM: Mhm, Which one? The one to exercise political rights?

FC: One can participate and exercise their political rights, of any kind. But you do not, you can not reveal an element of distrust.

RSM: But what element of distrust?

FC: You cannot expose, because you are signing the petition for the recall of the guy that is paying you and that is hiring you (...) <sup>86</sup>

105. With regards to the termination of the contracts with the alleged victims, the recording of the conversation contains the following:

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<sup>81</sup> Annex 22. Telephone conversation between Feijoo Colomine and Rocio San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>82</sup> Annex 30. Transcript of the interview with Magally Margarita Chang Girón, before the Office of the Thirty-Seventh Prosecuting Attorney on July 16, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>83</sup> Annex 30. Transcript of the interview with Magally Margarita Chang Girón, before the Office of the Thirty-Seventh Prosecuting Attorney on July 16, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>84</sup> Annex 31. Transcript of the interview with Thais Coromoto Peña, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>85</sup> Annex 31. Transcript of the interview with Thais Coromoto Peña, before the Office of the Thirty-Seventh Prosecuting Attorney on July 15, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006

<sup>86</sup> See Annex 21. Telephone conversation between Feijoo Colomine and Rocio San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

FC: Well but, but the, the Government has made a decision.  
 RSM: To dispose of all the employees who sign.  
 FC: Well, at least José Vicente made the decision in our case<sup>87</sup>.

106. In connection with the termination of the contract of the employee surnamed Guerra, the recording has the following:

FC: I mean, I, I took the decision not to execute the decision of, of José Vicente regarding Guerra.  
 RSM: Ok, perfect right?  
 FC: Because, well, because  
 RSM: He's going to do it right now  
 FC: In any case they are different, because in the other case, they said, "Yes, we signed," oh, well.  
 RSM: OK. Now one thing. What will Guerra do right now, is he going to have to say it in a public document? No? Before the CNE?  
 FC: No, he has to wait, for the call to challenge and do so.  
 RSM: OK  
 FC: Nothing else  
 RSM: ah  
 FC: And  
 RSM: It's okay  
 FC: And that's what  
 RSM: Did you warn José Vicente that, that, that this is not, this is not not, not allowed? To fire people for, for signing. Did you warn him?  
 FC: In those terms like you're telling me, no<sup>88</sup>.

107. In a conversation between Rocio San Miguel Sosa and Ilia Azpurua, Legal Consultant of the Vice Presidency of the Republic, the former expressed her dismay at the termination of her contract stating that regardless of having signed the presidential referendum, she always fulfilled her duties, to which the latter replied that she would inform the Vice President of that, also stating that "I think, I repeat. I consider you to be a highly professional person. But you have to understand a little, I mean, you're in the White Palace right? That is an issue, it is paradoxical right? Because your work has nothing to do with it. But it is paradoxical. But you have to be aware of your surroundings, at least in the physical space where you work at"<sup>89</sup>.

108. As indicated at the beginning of this section, the three alleged victims held various monthly, semi-annual or annual contracts with the National Border Council. Rocío San Miguel held eight contracts with the National Border Council between 1996 and 2004<sup>90</sup>; Magally Chang Girón held 12 contracts with the same institution between 1997 and 2004<sup>91</sup>; and Thais Coromoto Peña signed four contracts with the National

<sup>87</sup> See Annex 21. Telephone conversation between Feijoo Colomine and Rocio San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>88</sup> See Annex 21. Telephone conversation between Feijoo Colomine and Rocio San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>89</sup> Annex 32. Telephone conversation between Rocio San Miguel and Ilia Azpurua, March 31, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>90</sup> Within the file, records show the conclusion of various contracts of Rocío San Miguel with the National Border Council: From July 1, 1996 until December 31, 1996, from 1 January 1997 to 31 December 1997, 1 January 1998 to December 31, 1998, from January 1, 2000 to March 31, 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2002, the January 1, 2003 to December 31, 2003 and January 1, 2004 to December 31, 2004. See Annex 9. Rocío San Miguel contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>91</sup> Within the file, records show the conclusion of various contracts of Magally Chang with the National Border Council: from May 1, 1997 to December 31, 1997, from 1 January 1998 to 31 December 1998, from 1 January 1999 to March 31, 1999, from April 1, 1999 to May 31, 1999, from June 1, 1999 to June 30, 1999, from July 1, 1999 to December 31, 1999, 1 January 2000 to March 31, 2000, from

Border Council between 2000 and 2004<sup>92</sup>. None of these contracts was terminated before the agreed period, except the last ones that were finalized three months after its inception and months after the alleged victims signed the petition for the presidential recall referendum.

109. The Commission also notes that according to the list published in a Venezuelan national journal, out of the total of 23 employees of the National Border Council registered in the payroll until 2003<sup>93</sup>, four people signed the petition for a recall referendum on the presidential term, identified with the ID's 3.247.646, 4.421.705, 6.974.789 y 11.928.963, which belong respectively to Magally Chang Girón, Thais Coromoto Peña, Rocío San Miguel Sosa, and Jorge Guerra Navarro. All four people were informed of the termination of their contracts, however with respect to Jorge Navarro Guerra, as is clear from the statements of the alleged victims, he managed to keep his job after stating that "he did not sign the request for referendum, instead someone took his ID and signed for him"<sup>94</sup>, and that he would participate in the challenge process of signatures, to not to ratify it.

#### **D. Internal processes initiated in relation to the termination of the contracts**

110. In view of the abovementioned facts, the alleged victims initiated and promoted the judicial actions described below.

##### **1. Complaint before the Ombudsman**

111. On May 27, 2004 Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, filed a complaint before the Ombudsman, alleging unjustified and discriminatory dismissal from the National Border Council, exercised in retaliation for their signatures on the petition for a presidential recall referendum<sup>95</sup>. On June 29, 2004 the Delegate Defender of the Metropolitan Area of Caracas issued an order admitting the complaint and ordering the completion of all necessary steps to investigate the allegations<sup>96</sup>.

112. On 16 July 2004, the Coordinator of Legal Services of the Ombudsman Office issued a report indicating that it was not possible to prove the facts indicated by Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, in the sense that they were subjected to a discriminatory act by the National Border Council, by being fired from their respective post for having signed the petition for a presidential recall referendum<sup>97</sup>. The report notes that:

We are faced with the unproven statement of the plaintiffs against the factual demonstration of the discretionary powers of the acting administration. Such action, obviously, is insufficient

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April 1, 2000 to December 31, 2000, from 1 January 2001 to 31 December 2001, from 1 January 2002 to 31 December 2002, 1 January 2003 to December 31, 2003 and January 1, 2004 to December 31, 2004. See Annex 11. Magally Chang contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>92</sup> Within the file, records show the conclusion of contracts to provide services from April 1, 2000 to December 31, 2000, January 1, 2002 to December 31, 2002, January 1, 2003 to December 31, 2003, 1 January 2004 to 31 December 2004. See Annex 13. Thais Coromoto Peña contracts with the National Border Council, Annex A of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>93</sup> Annex 33. Copy of the payroll of the hired personnel in the National Border Council until December 2003, Annex 7 to the additional information submitted by the petitioners on May 30, 2007.

<sup>94</sup> Annex 21. Telephone conversation between Feijoo Colomine and Rocío San Miguel, March 24, 2004, Annex B of Annex IV of the complaint filed before the IACHR on March 7, 2006.

<sup>95</sup> Annex 34. Complaint before the Ombudsman, Annex III of the complaint filed before the IACHR on March 7, 2006.

<sup>96</sup> Annex 35. Order for admission of June 29, 2004. Annex III of the complaint filed before the IACHR on March 7, 2006

<sup>97</sup> Annex 36. Information Point of the Coordinator of Legal Services of the Ombudsman Office, July 16, 2004. Annex III of the complaint filed before the IACHR on March 7, 2006.

to prove that the reason for the dismissal of the petitioners are political and related to citizen participation<sup>98</sup>.

113. On August 17, 2004 the Delegate Defender of the Metropolitan Area of Caracas decided to archive the complaint by stating that it was not proven that the administration acted with abuse of power, on the contrary, it was only evidenced that they made use of their contractual right to terminate the contracts pursuant to the seventh clause of the contract<sup>99</sup>.

## 2. Action for constitutional *amparo* before the labor courts

114. On July 22, 2004 the alleged victims filed a constitutional *amparo* before the labor courts against the National Border Council arguing that they were the subject of employment discrimination by being dismissed as retaliation for signing the petition for the presidential recall referendum<sup>100</sup>.

115. On August 4, 2004 the Fourth Court of First Instance Judicial Circuit for Labor Matters declared itself incompetent to hear the *amparo* claim, considering that it would correspond to the Constitutional Chamber of the Supreme Court to examine the case, since the President of the National Border Council also served at the time as Minister of Foreign Affairs, therefore he's as a senior official as provided in Article 8 of the Organic Law on Protection of Rights and Constitutional Guarantees<sup>101</sup>.

116. On November 23, 2004 the alleged victims filed a brief before the Constitutional Chamber of the Supreme Court requesting that the Constitutional Court ruled on the *amparo*, because there was still not a decision on the declination of jurisdiction after 104 days had passed<sup>102</sup>. That request was repeated on February 3, 2005<sup>103</sup>, on May 3, 2005<sup>104</sup>, and on May 11, 2005<sup>105</sup>.

117. On 26 May 2005, the Constitutional Chamber of the Supreme Court issued a ruling stating that it does not accept declination of jurisdiction of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas because the case under study is a relationship of employer-employee nature, therefore the examination of the matter rests within the labor courts<sup>106</sup>. Under this, on June 17, 2005 the Fourth Court of First Instance admitted the *amparo*<sup>107</sup>.

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<sup>98</sup> Annex 36. Information Point of the Coordinator of Legal Services of the Ombudsman Office, July 16, 2004. Annex III of the complaint filed before the IACHR on March 7, 2006.

<sup>99</sup> Annex 37. Closing Act, August 17, 2004. Annex III of the complaint filed before the IACHR on March 7, 2006.

<sup>100</sup> Annex 38. Constitutional *amparo* claim, July 22, 2004, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>101</sup> Anexo 39. Resolution of the Fourth Court of First Instance Judicial Circuit for Labor Matters declaring itself incompetent to hear the constitutional *amparo* complaint, August 4, 2004. Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>102</sup> Annex 40. Request to the Constitutional Chamber of the Supreme Court, November 23, 2004, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>103</sup> Annex 41. Request to the Constitutional Chamber of the Supreme Court, February 3, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>104</sup> Annex 42. Request to the Constitutional Chamber of the Supreme Court, May 3, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>105</sup> Annex 43. Request to the Constitutional Chamber of the Supreme Court, May 11, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>106</sup> Annex 44. Judgment of the Constitutional Chamber of the Supreme Court stating that it does not accept the declination of jurisdiction of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas, May 26, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>107</sup> Annex 45. Decision of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas, June 17, 2005. Annex I of the complaint filed before the IACHR on March 7, 2006.



118. On 20 July 2005, the Public Prosecutor issued his opinion regarding the *amparo*, requesting that it be declared inadmissible, as the *amparo* was not the adequate remedy for proving whether a dismissal is justified or not, he also asked for the *amparo* to be dismissed as there was still an ongoing investigation by the Public Prosecutor, and because the alleged victims had not proven the alleged political discrimination<sup>108</sup>. Also on July 20, 2005, the President of the National Border Council José Vicente Rangel submitted a request to declare inadmissible the *amparo* on the grounds that the alleged victims should have resorted to the ordinary procedure established in the Organic Labor Procedure Law. He also considered that under the seventh clause of the contracts with the three alleged victims no cause is needed to terminate the contract, "regardless of whether the plaintiffs met or not with the responsibilities that were assigned to them, just by executing that power, as he did under the seventh clause of the contract, was enough"<sup>109</sup>.

119. On July 20, 2005, a constitutional hearing was held before the Fourth Court of First Instance Judicial Circuit for Labor Matters. As part of that hearing, the alleged victims requested including to the file the recording on a tape of the conversations, the transcript of a radio interview with Feijoo Colomine, as well as the transcript of the conversation between Rocío San Miguel and Ilia Azpúrua; however the Court refused such items as evidence considering that "both the playback of the tape and the transcript of the conversations were obtained without the consent of the alleged counterparts, in this case, citizens Feijoo Colomine and Ilia Apúrua, respectively. In addition, there is no way to be certain that the voices belong to those claimed to be the counterpart. Finally, in the opinion of this court, they are illegal and illegitimate evidence, and therefore they are not admitted to the trial"<sup>110</sup>.

120. On July 27, 2005 the Fourth Court of First Instance issued a judgment dismissing the *amparo* on the grounds that the evidence adduced by the plaintiff did not allow to "convincingly establish the causal link between the alleged discriminatory treatment for signing and the decision to terminate the employment relationship"<sup>111</sup>. In that decision, the court also found that "the respondent brought the documents, already discussed, which confirm that there was a worker whose contract was terminated at the same time as the plaintiffs and had not signed the recall referendum, and of another worker who did sign and yet he is still working for the National Border Council"<sup>112</sup>. The Commission does not have any evidence corroborating this information.

121. On July 29, 2005 the alleged victims appealed<sup>113</sup>, arguing among other thing that in the *amparo* procedure the testimony of victims was not evaluated neither positively nor negatively, therefore incurring in an improper valuation of certain evidence<sup>114</sup>. On September 9, 2005 the Third Superior Court for

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<sup>108</sup> Annex 46. Written opinion of the Prosecutor requesting the dismissal of the constitutional *amparo* complaint, July 20, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>109</sup> Annex 47. Letter from the President of the National Border Council to the Judge of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas, July 20, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>110</sup> Annex 48. Minute of the Constitutional Court hearing of July 20, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>111</sup> Annex 49, Judgement of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas, July 27, 2005. Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>112</sup> Annex 49, Judgement of the Fourth Court of First Instance Judicial Circuit for Labor Matters of the Metropolitan Area of Caracas, July 27, 2005. Annex I of the complaint filed before the IACHR on March 7, 2006. The decision states that during the constitutional public hearing, the respondent provided a certified copy of the notice of termination of the employment contract of the citizen Leoni Lopez on March 12, 2004 who did not sign against the President of the Republic.

<sup>113</sup> Annex 50. Appeal filed by the alleged victims on July 29, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>114</sup> Annex 51. Grounds of appeal, July 29, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

Labor Matters of the Labor Circuit Court dismissed the appeal on the grounds that the plaintiffs failed to show that the exercise of the contractual power of the employer constituted a discriminatory practice<sup>115</sup>.

### 3. Criminal complaint before the Public Ministry

122. On May 27, 2004 Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña filed a criminal complaint before the Prosecutor General's Office asking to initiate criminal investigations against the officials who carried their dismissal<sup>116</sup>, as this was an act of retaliation for signing the petition for the presidential recall referendum<sup>117</sup>. They reported that their dismissal was signed by the then President of the National Border Council José Vicente Rangel Vale, and that the Executive Secretary of the National Border Council told them that their dismissals were due to the gesture of distrust in which they had incurred by signing the petition for a presidential recall referendum<sup>118</sup>.

123. On July 7, 2004, the Office of the Thirty-Seventh Prosecuting Attorney ordered the launch of the criminal investigation<sup>119</sup>. On July 14, 2004 the Prosecutor interviewed the Executive Secretary of the National Border Council, Feijoo Colomine Rincones<sup>120</sup>. On the same date the Executive Secretary presented a report to the Prosecutor 37 of the Public Ministry<sup>121</sup>. On July 15, Rocío San Miguel, and Thais Coromoto Peña gave their statements, and on July 16 Magally Chang Girón made her statement<sup>122</sup>.

124. On January 21, 2005 the Thirty-Seventh Prosecuting Attorney requested the dismissal of the case to a trial judge, considering that the facts were not criminal in nature and noting that it could not be established the violation of a constitutional right as these were contractually established relationships, and as stipulated in the seventh clause of the contract signed by the plaintiffs the right to terminate the contract was reserved to the contractor<sup>123</sup>. On April 4, 2005 the Twenty-First Judge of First Instance acting as Control Court ordered the dismissal of the case considering that,

None of the clauses evidence that rules of criminal nature were violated, and although it is evident that the President of the National Border Council decided to terminate the procurement of services, the fact remains that this was allowed by the contract signed between the parties, in observing that none of the reported elements lead to corroborate the plaintiffs claim that the reason for the termination of the contract was the fact they voted in the recall referendum, and that if it were so, those facts are not criminal offenses, as the rules invoked as violating (sic) constitutional rights, are not punishable acts, and in any case, the

<sup>115</sup> Annex 52. Judgment of the Third Superior Court for Labor Matters of the Labor Circuit Court of the Judicial District of the Metropolitan Area of Caracas, September 9, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>116</sup> Annex 53. Criminal complaint filed before the Attorney General's Office, May 27, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>117</sup> Annex 53. Criminal complaint filed before the Attorney General's Office, May 27, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>118</sup> Annex 53. Criminal complaint filed before the Attorney General's Office, May 27, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>119</sup> Annex 54. Communication that orders the launch of the criminal investigation regarding the complaint filed by Rocío San Miguel, Magally Chang Girón and Thais Peña, May 27, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>120</sup> Annex 29. Transcript of the interview with Feijoo Colomine Rincones, July 14, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>121</sup> Annex 55. Report of the Executive Secretary of the National Border Council, July 14, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>122</sup> Annex 56. Testimony of the alleged victims, July 15 and 16, 2004, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>123</sup> Annex 57, Request for dismissal of the case to the Judge of First Instance acting as Control Court of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Annex II of the complaint filed before the IACHR on March 7, 2006.

disagreements arising as a result of a contractual relationship are not within the jurisdiction of this court, since the plaintiffs could pursue their claim in other administrative or labor jurisdiction, for the purpose of ensuring their right to work, as criminal proceedings are not the ideal proceedings for their claim<sup>124</sup>.

125. On April 15, 2005, Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña appealed against the decision to dismiss the case, arguing that the decision erred in law in concluding that "even if it had been that way (if it had been confirmed that the reason for the termination of the contract was voting in the recall referendum) neither such allegations constitute offenses"<sup>125</sup>, but since the alleged facts do constitute crimes, and if it wasn't corroborate that the reason for the termination of contracts was the participation in the recall referendum, it was precisely because the prosecution did not develop a proper investigation<sup>126</sup>.

126. On April 28, 2005 the Thirty-Seventh Prosecuting Attorney requested the members of the Court of Appeal to dismiss the appeal considering that "the trial record show that the measures taken by those interested in the subject was limited to a contractually established relationship and has nothing that intervenes in criminal law (...)"<sup>127</sup>.

127. On May 5, 2005 the Seventh Chamber of the Court of Appeal admitted the appeal filed<sup>128</sup>, and on May 12, 2005 that same Chamber dismissed the appeal stating that "it is impossible to demand of the Public Ministry (owner of the criminal action by excellence), to present a different final action other than the one already exercised (dismissal of this case) (...)"<sup>129</sup>.

128. On July 7, 2005 the alleged victims filed an appeal remedy (*casación*) against the decision which dismissed the appeal, alleging a series of violations of the right to due process and infringement and misinterpretation of the law<sup>130</sup>.

129. On 27 September 2005 the Chamber of Criminal Appeals of the Supreme Court dismissed the appeal brought by the victims of the case on the grounds that the appellants "failed to demonstrate the usefulness of the appeal remedy (*casación*) and did not express their arguments clearly"<sup>131</sup>.

## V. LEGAL ANALYSIS

130. Based on the arguments of the parties and the proven facts, the Commission will decide first whether the creation of the "Tascón list" and its dissemination are itself violations of the American Convention. Secondly, the Commission will examine whether the dismissal of the alleged victims constituted a violation of

<sup>124</sup> Annex 58, Resolution dismissal of the case of Control Court 21 of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, April 4, 2004. Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>125</sup> Annex 59, Appeal against the decision of dismissal, April 15, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>126</sup> Anexo 59. Appeal against the decision of dismissal, April 15, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>127</sup> Annex 60. Response of the Thirty-Seventh Prosecuting Attorney on the appeal against the decision of dismissal, April 28, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>128</sup> Annex 61. Admissibility of the appeal by the Seventh Chamber of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, May 5, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>129</sup> Annex 62. Decision of the Seventh Chamber of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, which dismisses the appeal, May 12, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>130</sup> Annex 63. Appeal remedy (*casación*) filed by Rocío San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña before the Chamber of Criminal Appeals of the Supreme Court, July 7, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>131</sup> Annex 64. Judgment of the Chamber of Criminal Appeals of the Supreme Court that dismisses the Appeal remedy (*casación*), September 27, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

political rights, freedom of expression and the principle of equality and non-discrimination. Third, the Commission shall determine whether the processes initiated internally constituted an effective remedy to protect them judicially against the dismissal. Finally, the Commission will refer to the allegations of the petitioners regarding the violation of the right to personal integrity. Consequently, the Commission will conduct its legal analysis referring first to political rights, freedom of expression and to the principle of equality and non-discrimination in the context of the dismissal. Second, the Commission will refer to the rights to a fair trial and judicial protection.

**A. Political rights, freedom of expression and the principle of equality and non-discrimination in the context of the dismissal (Articles 23.1, 13.1 and 13.3, 24 and 1.1 of the American Convention)**

131. Article 23.1 of the American Convention states:

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country

132. Article 13 of the Convention provides in its pertinent part:

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.

(...)

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

133. Article 24 of the Convention states:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

134. At this point the Commission will determine whether the dismissal of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña of public office in the CNF constitutes a violation of the rights mentioned above. This determination requires the Commission to rule first on whether it was an act motivated by the political opinion expressed by signing the petition to convene the recall referendum, or if as indicated by the State, if it was the application of the seventh clause of their employment contract. If it is an act motivated by political opinion, the Commission will analyze whether such treatment is justified under the American Convention.

135. The Commission shall conduct the analysis described in the previous section in the following order: i) General considerations on political rights and their relation to the right to freedom of expression, the

indirect restrictions on freedom of expression and the principle of equality and non-discrimination; ii) Analysis of whether the dismissal was based on the political opinion expressed by signing the petition for a recall referendum and, therefore, constituted a violation of political rights and freedom of expression; and iii) Analysis of whether the dismissal was an act of discrimination based on political opinion.

**1. General considerations on political rights and their relation to the right to freedom of expression, the indirect restrictions on freedom of expression and the principle of equality and non-discrimination**

136. Both the Commission and the Court have stressed the importance of political rights by recognizing and protecting the right and the duty of every citizen to participate in his or her country's political life, and to promote the strengthening of democracy and political pluralism<sup>132</sup>. The Court has emphasized that because of its importance, the American Convention under Article 27 prohibits their suspension and the essential judicial guarantees for their protection.

137. The Inter-American Court has stated that Article 23 of the American Convention contains various norms that refer to the rights of the individual as a citizen; that is, as titleholder of the decision-making process in public matters, in his capacity as a voter by means of his vote, or as a public servant; in other words, to be elected by the people or by appointment or designation to occupy a public office. In words of the Court, "as distinct from almost all the other rights established in the Convention that are recognized to every person, Article 23 of the Convention not only establishes that its titleholders must enjoy rights, but adds the word "opportunities." The latter implies the obligation to guarantee with positive measures that every person who is formally the titleholder of political rights has the real opportunity to exercise them. As the Court has previously indicated, it is essential that the State create optimum conditions and mechanisms to ensure that political rights can be exercised effectively, respecting the principle of equality and non-discrimination"<sup>133</sup>.

138. The rights enshrined in Article 23 of the American Convention can be exercised through broad and diverse activities that people do in order to participate in public affairs of a country and, under that rule, "citizens have the right to play an active role in the conduct of public affairs directly through referenda, plebiscites or consultations or through freely elected representatives"<sup>134</sup>.

139. When examining the scope of Article 23, the Commission has stated that if Article 23 was to be fully respected elections had to be authentic, universal, periodic, and by secret ballot or some other means that enabled voters to express their will freely<sup>135</sup>.

140. For its part, the United Nations, Human Rights Committee for the International Covenant on Civil and Political Rights (hereinafter "Human Rights Committee"), has indicated that "States should take measures to guarantee the requirement of the secrecy of the vote during elections (...) this implies that voters

<sup>132</sup> IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54. December 30, 2009, chapter II, para. 18; I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 192.

<sup>133</sup> I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 195; I/A Court H.R., Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 145.

<sup>134</sup> I/A Court H.R., Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 147. Similarly, United Nations, Human Rights Committee, when interpreting Article 25 of the International Covenant on Civil and Political Rights, the wording of which is very similar to the provision in the American Convention, establishes broad parameters concerning the regulation of political rights. When interpreting this norm, the United Nations Human Rights Committee has stated that political rights must be guaranteed for election or constitutional amendment, referendum and other elections. See United Nations, Human Rights Committee, General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) of July 12, 1996, CCPR/C/21/Rev.1/Add.7, available at: <http://www.refworld.org/docid/453883fc22.html>

<sup>135</sup> IACHR, Report 14/93, Case 10.956, Luis Felipe Bravo Mena, October 7, 1993, available at: <http://www.cidh.org/annualrep/93eng/Mexico.10956.htm>

should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process"<sup>136</sup>.

141. The two organs of the Inter-American system have pointed out that the exercise of political rights and freedom of thought and expression are closely linked and mutually reinforcing<sup>137</sup>.

142. As highlighted by the Inter-American Court, political rights are closely related to other rights embodied in the American Convention, such as freedom of expression, and freedom of association and assembly; together, they make democracy possible<sup>138</sup>. The right to freedom of expression is a cornerstone upon which the very existence of democratic societies is based, due to its indispensable structural relationship to democracy<sup>139</sup>. According to the Court without an effective guarantee of freedom of expression, democratic system weakens and pluralism and tolerance suffer grief; control mechanisms and citizen complaint may become ineffective and, ultimately, a fertile ground is created for authoritarian systems to take root<sup>140</sup>.

143. With regard to indirect restrictions on freedom of expression, the Court has held that the scope of Article 13.3 of the Convention should be the result of a joint reading with Article 13.1 of the Convention, in the sense that a broad interpretation of this standard allows to consider that it specifically protects communication, distribution and circulation of ideas and opinions, so that the use of "indirect methods or means" to restrict it are prohibited<sup>141</sup>. In this regard, the Court has stated that what seeks this subsection is to exemplify more subtle forms of restricting the right to freedom of expression by State authorities or individuals<sup>142</sup>, and that the enunciation of mechanisms for indirect restriction of Article 13.3 of the Convention is not exhaustive<sup>143</sup>. The Court has also indicated that for a violation to Article 13.3 of the Convention to be configured, it's required that the method or means effectively or indirectly restrict, the communication and circulation of ideas and opinions<sup>144</sup>.

144. In regard to the principle of equality and non-discrimination established in Articles 24 and 1.1 of the Convention, the Commission and the Inter-American Court have repeatedly held that it constitutes the central and fundamental axis of the Inter-American human rights system. Also, it has been established that it

<sup>136</sup> Human Rights Committee, General Comment No. 25, para. 20.

<sup>137</sup> I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 90; IACHR, Freedom of Expression and the Electoral Process: The Case of Opinion Polls and Exit Polls, 2005, paras. 11-15, available at: <http://www.oas.org/en/iachr/expression/reports/thematic.asp>. Likewise the European Court of Human Rights has ruled that the two rights are interrelated. See ECHR, Case Mathieu-Mohin and Clerfayt v. Belgium, judgment of 2 March 1987, Series A, No. 113, para. 54.

<sup>138</sup> I/A Court H.R., Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 140.

<sup>139</sup> Cfr. I/A Court H.R., Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 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. 116; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 86; 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.

<sup>140</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 140.

<sup>141</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 161.

<sup>142</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 162.

<sup>143</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 163.

<sup>144</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 140. Quoting *Cfr. Case of Ríos et al. v. Venezuela*, para. 340, and *Case of Perozo et al. v. Venezuela*, para. 367.

"entails *erga omnes* obligations of protection that bind all States and generate effect with regard to third parties, including individuals"<sup>145</sup>. The Court has indicated that in the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. On it rests the legal structure of national and international public order, and permeates the entire legal system<sup>146</sup>.

145. The Court has established in its jurisprudence that Article 1.1 of the Convention is a general rule, the contents of which extends to all provisions of the treaty, because it has the obligation of States Parties to respect and guarantee the full and free exercise of the rights and freedoms recognized therein "without any discrimination". That is, whatever the origin or the form it takes, any treatment that can be considered discriminatory with respect to the exercise of any of the rights guaranteed under the Convention is per se incompatible with it<sup>147</sup>. Failure by the State, by any discriminatory treatment, of the general obligation to respect and guarantee human rights, gives rise to international responsibility<sup>148</sup>. That is why there is an indissoluble link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination<sup>149</sup>. Article 1.1 of the Convention includes within the prohibited categories for discrimination "political opinion".

146. The Commission considers that the signature for the convening of a mechanism of political participation, such as the presidential recall referendum, is not only the exercise of political rights in accordance with Article 23 of the Convention, but also an expression of a political opinion of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, in turn protected by Article 13 of the Convention and article 1.1 thereof as discrimination prohibited category. Consequently, in accordance with the standards mentioned so far, the State had to ensure that political opinion was expressed in conditions that protect the free exercise and without fear of reprisals of the political rights. The State should have also refrained from taking actions regarding Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña based on their political views without justification and, of indirectly penalizing such expression.

147. The Commission will now determine whether the dismissal of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, was a breach of those obligations.

## **2. Analysis of whether the dismissal was based on the political opinion expressed by signing the petition for a recall referendum and, therefore, constituted a violation of political rights and freedom of expression**

148. At this point the Commission has to address the debate on the statement by the State regarding the termination of the contract, against the alleged real motivation for such action. In the instant case the Commission notes that the decision to terminate the contracts with the alleged victims by letter dated March 12, 2004, lacks motivation, indicating in the text of the letters only that that the contracts with the National Border Council are terminated as from April 1, 2004<sup>150</sup>.

<sup>145</sup> I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 173 (5).

<sup>146</sup> Cfr. *Juridical Condition and Rights of the Undocumented Migrants*, para. 101, and *Case of Espinoza González v. Peru. Preliminary Objection*, para. 216.

<sup>147</sup> Cfr. *I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4*, para. 53, and *I/A Court H. R., Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270*, para. 332.

<sup>148</sup> Cfr. *Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18*, para. 85, and *Case of Espinoza González v. Peru*, para. 218.

<sup>149</sup> Cfr. *Juridical Condition and Rights of the Undocumented Migrants*, para. 53, and *Case of Espinoza González v. Peru*, para. 218.

<sup>150</sup> Anexo 17. Carta del Presidente del Consejo Nacional de Fronteras a Rocío San Miguel, comunicando la finalización de la relación laboral, el 12 de marzo de 2004, Anexo F al Escrito del Estado dentro del trámite de admisibilidad ante CIDH de 16 de enero de

149. The petitioners argued that the real motivation of the termination their contracts was the political opinion of Rocio San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña, expressed through in the recall referendum of the President of the Republic.

150. In contrast within the framework of internal processes, CNF authorities who showed up said that the termination was merely the application of the seventh clause of the contract, which allows for discretionary dismissal without motivation. In a radio interview, the Executive Secretary of the CNF said that the three alleged victims were dismissed by order of the Vice President as a result of a restructuring. In the same vein, the authorities that were in charge of deciding the various remedies assumed this version to be true, limiting themselves to declare that the termination of the work relationship was the exercise of discretionary powers under the text of the contract. In the amparo process it was concluded that "the plaintiffs have not shown that the performance of the contractual power of the employer constituted a discriminatory practice"<sup>151</sup>. In the criminal proceedings, the Twenty-First Court of First Instance dismissed the process by holding that "none of the elements lead to corroborate the complainants statements that the reason for the determination of the contract was voting in the recall referendum"<sup>152</sup>. During the Inter-American proceedings, the State maintained the same version on the exercise of the discretionary power that the own contract allowed as motivation for its own termination.

151. Given the argument of the petitioners according to which the real motivation of the contract termination with the alleged victims was to punish them for their political expression in the petition for referendum, the analysis of the Commission cannot be based solely on the motivation formally declared in the preceding paragraphs. It is up to the Commission to evaluate all available evidence to determine whether the termination was a misuse of power, understood as the use of formally valid procedures to conceal an illegal practice<sup>153</sup>. The IACHR has stated that in these cases circumstantial or presumptive evidence is of especial importance<sup>154</sup>.

152. The Commission will now summarize the different elements that it has in its possession to determine whether the dismissal of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, was motivated by the political opinions of Rocio San Miguel Sosa, Magally Chang Girón and Thais Coromoto Peña and was therefore a misuse of power concealed in the motive argued by the State according to which the termination of the contracts with the alleged victims was the application of a provision of the contract or part of a restructuring process.

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2008; Anexo 18. Carta del Presidente del Consejo Nacional de Fronteras a Magally Chang Girón, comunicando la finalización de la relación laboral, el 12 de marzo de 2004, Anexo F al Escrito del Estado dentro del trámite de admisibilidad ante CIDH de 16 de enero de 2008; Anexo 19. Carta del Presidente del Consejo Nacional de Fronteras a Thais Coromoto Peña, comunicando la finalización de la relación laboral, el 12 de marzo de 2004, Anexo F al Escrito del Estado dentro del trámite de admisibilidad ante CIDH de 16 de enero de 2008. De conformidad con una comunicación del entonces Secretario Ejecutivo del Consejo Nacional de Fronteras, las presuntas víctimas prestaron sus servicios al Consejo Nacional de Fronteras hasta el 30 de abril de 2004. Ver Anexo 20. Carta del Secretario Ejecutivo del Consejo Nacional de Fronteras al Fiscal 37 del Ministerio Público, 13 de julio de 2004, Anexo II de la denuncia presentada ante la CIDH el 7 de marzo de 2006.

<sup>151</sup> Annex 52. Judgment of the Third Superior Court for Labor Matters of the Labor Circuit Court of the Judicial District of the Metropolitan Area of Caracas, September 9, 2005, Annex I of the complaint filed before the IACHR on March 7, 2006.

<sup>152</sup> Annex 58. Resolution dismissal of the case of Control Court 21 of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, April 4, 2004. Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>153</sup>IACHR. Application filed before the Inter-American Court of Human Rights, in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") (Case 12.489) against the Bolivarian Republic of Venezuela, November 2, 2006, para. 128.

<sup>154</sup>IACHR. Application filed before the Inter-American Court of Human Rights, in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") (Case 12.489) against the Bolivarian Republic of Venezuela, November 2, 2006, para. 129.



153. First, the Commission notes that the process of creation and publication of the Tascón List, constitutes, *per se*, a reflection on the lack of safeguards during the recall referendum of the President of the Republic, in order to guarantee the “free expression of the will of the voters” in the terms of article 23.1 b) of the Convention. This article seeks to protect persons against forms of pressure and reprisals within electoral processes. The Commission understands that these guarantees are applicable to the processes of recall referendums of positions elected by popular vote. The Commission recognizes that the process of collecting signatures to hold a recall referendum, by its own procedure of collecting signatures, cannot guarantee the anonymity of the expression of the voters. However, this does not mean that the identity of the people who signed the petition for a recall referendum is public information. While the State must investigate any allegation of fraud in the electoral process, mechanisms should be explored in that framework, to protect voters against retaliation. In this sense, providing information on the identity of the persons who signed the petition to convene the recall referendum to a Congressman, taking into account the context and the public statements made by officials; as well as the creation of the “Tascón list” on a web page, under accusations of a “mega-fraud” created an enabling environment for the realization of reprisals.

154. Second, the Commission notes the existence of a known political context of widespread polarization by the time the events occurred. In this framework, the Commission established as proven that both the then President of the Republic and other senior government officials, including at least two ministers and a Congressman, made contemporaneous statements or at the time of signature or at the time of their presentation to the CNE, whose contents clearly show that they were forms of pressure for people not to sign, and of threats of retaliation for those who had signed, and even the unfounded accusation of terrorists to those who signed. Of particular relevance is the statement of the then President of the Republic who, referring to the “Tascón list,” said “let the faces come out”.

155. The Commission notes that in response to the State's obligations to respect, guarantee and promote human rights, officials have a duty to ensure that in exercising their freedom of expression, they don't incur in the disregard of fundamental rights<sup>155</sup>. They should also ensure that their expressions are not a “forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute to public deliberation through the expression and dissemination of thought”<sup>156</sup>. This special duty of care is particularly pronounced in situations of great social unrest, public disorder or social or political polarization, precisely because of the risks such situations might pose for specific individuals or groups at a given time<sup>157</sup>.

156. Third, the Commission notes that the present case does not constitute an isolated complaint but there are many complaints about the materialization of these threats. These complaints were documented by Human Rights Watch in the above mentioned report in the section on proven facts. In addition, there are multiple press documents that account for allegations of dismissals of people who appeared on the “Tascón list” in six different state offices. Even the Attorney General's Office itself acknowledged the existence of many complaints in this regard, when it ordered in April 2005 to open an investigation into cases of political discrimination.

157. Fourth, the Commission notes that the signature challenge process carried out by the CNE and held on June 27, 2004, was not merely so that people could object to possible fraudulent use of their signatures and identities. When calling to the challenge process, the option to retract and withdraw their signature for people who signed for the recall referendum validly was also given. While it may be reasonable to create a verification system in order to examine allegations of fraud, the object of it should not be to obtain a new expression of the persons who validly signed. The granting of this option is problematic in the context of threatening statements by senior government officials, including the President of the Republic.

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IACHR, The Inter-American Legal Framework Regarding the Right to Freedom of Expression OEA/Ser.L/V/II/CI/RELE/INF.2/09/, December, 30 2009, para. 203.

<sup>156</sup>IACHR, 2013 Annual Report of the Inter-American Commission on Human Rights, Volume II, Annual Report of the Office of the Special Rapporteur for Freedom of Expression oea/ser.L/V.II/Doc.50, December 31, 2013, para. 911.

<sup>157</sup>*Ibid.* para. 870.

158. Fifth, the Commission notes that, as was indicated in paragraph 87, the then President of the Republic, in a statement of 15 April 2005, recognized that "Tascón list"<sup>158</sup> was used to fire workers or block job applications. This time the then President called to build bridges and to "bury" the "Tascón list". Regardless, as relevant to this analysis, the Commission notes that there was recognition from the highest echelons of power, of the use of the "Tascón list" as a means to realize retaliation against people who signed. The Commission further notes that under this recognition, the use of the "Tascón list" occurred in the workplace.

159. Sixth, the Commission has the testimony of Rocío San Miguel, Magally Chang Girón, and Thais Coromoto Peña, who provided the following elements:

- Rocío San Miguel Sosa referred to a conversation with the Executive Secretary of the National Border Council who indicated that the reason for her dismissal was for petitioning for the presidential recall as well as a conversation with the legal consultant of the vice presidency who told her she was a trusted staff member and by signing she expressed a gesture of distrust.
- Magally Chang Girón referred to the fact that three of the four people who signed the request for a referendum were dismissed, and that she saw the communication for dismissal of the fourth person - Jorge Guerra - learning later that ultimately he was not dismissed, without knowing the reasons.
- Thais Coromoto Peña mentioned that after being notified of the dismissal, the Executive Secretary of the National Border Council told her that if she withdrew the signature he could support her to suspend her dismissal as was done with Jorge Guerra.

160. Seventh, the payroll of the National Border Council for 2003, confirms that of the total of 23 employees of the institution, the dismissal was notified only to the four people in the Council who signed the petition for a recall referendum: Rocío San Miguel, Magally Chang Girón, Thais Coromoto Peña, and Jorge Guerra Navarro.

161. Eight, on many occasions, including one of the conversations referred to by Rocío San Miguel, there is reference to the fact that Jorge Navarro Guerra could keep his job because he objected to his signature. The State has failed to contest before the Commission that Jorge Guerra initially signed, was fired along with the three alleged victims, then participated in the process of challenge objecting his signature, and was precisely the only one of the four dismissed that could preserve his job.

162. Ninth, the Commission notes the continuation of the alleged victims contracts with the National Border Council for periods of eight years in the case of Rocío San Miguel, seven years in the case of Magally Chang Girón, and four years in the case of Thais Coromoto Peña, without them being resolved before the period agreed in each of them, except for the last contract that was terminated a few months after the alleged victims signed the petition for a recall referendum.

163. Finally, the Commission was provided by the petitioners of the transcript of telephone conversations of Rocío San Miguel with the Executive Secretary of the National Border Council and the Legal Adviser of the Vice President, who suggest that her participation in the referendum was the cause for terminating her contract. The State has failed to demonstrate the lack of authenticity of the transcript of these conversations.

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<sup>158</sup> Statement by Venezuelan President Hugo Chávez at the V Mobile Cabinet Meeting, April 15, 2005, in the city of Puerto Ordaz, cited in IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II.Doc.54, December 30, 2009, chap II.a, para. 99.

164. The Commission recalls that there are formally valid decisions which can be used not as legitimate means of administering justice, but as mechanisms for achieving undeclared ends that were not evident at first sight and seek to impose an implicit sanction with a purpose other than those for which they have been prescribed by law<sup>159</sup>.

165. For its part, the Court has also referred to the importance of the concept of misuse of power in cases such as this:

(...) The Court considers necessary to note that the reason or purpose of a particular act of State authorities is relevant to the legal analysis of a case<sup>160</sup>, because a motivation or a different purpose of the rule that grants the powers State authority to act, can show whether the action may be considered arbitrary<sup>161</sup> or a misuse of powers. In relation to this, the Court takes as its starting point that the actions of State authorities are covered by a presumption of lawful behavior<sup>162</sup>. And therefore unlawful conduct by state authorities must appear proven to rebut the presumption of good faith<sup>163</sup>.

166. The Commission considers that all these elements are consistent with each other and allow to reach the conviction that the termination of contracts of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña, constituted an act of misuse of power in which the existence of a discretionary power was used in the contracts as a veil of legality for the true motivation to punish the victims for their expression of political opinion by signing the petition for the recall referendum. This implicit sanction constituted a violation of political rights and an indirect restriction on freedom of expression.

167. Consequently, the Commission concludes that the State of Venezuela violated the rights established in Articles 23.1 and 13.3 of the American Convention, in conjunction with Article 1.1 thereof, to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña. Also, by finding that these

<sup>159</sup> IACHR. Application filed before the Inter-American Court of Human Rights, in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") (Case 12.489) against the Bolivarian Republic of Venezuela, November 2, 2006, para. 128.

<sup>160</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para 189. Quoting. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266*, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268*, para. 210.

<sup>161</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para 189. Quoting. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*. In this regard, the European Court of Human Rights has taken into account the real purpose or grounds that the State authorities had when exercising their functions, in order to determine whether or not there had been a violation of the European Convention on Human Rights. For example, in the Case of Gusinskiy v. Russia, the European Court considered that the restriction of the victim's detention, authorized by Article 5.1(c) of the European Convention was applied not only in order to make him appear before the competent judicial authority, considering that there were reasonable indications of the commission of an offense, but also in order to oblige him to sell his Company to the State. In the case of Cebotari v. Moldavia, it declared that Article 18 of the European Convention had been violated because the Government had not convinced the Court that there were reasonable indications that the applicant had committed an offense, and the Court concluded that the real purpose of the criminal proceeding and the applicant's detention was to put pressure on him and, thus, prevent his company "Oferta Plus" from suing before the Court. Finally, in the case of Lutsenko v. Ukraine, the European Court determined that the deprivation of liberty of the applicant, authorized by Article 5.1(c), had been applied not only in order to make him appear before the competent judicial authority, because there were reasonable indications that he had committed an offense, but also for other reasons related to the prosecutor's intention of accusing the applicant for publicly expressing his opposition to the charges against him. Cf. European Court of Human Rights, Case of Gusinskiy v. Russia, Judgment of 19 May 2004, paras. 71 to 78; Case of Cebotari v. Moldavia, Judgment of 13 February 2008, paras. 46 to 53, and Case of Lutsenko v. Ukraine, Judgment of 3 July 2012, paras. 100 to 110.

<sup>162</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, Quoting. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 210.

<sup>163</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, paras. 189. Quoting. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 210.

violations took place in the context of a widespread practice of retaliation for the expression of political opinions under the recall referendum, the Commission considers that the State also violated its obligations under Article 2 of the American Convention.

### 3. Analysis of whether the dismissal constituted an act of discrimination based on political opinion

168. Of particular relevance to the analysis of the alleged discrimination, the Commission stresses that in accordance with the indications listed in the previous section is that of the total of 23 employees at the National Border Council to date the only those who signed the presidential recall referendum request were notified of their contract termination, as is the case of the three alleged victims. According to her statement, in the case of Thais Coromoto Peña, the Executive Secretary of the National Border Council told her that she could keep her job if she withdrew her signature petitioning for the presidential recall referendum. Also, as noted, the State has failed to controvert the fact that Mr. Jorge Guerra Navarro, was able to keep his job after he disavowed his signature. With these elements, the Commission considers that the National Border Council granted differential treatment to those public employees who participated in the petition for the presidential recall referendum.

169. The Inter-American Court has, however, noted that "not all differences in treatment may be considered offensive by itself," but only that distinction that "has no objective and reasonable justification"<sup>164</sup>. The Court made the difference between "distinction" and "discrimination" so that the first are compatible with the American Convention as they are reasonable and objective, while the latter are arbitrary differences that lead to the detriment of human rights<sup>165</sup>.

170. Article 1.1 of the Convention specifically stipulates that the rights enshrined in the treaty should be respected and guaranteed "without discrimination on grounds of [...] political opinion". As for the reason for the different treatment received by the three victims, the Commission already stated in the previous section that the dismissal was based on the expression of their political opinions, so it is not necessary to further explore this point.

171. However, the Commission notes that the specific criteria under which discrimination is prohibited under Article 1.1, although not an exhaustive list<sup>166</sup>, it constitutes an illustrative list of categories for which the differences in treatment are particularly problematic<sup>167</sup>. In the case Granier et al (*Radio Caracas Televisión*) v. Venezuela, the Court found that "political opinion" is one of those categories that trigger strict scrutiny against any difference in treatment based on it<sup>168</sup>.

172. In practical terms this means that, having established a difference in treatment based on political opinion, the same is presumed incompatible with the American Convention, reversing the burden of proof for the State, which must give reasons of much weight to support a distinction of this nature in the light

<sup>164</sup> I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No.17, para. 46.

<sup>165</sup> I/A Court H.R., Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 211, quoting I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 84.

<sup>166</sup> I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 85.

<sup>167</sup> Cfr. IACHR, Application before the /A Court H.R. in the Case of Karen Atala Riffo and daughters against the State of Chile, Septiembre 17, 2010, para. 88, available at: <http://www.cidh.oas.org/demandas/12.502ENG.pdf>.

<sup>168</sup> I/A Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, paras. 223-227.

of the judgment of proportionality and its sub-principles of legitimate aim – that in the case of a strict judgment must be a pressing social need - suitability, necessity and proportionality in strict sense<sup>169</sup>.

173. In the present case the Commission notes that the State has denied that the dismissal had taken place as a result of the political views of the victims expressed by signing the petition for the recall referendum. Consequently, the State has not attempted to justify the difference in treatment based on political opinions, because their argument has been based on objecting that this was the real reason for the dismissal, which has already been undermined by the Commission throughout this report.

174. In these circumstances and considering the presumption of unconventionality of any difference in treatment based on political opinion and subsequent burden of proof breached by the State in the present case, the Commission concludes that the State violated the principle of equality and nondiscrimination established in Articles 24 and 1.1 of the American Convention to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña.

**B. The rights to a fair trial and judicial protection (Articles 8.1, 25.1 of the American Convention), in relation to the obligation to respect rights (Article 1.1 of the American Convention)**

175. The articles of the Convention mentioned in the title of this section read as follows:

Article 8. Right to a Fair Trial

1. 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.

Article 25. Right to Judicial Protection

1. 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.

Article 1.1 of the Convention states

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

176. The Commission will analyze the facts in light of these standards from the following structure: 1. The due process within the context of the dismissal; 2. Analysis of effectiveness and due diligence of the amparo remedy and criminal complaint; 3. Reasonable time analysis of the amparo remedy.

**1. Due process within the context of the dismissal**

<sup>169</sup> Cfr. IACHR, Application before the /A Court H.R. in the Case of Karen Atala Riffo and daughters against the State of Chile, Septiembre 17, 2010, para. 89, available at: <http://www.cidh.oas.org/demandas/12.502ENG.pdf>.

177. In the previous section, the Commission established that there was a misuse of power in the termination of contracts of the victims with the National Border Council. This implies that such termination constituted, in fact, an administrative penalty. The Inter-American Commission has stated that the misuse of power constitutes a violation of the right to a fair trial and may involve the violation of other rights protected by the Convention<sup>170</sup>.

178. In this regard, both the Inter-American Court and the IACHR have indicated that although Article 8 of the American Convention is titled " Right to a Fair Trial " its application is not limited to judicial remedies in a strict sense, "but to all the requirements that must be observed in the procedural stages" in order for all persons to be able to defend their rights adequately vis-à-vis any type of State action that could affect them. That is to say that the due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature<sup>171</sup>.

179. In the present case, since it is an implicit sanction, imposed by an unjustified decision, the victims in the case were prevented from criticizing the real reason for it or impose a further review by a higher court to analyze the seriousness of the conduct in question and the proportionality of the sanction. The Commission notes that motivation has a significant impact on the analysis of the impartiality of the authority in charge of the exam and application of the penalty, precisely because of this absence favors that non punitive formal acts translate into real sanctions as a way of retaliation against the people who are targeted.

180. For these reasons, the Commission considers that the State is responsible for the abuse of power that took place with the aim of imposing an implicit sanction under the excuse of applying a discretionary power, which carried the violation of the substantive rights mentioned, and a general violation of the guarantees of due process enshrined in Article 8 of the American Convention in conjunction with Article 1.1 thereof, to the detriment Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña.

## **2. Analysis of effectiveness and due diligence of the *amparo* remedy and the criminal complaint**

181. The Court has indicated that the protection of the individual against the arbitrary exercise of public power is the primary objective of international protection of human rights. The lack of effective domestic remedies renders people defenseless<sup>172</sup>.

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<sup>170</sup> In the Case of the *General Gallardo*, the Inter-American Commission highlighted that "every administrative act must be directed at the accomplishment of a purpose, which is always determined, either expressly or tacitly (and hence is subject to regulation), by the provision that confers the authority to act. If the administrative authority or organ departs from that purpose, which conditions the exercise of its competence, any act or decision it takes for a different purpose ceases to be legitimate...". Similarly, the author Alibert has said that "an agent of the administration commits an abuse of power when, in performing an act within his competence and respecting the forms imposed by legislation, he makes use of his power in cases, for motives and to purposes other than those for which this power was conferred upon him. The abuse of power is an abuse of mandate, an abuse of law. An administrative act may have been performed by the competent official with all the appearances of legality and yet this discretionary act, which the qualified official had the strict right to perform, may be rendered illegal if its author has used his powers for a purpose other than that for which they were conferred on him, or to speak in terms of jurisprudence, for a purpose other than the public interest or the good of the service". [T]he Commission finds that while in principle General Gallardo was detained after the respective arrest warrant was issued by a competent Tribunal, it is evident that said public authority was used for ends other than those provided for in Mexican law, thus constituting an abuse of power, through successive and related actions that have tended to deny General José Francisco Gallardo his personal liberty, through acts that have the appearance of legality. Therefore, said conduct by the Mexican military authorities means that the law has been used for a purpose other than the one established in the law, i.e. the unlawful deprivation of liberty through acts that abide by legal formality. IACHR, Report No. 43/96, Case 11.430, Mexico, October 15, 1996, paras. 70 and 114.

<sup>171</sup> I/A Court H.R., Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 124; IACHR. *Case 12.600 Hugo Quintana Coello et al (Supreme Court of Justice) against Ecuador (Merits)*, August 2, 2011, para. 100.

<sup>172</sup> I/A Court H.R., Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 129; I/A Court H.R., Case of García Asto and Ramírez Rojas v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, para. 113; I/A Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 183.

182. The Commission notes that the State has a general obligation to provide effective judicial remedies to individuals claiming to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process (Article 8.1), all within the general obligation, by such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1.1)<sup>173</sup>. The Court has indicated that the victims and their relatives have the right, and the States the obligation, to ensure, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired<sup>174</sup>.

183. Likewise, the Court has understood that, for an effective recourse to exist, it is not enough for it to be established by the Constitution or law, or be formally admissible; rather it needs to be truly appropriate for establishing whether there has been a human rights violation and for providing whatever is necessary to repair this<sup>175</sup>. The same court also noted that these domestic recourses must be available to the interested parties and result in an effective and justified decision on the matter raised, as well as potentially providing adequate reparation<sup>176</sup>.

184. In turn, the Inter-American Court has noted that the duty to investigate must be done with "due diligence" implying that investigation should be undertaken utilizing all the legal means available and should be oriented toward the determination of the truth<sup>177</sup>. In the same vein, the Court has indicated that the State has a duty to ensure that everything you need to know the truth about what happened, and that the possible responsible parties are punished<sup>178</sup>, involving every State institution<sup>179</sup>. The Court has also said that it is particularly important that the competent authorities adopt all reasonable measures to guarantee the necessary probative material in order to carry out the investigation<sup>180</sup>.

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<sup>173</sup> I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; I/A Court H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 260; and Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284, para. 165.

<sup>174</sup> I/A Court H.R., Case of García Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 168, para. 103; I/A Court H.R., Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; and I/A Court H.R., Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of August 2, 2008 Series C No. 181, para. 382.

<sup>175</sup> 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; I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 61; I/A Court H.R., Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 136.

<sup>176</sup> /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. 126.

<sup>177</sup> I/A Court H.R., Case of García Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101.

<sup>178</sup> I/A Court H.R., Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; I/A Court H.R., Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para 146; I/A Court H.R., Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 382.

<sup>179</sup> I/A Court H.R., Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 130; I/A Court H.R., Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 120; and I/A Court H.R., Case of Huilca Tecse v. Peru. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, para. 66.

<sup>180</sup> I/A Court H.R., Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para 122.

185. Taking into account the parameters indicated, the Commission will examine whether, in this case the State of Venezuela offered to the victims an effective remedy to protect them of violations of their human rights through a serious and diligent investigation within a reasonable time.

186. The Commission notes that the victims presented both an *amparo* remedy and a criminal complaint. The *amparo* was filed on July 22, 2004 while the criminal complaint was filed on May 27, 2004. The *amparo* was finally resolved unfavorably on September 9, 2005; while the criminal investigation was dismissed, a decision that became final after the rejection of the appeal remedy (*casación*) on September 27, 2005.

187. The motivations of the judicial authorities in both processes are similar in that both remedies concluded that the victims did not prove the political discrimination claimed, and assumed as valid the consistent explanation on the implementation of the seventh clause of the contract that granted discretionary powers to the employer. For example, the decision of First Instance of the *amparo* proceeding of July 27, 2005, subsequently confirmed, indicated there was a failure to "clearly establish the causal link between the alleged discriminatory treatment for signing and the decision ending the working relationship". In the criminal proceedings, when delivering the dismissal, it was noted that although the CNF ended the employment relationship "which would be allowed by the contract (...) none of the items presented lead to corroborate the complainants' statement that the reason (...) was voting in the recall referendum".

188. The Commission notes that the judicial officers who examined both remedies limited to determining whether National Border Council had the right to unilaterally terminate the contracts with the victims. This corroboration is not suitable to determine whether there was discrimination in a case of alleged discrimination precisely that operated covertly behind the veil of legality of the discretion established in the contract. When a judicial authority finds an allegation of disguised discrimination, the obligation of due diligence implies an investigation beyond the formally declared motivation of the act and take into consideration all the indicia, circumstantial evidence and others.

189. Moreover, the reasons for rejection of the remedies also refer to the fact that the victims did not prove discrimination. In this regard, the Commission notes that the judicial authorities in charge of resolving such cases should be aware that covert forms of discrimination often do not have direct proof and, therefore, the burden of proof cannot rest absolutely in the person alleging discrimination as occurred in the context of these remedies.

190. Consequently, the Commission considers that although the *amparo* judicial authority referred to the allegation of discrimination, it was examined only formally and without due diligence. Also, the judicial authority imposed a very high standard when requiring the victim to prove "clearly" the causal link between the discriminatory treatment and the decision to end the working relationship. This also involves placing all the burden of proof on the person alleging discrimination.

191. The Commission considers that the authorities must use all legal means at its disposal to obtain the truth of what happened to victims of human rights violations<sup>181</sup>. A due diligence in the investigation process requires the authorities to take into account the complexity of the facts, the context and the circumstances in which they occurred and patterns that explain their commission, avoiding omissions in the collection of evidence and track all logical lines of investigation<sup>182</sup>. Both the IACHR and the Inter-American Court have established that prosecutors, when drawing logical lines of investigation must take into account all the evidentiary material in its possession. In that sense, when victims bring to the investigative bodies

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<sup>181</sup> As it has been indicated by the Inter-American Court in cases of serious human rights violations. See, for example, I/A Court H.R., Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para.143.

<sup>182</sup> I/A Court H.R., Case of Escué Zapata. v. Colombia. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of May 5, 2008 Series C No. 178, para.106; I/A Court H.R., Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para.333.



evidentiary material, they should be valued by State bodies to develop the research hypotheses on the obligation of the judicial guarantees<sup>183</sup>.

192. The Commission notes that the judicial authorities who examined the claims did not consider the hypothesis concerning the use of the power to terminate the employment under the contract clause as a mean of retaliation against the victims for their participation in the recall referendum petition. The proceedings were limited to collecting the testimony of the three victims and the then Executive Secretary of the National Border Council, omitting the realization of other fundamental steps to check the allegation of discrimination. In such proceedings the Commission would consider: i) To receive the statement of the then President of the National Border Council José Vicente Rangel Vale who terminated the contracts of the alleged victims with the National Border Council and who was accused of having exercised such power arbitrarily, ii) Conducting an interview with Jorge Guerra Navarro, employee of the National Border Council, whose contract would have been terminated but was kept in his post for allegedly committing to withdraw his signature in the process of challenge; iii) call to testify people of the staff to the National Border Council, who could have testified about the facts of the case and the context in the National Border Council; and iv) requesting the payroll of the National Border Council for 2003 and the list of signatories of the petition for a presidential recall referendum.

193. In this regard, the Commission considers that neither under the *amparo* remedy, nor under the criminal investigation, the judicial authorities examined properly the allegation of disguised discrimination, limiting themselves to verify the formal justification given by the authorities, placing all the burden of proof on the victims, for a fact that, by its very nature, can hardly have direct or "reliable" evidence, as indicated by the authority who heard the *amparo* claim.

194. The Commission further notes that in the context of the criminal investigation, the victims filed an appeal against the decision of dismissal. By raising the appeal, they argued that the decision to dismiss erred in law in concluding ""even if it had been that way (if it had been confirmed that the reason for the termination of the contract was voting in the recall referendum) neither such allegations constitute offenses" indicating that the facts do constitute offenses under articles 203, 166, 175, 254, 286 of the Criminal Code, 256 of the Law of Suffrage and Political Participation and 68 of the Anti-Corruption Act, also arguing that if wasn't proved that the reason for the termination of the contracts was the participation in the recall referendum, it was precisely because the prosecution did not develop a proper investigation.

195. The Commission emphasizes that in the decision to deny the appeal, the Court of Appeals did not address the allegations of the alleged victims and merely stated that "it is impossible to demand of the Public Ministry (owner criminal action by excellence), to present a different final action other than the one already exercised (dismissal of this case) (...)"<sup>184</sup>. The Commission notes that Article 447 of the Criminal Procedure Code provides the possibility of challenging decisions that "end the process or make it impossible to continue"<sup>185</sup>.

196. In this respect, the Commission recalls that Article 25.1 of the American Convention establishes the obligation of the States Parties to ensure to all persons subject to their jurisdiction an effective

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<sup>183</sup> IACHR, Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. June 28, 2007, para. 153. Available at: <http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm>.

<sup>184</sup> Annex 62. Decision of the Seventh Chamber of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, which dismisses the appeal, May 12, 2005, Annex II of the complaint filed before the IACHR on March 7, 2006.

<sup>185</sup> Criminal Procedure Code, Official Gazette of the Bolivarian Republic of Venezuela No 5558 of 14-11-2001, available at: [http://www.oas.org/juridico/spanish/cyb\\_ven\\_Cod\\_Org\\_Pro\\_Penal.pdf](http://www.oas.org/juridico/spanish/cyb_ven_Cod_Org_Pro_Penal.pdf).

judicial remedy<sup>186</sup> which supposes that, in addition to the formal existence of remedies, these obtain results or responses to the violations of the rights established in the Convention, the Constitution, or by law<sup>187</sup>.

197. The Commission considers that the appeal in this case, by not ruling nor containing adequate motivation for understanding that the arguments of the victims were duly considered, as well as the reasons of their irrelevance, did not constitute an effective remedy to examine the decision to dismiss.

198. In light of all the above considerations the Commission concludes that neither the *amparo* remedy, nor the criminal investigation, including the appeal against the dismissal, constituted effective remedies to deal with the alleged misuse of power materialized in covert discrimination. Consequently, the Commission concludes that the State of Venezuela is responsible for the violation of the rights to judicial guarantees and judicial protection established in Articles 8.1 and 25.1 of the American Convention in relation to the obligations under Article 1.1 thereof to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Peña Coromoto.

### 3. Reasonable time analysis of the *amparo* remedy

199. The Commission will now consider whether in the processing of the *amparo* remedy the State respected the guarantee of reasonable time. The *amparo* was filed on July 22, 2004 and finally solved on September 9, 2005, that is, 14 months later.

200. The Inter-American Court jurisprudence has found that it is necessary to take into account four elements to determine the fairness of such term: a) the complexity of the matter, b) the procedural activity of the interested party, c) the conduct of judicial authorities, and d) the impairment to the legal situation of the person involved in the proceedings<sup>188</sup>.

201. With regard to the complexity of the matter, the Commission notes that the *amparo* remedy filed against the National Border Council seek for the Court to declare that the administrative act of dismissal was a violation of the right to equality before the law, to the guarantee of non-discrimination, and of labor rights and job stability, as well as the restitution of the alleged victims to their jobs. Although, as noted above, cases of misuse of power or covert discrimination may take some complexity, especially in terms of evidence, the Commission notes that the judicial proceedings of *amparo* filed by the victims was very specific, since it consisted of the *amparo* presentation accompanied by the supporting documents. The Commission has no information on a relevant evidentiary display that could justify the delay of 14 months to rule on an appeal. Consequently, the Commission considers that the State did not prove that the delay was attributable to the complexity of the case.

202. Regarding the procedural activity of the interested party, the petitioners filed the *amparo* on 22 July 2004. On August 4, 2004 the Fourth Court of First Instance declared itself incompetent to hear the action and referred the *amparo* case to the Constitutional Chamber of the Supreme Court. In at least three occasions the victims petitioned the Constitutional Court a ruling on the challenges to the jurisdiction matter. On May 26, 2005 the Constitutional Chamber of the Supreme Court issued a ruling stating that it does not accept the challenges to the jurisdiction. Under this, on June 17, 2005 the Fourth Court of First Instance admitted the *amparo*. On July 20, 2005 the alleged victims appeared to a constitutional hearing before the

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<sup>186</sup> I/A Court H.R., Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36, para. 103.

<sup>187</sup> I/A Court H.R., Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 242, para. 107.

<sup>188</sup> 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.

Fourth Court of First Instance of Labor Matters, and the end of the hearing the Fourth Court of First Instance dismissed the *amparo*, and indicated that it would issue a decision stating the matters of fact and law of the decision, within five working days of the hearing. On July 27, 2005 the Fourth Court issued the judgment on the merits, dismissing the *amparo* claim. Under this, on July 29, 2005 the alleged victims appealed. On September 9, 2005 the Third Superior Court for Labor of the Labor Judicial Circuit dismissed the appeal. In this regard, the Commission notes that the alleged victims were actively involved in the process without any elements that might attribute the delay in the decision of *amparo*.

203. As for the conduct of the judicial authorities, the Commission notes that Article 26 of the Constitution provides the right to obtain a corresponding prompt decision from the organs of justice<sup>189</sup>. Venezuelan law, specifically the Organic Law on Protection of Rights and Constitutional Guarantees of 1988, in force at the time, provided for the *amparo* as a quick remedy to respond to alleged violations of human rights.<sup>190</sup> This law referred to the "brief, summary and effective" nature of the remedy and established that courts must give "preference to the processing of *amparo* to any other matter"<sup>191</sup>.

204. Despite these provisions, the Commission notes that for most of the duration of the process under the judicial authorities, they were discussing jurisdiction issues. Indeed, after the Fourth Court declined jurisdiction and referred the case to the Constitutional Court, and despite repeated requests of the victims, the plea was not resolved until ten months later, on May 26, 2005, when the Constitutional Chamber of the Supreme Court issued a ruling stating that it did not accept the challenges to the jurisdiction. In turn, the judgment on the merits of the *amparo* was issued on July 27, 2005, over a year after its introduction; the State has not presented any justification for the delay of a remedy that for its own nature should be resolved with the greater immediacy possible.

205. In view of the above, the Commission considers that the *amparo* remedy did not comply with the guarantee of reasonable time, which was an additional factor of the denial of justice suffered by the victims in the terms stated in this report. Consequently, the Commission concludes that in the present case the breach of the reasonable time guarantee under the *amparo* proceeding was an additional violation of the right to a fair trial and judicial protection established in Articles 8.1 and 25.1 of the Convention American in conjunction with Article 1.1 of the same instrument to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña.

<sup>189</sup> See Article 26 of the Political Constitution of the Bolivarian Republic of Venezuela, available at: [http://www.cne.gob.ve/web/normativa\\_electoral/constitucion/titulo3.php#cap2sec2](http://www.cne.gob.ve/web/normativa_electoral/constitucion/titulo3.php#cap2sec2)

<sup>190</sup> Cfr. 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, paras. 155 y 156. Organic Law on Protection of Rights and Constitutional Guarantees of 1988, available at: <http://www.tsj.gov.ve/legislacion/loadgc.html>, establishes in its relevant parts:

Article 22. The court hearing the application for *amparo* shall have the power to restore the juridical situation, regardless of considerations of mere form without any preliminary investigation that precedes it.

In this case, an order of protection must be motivated and be based on a means test that constitutes a serious presumption of violation or threat of violation.

Article 23. If the Judge chooses to restore immediately the juridical situation under the previous article, he will order the authority, institution, social organization or individual alleged to violate or threaten the right or constitutional guarantee, that within forty-eight (48) hours, counted from the respective notification, file a report on the alleged violation or threat that gave rise to the injunction request.

The lack of the corresponding report will be understood as acceptance of the offenses in question.

Article 26. The court hearing the *amparo*, will set within ninety-six (96) hours following the presentation of the report by the alleged offender or the expiration of their respective term, the opportunity for the parties or their legal representatives express, orally and publicly, the respective arguments.

Carried out that measure, the Judge will have a non-extendable term of twenty-four (24) hours to decide the application for constitutional *amparo*.

<sup>191</sup> Organic Law on Protection of Rights and Constitutional Guarantees of 1988, arts. 4, 13, available at: <http://www.tsj.gov.ve/legislacion/loadgc.html>.

## **VI. CONCLUSIONS**

206. In accordance with the considerations of facts and law expressed in this report on merits, the Commission concludes that the Venezuelan State is responsible for the violation of political rights, the right to freedom of expression, the right to equality before the law and non-discrimination, fair trial and judicial protection embodied in Articles 23, 13, 24, 8 and 25 of the American Convention, in conjunction with Article 1.1 of the same instrument to the detriment of Rocío San Miguel Sosa, Magally Chang Girón, and Thais Coromoto Peña.

207. The Commission considers that, based on the available information, the possible violation of the right to personal integrity is subsumed in the violations found throughout this report. The Commission has no information enabling it to determine the need for a separate determination on Article 5 of the American Convention.

## **VII. RECOMMENDATIONS**

208. Based on the foregoing conclusions,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF VENEZUELA,**

1. To reinstate victims to the civil service on a job similar to the one they would currently hold, had they not been separated from their posts. Should this not be the will of the victims or that there are objective reasons which prevent the reincorporation, the State must pay compensation for this, which is independent of the repairs relating to the material and moral damage in the recommendation number two.

2. To provide adequate compensation for the human rights violations declared in this report both material and morally.

3. To carry out the corresponding criminal, administrative or other proceedings related to the human rights violations declared in this report, in an impartial, effective and within a reasonable time manner, in order to fully clarify the facts and to establish the respective responsibilities.

4. To adopt the necessary measures of non-repetition to prevent future occurrence of similar events. In particular, adopt legislative, administrative or other measures to prevent discrimination for political reasons. In this context, to ensure the existence of clear rules on access and use of data collected in electoral processes, with the necessary safeguards to ensure the free expression of political opinions without fear of reprisals. In addition, to carry out training programs: i) to public officials at all levels on the prohibition of discrimination based on political opinion; and ii) to legal practitioners called upon to hear any allegations of covert discrimination or misuse of power.