



36th Provincial Criminal
Prosecution Office of Lima
Office of the Prosecutor
General

JUDICIAL BRANCH
Lima Criminal Court
APRIL 23, 2018
FILING DESK
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21 pages

Specialist: Reyes Caballero
Case File: No. 436-2015
Prosecutor's Decision No. 066 - 2018

TO THE JUDGE OF THE THIRTY-SIXTH CRIMINAL COURT OF LIMA:

This Office has been informed through page 2529 of the investigation **into OSCAR ARTURO DIAZ MUÑOZ** for the offense against public trust – **Falsification of a Public Document**, to the detriment of the State and Carlos Fernando Mesía Ramírez, so that we can issue our decision in accordance with the law.

I. FACTS INVESTIGATED

The criminal complaint on pages 679/681 shows that **OSCAR ARTURO DÍAZ MUÑOZ**, acting as Secretary-Reporter of the Constitutional Tribunal, overseeing Case File No. 00022-1996-PI/TC, dated July 16, 2013, has been accused – after the court sat *en banc* to vote on the final decision in the case cited – of doctoring a draft decision signed by Justices Eto Cruz and Mesía Ramírez, dated June 23, 2013 (a draft that should have been discarded) into the “Dissenting Opinion” of Justice Carlos Mesía Ramírez, by using correction fluid [white out] on the title of the document on page 000302, to overwrite “Dissenting Opinion” of Justice Mesía Ramírez. Correction fluid [white out] has also been applied to all the signatures of Justice Eto Cruz (see pages 000303/000308), as stated in the case record on pages 357/366. Similarly, on page 000309 the third paragraph has been deleted, and in its place it has been written “because of the foregoing considerations, my vote is for.” All this has been done with the sole purpose of securing the vote of Justice Mesía Ramírez so as to be able to issue judgment in Case No. 00022-1996- PI/TC, after using its content and signature to prepare the so-called “dissenting opinion,” which was not issued by then-Justice Carlos Mesía Ramírez, as he has stated in his declaration on pages 77/80 and as is corroborated by Justice Gerardo Eto Cruz, who in his statement on pages 256/261 asserted that said draft ruling, which was not approved, and should have been discarded because approval had been given to another draft opinion that established a different form of payment for the land reform bonds. This falsification is demonstrated by the Forensic Expert’s Report No. 12439-12454/2015, which appears on pages 348/376, by the analysis conducted on pages 275/310 of Case File No. 00022-1996-PI/TC. The falsification was detrimental to the State and to then-Justice Carlos Mesía Ramírez, as it violates the principle of legal certainty to have attributed to him the authorship of a document that he did not

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submit as an “dissenting opinion.”

II. INVESTIGATIONS CARRIED OUT AT THE COURT

- 2.1. **Pages 1007/1056 contain the transcript of the Arraignment Hearing**, consisting on the commencement of the investigation against the defendant for the offense against public trust – Falsification of a Public Document, to the detriment of the State and of Carlos Fernando Mesía Ramírez, and a Simple Writ of Summons is issued.
- 2.2. **Page 1386** contains the ruling qualifying the case as “complex.”
- 2.3. **The formal statement made by Oscar Arturo Díaz Muñoz at his initial appearance is found on pages 1504/1509.** He declares that he is innocent of the charges filed against him and that this case is related to case No. 22-1996-PI (the Land Reform Bonds case), on which the Tribunal issued a decision in 2001. The ruling in this case was issued during an enforcement proceeding, which has no hearing. This means that that the preliminary draft of the opinion was prepared by the Justice rapporteur (Justice Eto Cruz) and put on the agenda of the full tribunal sitting *en banc* by order of the President of the Tribunal (at that time Justice Oscar Urviola Hani) for deliberation and vote. In this case, the Justice rapporteur (Eto Cruz) made a first preliminary draft which was also accepted and signed by Justice Carlos Fernando Mesía Ramírez, now the alleged victim. Nevertheless, on the day that this case was scheduled to come before the tribunal *en banc* (July 16, 2013) Justice Eto Cruz submitted a new preliminary draft opinion, as stated in the document signed by Justice Eto Cruz on July 15, 2013, which appears in the record of the tribunal sitting *en banc* for July 16, 2013, a copy of which is included in the Case File. Justice Eto Cruz defended this new draft opinion (*i.e.*, the second one) before the other Justices of the Constitutional Tribunal and the record states that: “Justice Mesía Ramírez expressed his disagreement with this new draft,” and ratified the vote that he had already cast for that meeting of the full tribunal. He also stated that he was not going to change his vote, because he had already cast it (it was Eto Cruz’s first preliminary draft opinion). He further emphasizes that the aforementioned minutes for July 16, 2013, contains a statement regarding the result of the vote: “Justice Eto Cruz’s new draft opinion won the support of Justices Urviola Hani and Álvarez Miranda, and the result at the end of voting was four votes in favor of Justice Eto Cruz’s preliminary draft of the tribunal opinion (the second one submitted by him) by virtue of the casting vote of Urviola Hani (since the President’s vote is worth two) to break the tie in accordance with article 10-A of the Rules of the Constitutional Tribunal. Therefore,

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Justice Mesía Ramírez's vote was a minority vote, becoming a dissenting opinion, together with the dissenting opinions of Justices Vergara Gotelli and Calle Hayen." Regarding the minutes, he stressed that Justice Mesía Ramírez confirmed the vote that had already been cast (the one he signed together with Justice Eto Cruz) and that he was not going to change that vote and that, therefore, there was no need to grant the 48-hour period to issue a dissenting opinion, as per Article 44 of the Constitutional Tribunal's Regulation. Accordingly, once the voting was concluded, as is shown in the July 16, 2013 minutes (Case No. 22-1996-PI Land Reform Bonds Case), and Justice Eto Cruz had removed his signature from the first preliminary draft opinion that he had signed jointly with Justice Mesía Ramírez, that first preliminary draft opinion became Justice Mesía Ramírez's dissenting opinion. The corrections to the document with correction fluid [white out] were made so that it would reflect the final result of the voting. Basically, where it previously said "decision of the Constitutional Tribunal," it now says "Dissenting opinion of Justice Mesía Ramírez" and correction fluid [white out] was also applied to the place where Justice Eto Cruz's removed signature was located, because it was a crossed-out signature, and the judgment of July 16, 2013, was published on the Tribunal's web page on the same day, together with the three dissenting opinions, as is the case with all Constitutional Tribunal's decisions. In fact it is still there more than three years later. On the following day, July 17, 2013, then-Justice Mesía Ramírez was interviewed by RPP television at 8:21 p.m. (see the video in the case file) and when asked about the aforementioned judgment (Land Reform Bonds case 22-1996-PI) he made no objection to the judgment published on the web page or to his dissenting opinion that was also published the day before, which had already been reported by all the newspapers. He simply said: "There has been no pressure, but rather, what I believe is that in this case what the Tribunal has meant to say is that in this country there is legal certainty, private property is respected, and the State honors its debts." That statement can be found between 13m 7s and 13m 20s in the video of the interview. On July 22, 2013, six days after the publication of the decision in the case of the Land Reform Bonds and the dissenting opinions, Justice Mesía Ramírez sent a letter to the President of the Constitutional Tribunal, Justice Urviola Hani, saying that, although the judgment in the Land Reform Bonds case was approved at the meeting of the tribunal sitting *en banc* (a meeting in which Justice Mesía participated), the vote published on the Constitutional Tribunal's website, six days previously, had apparently been corrected without his authorization, and therefore he requested that he be allowed to cast his dissenting opinion again. It should be noted that Justice Mesía Ramírez does no more than mention in his letter that his vote published on the web had been corrected and does not indicate what the corrections were. It should also be noted that in this letter, Justice Mesía Ramírez says, "my opinion put up on the web page;" he does not say, "**the opinion that**

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is attributed to me,” in other words, he does not deny that it is his opinion. On August 1, 2013, this letter was answered by Urviola Hani, the President of the Constitutional Tribunal, who, referring to the result of the voting in case No. 22-1996-PI and what Justice Mesía’s final vote had been, told Mesía Ramírez that his petition for annulment and a new vote could not be granted. A second letter from Justice Mesía Ramírez on August 9, 2013, i.e., almost a month after the publication of the Land Reform Bonds case on the Constitutional Tribunal’s web page, was addressed to him personally [sic] and was immediately forwarded to the President of the Constitutional Tribunal, who in his reply to Justice Mesía Ramírez, repeated the terms of his first letter, i.e., that his petition could not be granted. On August 13, 2013, i.e., after the exchange of these two letters between Justice Mesía Ramírez and the President of the Constitutional Tribunal, Urviola Hani, a meeting of the full tribunal was held, the minutes of which were signed by Mesía Ramírez and the other five Constitutional Tribunal Justices and placed in the records. According to item 5), regarding Case No. 22-1995[sic]-PI: **“Justice Mesía Ramírez referred to Case 22-1996-PI/TC and the controversy over the judgment that has arisen in the media and inside the tribunal, as a result of the majority, individual votes, and dissenting opinions. After a wide-ranging discussion in which all the Justices took part, it was agreed that this is a closed case.”** Justice Mesía Ramírez recognizes the validity of his vote and accepts that any discussion on it has been settled by the Constitutional Tribunal sitting *en banc*.” This is also what Justice Mesía Ramírez told the newspaper *La Primera*, which on August 19, 2013, published on page 6 that **“Last Tuesday August 13, 2013, the full tribunal met and, as with all collegiate bodies, the majority rules and almost unanimously, (with the exception of Justice Calle) agreed that those who had made the judgment should make the decision, and with that my petition was declared closed.”** The Constitutional Tribunal in its official bulletin (which is in record number 62 for November/December 2014) published on page 3 a comprehensive explanation of these facts and concluded that the procedure for voting on the decision of July 16, 2013, in case 22-1996-PI, was completely normal. This explanation was also published on its web page, in press release 124-2014, which is still available there. On the occasion of the visit of the handwriting experts to headquarters of the Constitutional Tribunal on May 13, 2015, following the criminal complaint made by Mr. Augusto Pretel Rada, the new Constitutional Tribunal sitting *en banc* was informed by its president of the falsehood of this complaint, as is set forth in item 3.1.b of the minutes for May 14, 2015. Then, on June 23, 2015, the Legal Counsel of the Constitutional Tribunal appeared in person and presented a document to Criminal Prosecution Office No. 12 of Lima on the events that led to the dismissal of Augusto Pretel Rada’s complaint on the grounds of inconsistency. He also states that there is a possibility of a Justice submitting a preliminary draft of a tribunal opinion and then submitting another one when the meeting of the full

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tribunal is held. He says that he does not know who might have applied correction fluid [white out] to Eto Cruz's signature, and that this alteration in no way changed the result of the judgment that was issued, and that it was a practice that was already in existence when he began working in the Constitutional Tribunal.

- 2.4. The Expert Handwriting Report** submitted by the defendant can be found on pages 1519/1606.
- 2.5. The preliminary statement of the Legal Counsel of the Constitutional Tribunal Carlos Enrique Peláez Camacho can be found on pages 1606/1607.** In it he states there is no specific victim in the Constitutional Tribunal, and that said tribunal's highest body ruled and recorded in the minutes of August 13, 2013, that no disciplinary proceedings were taken against the accused because it would be counterproductive since the material contents of the judgment or document in question have not been altered. He also notes that, as the Office of the Prosecutor General has already pointed out, the person who made the criminal complaint, Augusto Pretel, is not a party to case 22-1996-PI, and lacks legal standing.
- 2.6. The preliminary statement made by Carlos Fernando Mesía Ramírez can be found on pages 1608/1616.** He states that although he does not remember the exact dates, when he was a member of the Constitutional Tribunal it normally met every Tuesday to discuss and vote on current cases. On one of those Tuesdays they discussed the preliminary draft of the opinion submitted by Justice Eto Cruz, who had been studying the case of the land reform bonds (Case No. 22-1996-PI/TC). The draft had four votes in its favor, but it was suggested that he should make some changes of form, rather than of substance, by Thursday the 11th of that week (i.e., in 48 hours). Basically, the main thing was to establish the calculation method for updating the debt owed on the land reform bonds. If he is not mistaken, it was on Friday of that week that Justice Eto Cruz came to his office to sign the preliminary draft. The preliminary draft reflected the wishes of the full tribunal and established that the debt owed on the land reform bonds would be updated in accordance with the consumer price index. Nevertheless, without his consent, at 10 a.m. on Tuesday July 16 the tribunal *en banc* began to discuss a preliminary draft that provided another method of calculating the debt, and this was the one that was eventually approved, contrary to what had been agreed on Tuesday of the previous week. This new draft was fundamentally identical to the text that Justice Eto Cruz made him sign, and the only thing that changed, as has already been said, was the method of updating the debt, which was the fundamental point at issue. As Justice Mesia had not had enough time to prepare the new draft and he was obviously upset and outraged with what was happening, he requested

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48 hours to make known the grounds of his dissenting opinion as per the Tribunal's Regulation. At midday, the meeting was adjourned and he went home, only to discover at 4:00 p.m. that the decision had been posted with a reportedly dissenting opinion, which had not been given to the secretary-reporter. In view of this, on July 22, he sent a letter to the secretary-reporter of the Constitutional Tribunal explaining that that was not his opinion, but never received a reply. Nevertheless, the president answered, and he replied that he had already voted and decided to send another letter to the secretary-reporter with his unpublished opinion, and thus the Constitutional Tribunal has offended him and harmed his rights as a Justice and had not so far allowed him to place on the record for the nation the reasons why he was not in agreement with the way his colleagues had voted. He said that he agreed with the holding of the judgment, but not with the form of payment.

- 2.7. The witness statement of Felipe Andrés Paredes San Román can be found on pages 1618/1622.** He states that he knows the defendant and that he was present at the meeting of July 16, 2013, where they discussed the case of the land reform bonds, which had been discussed at previous meetings, and at that meeting the votes or preliminary draft opinions prepared by the Justices were delivered, a task that the Justices entrusted to the general clerk of the Tribunal, Oscar Zapata Alcázar. Following that, the Justices began the discussion based on a preliminary draft opinion presented by Justice Eto Cruz, to which Mesía was opposed because he disagreed with it. Eto Cruz asked him a few questions, and [Mesía] answered them. The voting then took place (the results must be in the minutes for that date), with Urviola and Alvarez voting in favor of Eto Cruz's preliminary draft, and Vergara, Hallen and Mesía against. Since there was a tie, the casting vote (i.e., the president's vote) decided the result. In accordance with Article 10-A of the Constitutional Tribunal's Regulation, this must be in the minutes. He also states that Justice Mesía was in agreement with everything except the form of payment and that he did not witness Justice Mesía's asking for 48 hours to defend his dissenting opinion, but that he was a witness when he ratified his vote. With regard to posting the judgment on the web, this occurs when voting takes place, even more so if a Justice disagrees on the form of payment, and since it was a minority vote, there was no point in delaying its publication.

- 2.8. The witness statement of Oscar Urviola Hani can be found on pages 2336/2342.** He states that at the meeting on July 16, 2013, the Justice who wrote and defended the preliminary draft opinion was Eto Cruz, and it was adopted as the tribunal's decision. Because on July 15, one day before it was announced that it had been changed, he withdrew his signature from his draft opinion that he had signed with Mesía Ramírez. On the same date Eto Cruz's modified preliminary draft opinion was discussed (as

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is recorded in the minutes), and Eto Cruz's new draft won the support of Urviola Hani and Alvarez Miranda. The result was four votes in favor of Eto Cruz. He denies that Mesía Ramírez expressed his dissenting opinion. With regard to Mesía Ramírez's dissenting opinion, they are adaptations to convert what was originally a preliminary draft judgment into an dissenting opinion, by using liquid paper [white out] to delete references to the decision and the name of Eto Cruz, who withdrew his signature from the original preliminary draft. This is a procedure that has been seen in a lot of cases in the Constitutional Tribunal, most of them during Justice Mesía Ramírez's period in office. In this case it was done because of the urgency to publish the decision. This practice is employed only in exceptional circumstances, and normally the new opinion is printed and the Justice who cast the dissenting opinion is asked to sign it. He also states that on the following day, Justice Mesía told radio programs and local newspapers that he accepted the judgment, although he disagreed with the approach taken. He did not mention any irregularity or tampering with his opinion.

2.9. The witness statement of Gerardo Eto Cruz can be found on pages 2455/2466.

He states that he knows the defendant and Carlos Mesía Ramírez for academic reasons, that he was a member of the Constitutional Tribunal in the months of July and August 2013, and wrote the draft opinion in the land reform bonds case, which was heard on July 16, 2013. He mentions that discussion in the Constitutional Tribunal took place in several stages. First there was a big discussion regarding the legal nature and whether the unconstitutionality proceedings would have an "executive phase" in the strict sense, and he put forward his opinion that the abstract [judicial] review proceedings should not only be limited to the declaration of unconstitutionality, but that it should be possible to execute the judgment. This was opposed by some of his colleagues, but he wanted to make it clear that discussions on the matter began on March 19, 2013, when he asked for a reserved meeting between Justices. This is documented in the minutes for April 9, 2013, then in the minutes for April 16 and 23, 2013, June 11, 2013; and July 9, 2013. The minutes refer to a draft proposal for the decision to be executed and thus pay the debt associated with the land reform bonds. The majority approved the "current value" standard indicated by the Constitutional Tribunal in the 2001 judgment. He also states that he prepared a draft opinion that he signed together with Carlos Mesía, but in the discussions he subsequently changed his position, but only on the methodology of payment, after conversations with Justice Ruviola [sic], who gave them a reassessment between the impact involved in using the consumer price index (CPI), set forth in points 21–25, and the current value standard (criterio valorista), and from points 26–29 the updated debt payment

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procedure was established; that is where the structure of the judgment that he had originally signed with Justice Carlos Mesía was changed. Because of that, from July 9, 2013 onward Urviola, Alvarez, Miranda and him decided to maintain the “current value” approach, but changed the CPI methodology for one in which the amount owed would be converted into dollars and paid with interest calculated at the U.S. Treasury Bonds interest rate. He believes that the defendant secretary must have delivered drafts that were different from the one he had signed, which was dated July 9, 2013, but by July 16, 2013, all the Justices were in possession of the alternate draft that he himself had reconsidered. At that point the discussion began and Justice Carlos Mesía expressed his disagreement with this new draft (his disagreement was recorded in the minutes), but ratified the draft that had been submitted and signed by Carlos Mesía and him [Eto Cruz]. His signature was deleted from that draft because what is now known as the final opinion had already been submitted and the copies were delivered. [Eto Cruz] also states that he was the author of the draft that was finally signed by the three Justices, which was the result of ideas contributed by Justice Oscar Urviola and restructured by the adviser in his office. Regarding the removal of his signature from the draft that he signed with Mesía Ramírez, at the hearing on July 16, 2013, his signature appeared crossed out, which is usual when Justices change their original drafts as a result of discussions. As a result, only the signature of Mesía Ramírez remained on the draft and said document could have been discarded. Thus, what happened is that the Tribunal officials decided to use this draft as a “dissenting opinion” of Justice Mesía Ramírez, and after that date, July 16, 2013, the judgment was published in the Constitutional Tribunal [sic] with the aforementioned dissenting opinion. Justice Mesía Ramírez questioned this and complained because he had demanded to be given the 48 hours to which Justices are entitled when they issue dissenting opinions. Regarding the facts, he states that he did not know that his signature had been deleted with liquid paper [white out], but Justice Mesía Ramírez questioned the reporter and the President of the Tribunal (Urviola). He also states that there is a record of the parties, but that there is also a yellow notebook showing the evolution of the drafts, and that is where positions and changes to the same can be seen until in the end they come together in an agreed decision. And that is where the reporter, without consulting anyone, for example, changes the phrasing of the introduction to the judgment to something along the lines of “In the present case with the votes cast...” The opinions are adapted according to how they were concluded, but in some cases, when a heading does not correspond with an opinion, it is deleted and changed to the decision finally taken by the Justice. These are situations that do occur, but they are the exceptions, not the rule, given that to avoid moving signatures around the reporter may delete a part. They are contingencies that arise and should be corrected.

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He ends by stating that the reporter's actions [regarding] the use of the draft with his signature does not constitute a situation bordering on crime. Nevertheless, it is an administrative matter that should have been addressed by the President of the Tribunal for clarification or definition. The reporter's conduct has not caused harm to a protected legal interest and the president's haste to issue the judgment took precedence since the renewal of the Justices' appointments was imminent, a change that did not, in fact, occur.

- 2.10. **The ratification of report No. 12439-12454/2015 on the handwriting in the document** by the Expert Félix Roger Escajadillo Cabrera can be found on **pages 2463/2466**.

III.- DESCRIPTION OF THE CRIMINAL OFFENSE UNDER EXAMINATION

The alleged criminal conduct of the defendant is provided for and punishable under Article 427 of the Criminal Code, which states as follows:

3.1- Falsification of documents

Article 427.- Any person who creates, in full or in part, a false document or who tampers with a genuine document which may give rise to a right or obligation or be used to prove a fact, with the intention of using the document, shall be liable, if such use may give rise to any detriment, to a sentence of imprisonment for not less than two and not more than ten years, and to thirty to ninety days' fine in the case of a public document, public record, authentic title or any other document which may be transmitted by endorsement or to the bearer and to a sentence of imprisonment for not less than two and not more than four years, and to one hundred and eighty to three hundred and sixty-five days' fine in the case of a private document.

Any person who makes use of a false or falsified document, as if it were genuine, provided that such use may give rise to any detriment, shall be liable, as applicable, to the same sentences.

In addition, it must be taken into account that this criminal offense – the offense of falsification of documents – defined in Article 427 of the Criminal Code, whether in relation to falsification (tampering) [or] use, does not require the existence of a specific detriment, **it being sufficient for there to be a potential detriment**, that is to say, the mere existence of the likelihood of causing a detriment, as held in the Cassation No. 1121-2016



issued by the Permanent Criminal Division of the Supreme Court of the Republic.¹

IV.- LEGAL REVIEW FOR THE ASSESSMENT OF THE EVIDENCE

- 4.1 The purpose of the criminal process, as the object of Criminal Procedural Law, is, among others, to ascertain the concrete truth, and to that end there must be a correspondence between the identity of the defendant and that of the person actually on trial, as well as his criminal liability; the annexed evidence must be assessed in order to demonstrate the existence of the offense under investigation. In addition, the punishable acts under investigation must be reviewed and assessed objectively, in the light of the existence of the evidence put forward, which must be assessed together with the statements made by the parties involved; the defendant must be acquitted in the absence of any relationship between the said elements, or his liability [sic], if it exists, regarding the connection with the evidence, since it is prohibited to establish strict liability, under the provisions of Article Seven of the Preliminary Title of the Criminal Code.²
- 4.2 In order to establish the criminal liability of the person under investigation, it is first necessary to determine the causal link, that is to say, the cause and effect; also, this is perfected when the party falsifies, tampers with a genuine document, which is an affront to public trust, acting with willful misconduct. A person acts with willful misconduct where by acting with willful intent he may potentially cause a harmful outcome.
- 4.3 In criminal matters, the punishable act must be reviewed and assessed objectively, in the light of the evidence for the prosecution and the defense, and this must necessarily conclude with the acquittal of the defendant if the evidence is insufficient or unreliable, or with a finding of criminal liability where there is a close and direct relationship with it, since Article Seven of the Preliminary Title

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¹ Cassation No. 1121-2016, point “Ten” (...) this Supreme Court in Application for Annulment No 2279-2013/Callao. At legal ground 4.4, it stated that “the objective condition for punishability in this category of offenses is the possibility of causing detriment...”

² **Article VII.- Criminal Liability**

The punishment requires the criminal liability of the defendant. Strict liability in any form is prohibited.



of the Criminal Code prohibits any kind of strict liability.³

- 4.4 Under the Principle of Detriment, the imposition of the punishment requires that the legal interests protected by the criminal law suffer detriment or become endangered, meaning that in a state under the rule of law it is not possible to punish any act or omission, but only those that cause detriment to or endanger the essential conditions of the life led by citizens.

V.- REVIEW AND ANALYSIS OF THE CASE

- 5.1 It has been determined during the course of investigations that between the months of July and August 2013 the defendant, **Oscar Arturo Díaz Muñoz**, held the title of Secretary-Reporter at the Constitutional Tribunal; according to the Procedure Manual of the Jurisdictional Area of the Constitutional Tribunal, his duties included, among other duties, scheduling hearings, allocating cases, hearings, applications, submissions, disagreements, dissenting opinions, abstentions (see Manual at pages 2182/2293).
- 5.2 Furthermore, the commission of the offenses has been demonstrated on the record, since while he was performing his functions as Secretary-Reporter of the Constitutional Tribunal in Case No. 00022-1996-PI/TC, which was heard on July 16, 2013, after the plenary session for voting on the final decision in the said case, the defendant created from a discarded draft decision signed by Justices Eto Cruz and Mesía Ramírez dated June 23, 2013, the “Dissenting Opinion” of Justice Carlos Mesía Ramírez, using correction fluid [white out] for this purpose on the heading of the document (at page 000302) and overwriting on it “**Dissenting Opinion**” of Justice **Mesía Ramírez**; similarly, correction fluid [white out] was also applied to all the signatures of Justice Eto Cruz (see pages 000303/000308), as may be seen at pages 357/366; and similarly (at page 000309) it can be seen that the third paragraph was deleted and in its place “**On account of these considerations, I vote in favor**” was written; all these actions were performed for the single purpose of counting the vote and publishing the dissenting opinion of Justice Mesía Ramírez in order to be able to issue a judgment in Case No. 00022-1996-PI/TC, having created the so-called “**dissenting opinion**” from its content and signature, a dissenting opinion that was never

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Article VII.- The sentence requires the criminal liability of the defendant. Strict liability in any form is prohibited.



issued by then-Justice Carlos Mesía Ramírez, as the latter has said in his statement at pages 77/80, which has been corroborated by then-Justice Gerardo Eto Cruz in his statement at pages 256/261, in which he states that the said draft judgment should have been discarded because it was not approved, as another draft judgment had been approved, providing for a different form of payment of agrarian bonds; such tampering has been demonstrated in the Forensic Expert's Report No 12439/12454/2015, which appears at pages 348/376, conducted on pages 275/310 of Case No. 00022-1996-PI/TC, which literally concludes that the disputed judgment: **“SHOWS SIGNS OF TAMPERING AND MODIFICATION; THAT IS TO SAY, THE WORDS “PUBLIQUESE Y NOTIFIQUESE” [for publication and notification], THE SECOND “S” AND THE SURNAMES URVIOLA HANI, ETO CRUZ AND ALVAREZ MIRANDA HAVE BEEN CONCEALED WITH WHITE CORRECTION FLUID, LEAVING VISIBLE ONLY THE SURNAME OF JUSTICE MESÍA RAMÍREZ; IN ADDITION, UNDER THE SIGNATURE OF THIS LATTER JUSTICE, TO THE RIGHT, AN ATTEMPT WAS ALSO MADE TO DISTORT A SIGNATURE, WITH BLUE BALL-POINT PEN AND THIS WAS THEN CONCEALED BY APPLYING WHITE CORRECTION FLUID; SIMILAR TO THOSE THAT WERE CONCEALED ON PREVIOUS PAGES, LOCATED ON THE LOWER LEFT MARGIN (...).”**

- 5.3 The criminal liability of the defendant has also been demonstrated on the record towards the victim **Carlos Fernando Mesía Ramírez**, who stated, in court proceedings at pages 1608/1616, as a former Justice of the Constitutional Tribunal, where it was standard practice to meet every Tuesday to discuss and vote on current cases, on one of those Tuesdays there was a debate regarding the draft opinion delivered by Justice Eto Cruz, who had been studying the agrarian bonds case, Case No. 022-1996-PI/TC; the said opinion received four votes; nevertheless, it was suggested to him that on Thursday the 11th, in the same week and month, that is to say 48 hours later, he should make certain formal amendments to it, not affecting the substance; nevertheless, on Tuesday, July 16, 2013, at ten a.m. the plenary session began to debate a draft opinion that provided for a different method for calculating the debt, which was the one approved, contrary to what had been agreed the previous Tuesday; this new agreement was identical in its reasoning to the text that Justice Eto Cruz asked him to sign; the only thing that changed was the updating of the debt, which was the debate on the merits, as the declarant had not had time to prepare a new opinion and as he was obviously completely annoyed and indignant at what was happening, he requested 48 hours to issue the reasoning of his dissenting opinion as per the Tribunal's Regulation; nevertheless, the session was adjourned at midday and he went home, discovering at four o' clock in the afternoon that the decision had been posted without his consent, an alleged dissenting opinion that he had not handed to the Secretary-Reporter; in these circumstances, on July 22, 2013, he sent a letter to the reporter of the Constitutional



Tribunal pointing out that it was not his opinion, but he did not reply to him; the presiding Justice, however, did, and he responded that he had already voted; and he chose to send another letter to the reporter but with his unpublished opinion, and with this he states that the Constitutional Tribunal has wronged him and has infringed his right as a Justice, by not allowing him to date to report to the nation the reason why he was not in agreement with the way in which his colleagues had voted, that he was in agreement with the holding of the decision, but not with the method of payment.

- 5.4 The victim's statement has been corroborated by the witness, also a Justice, **Gerado Eto Cruz, who states at pages 2455/2466** that Case No. 00022-1996-PI/TC on the Agrarian Bonds was allocated to him as "**Justice Rapporteur**", responsible for drafting the judgment, which was set down for a hearing on July 16, 2013, which he states had various scenarios within the Constitutional Tribunal, one on the major discussion regarding the legal issue of whether proceedings for unconstitutionality would have an 'execution stage', which started to be discussed on March 19, 2013, and he also stated that he had requested a closed session for the Justices; this fact is shown in the record for April 9, 2013, and then on April 16 and 23, 2013, June 11, 2013, and July 9, 2013; the record makes reference to a draft that is ordered to be executed, and for payment of the agrarian bonds to be honored, and the majority accepted the current value standard (criterio valorista) indicated by the Constitutional Tribunal in the judgment in 2001. As regards the draft decision that he prepared, he signed it together with Carlos Mesía Ramírez, who in subsequent discussions changed his position on the method of payment; it was at that time that the structure of the decision, which he had initially signed with Justice Carlos Mesías, changed, because as from July 9, 2013, Urviola, Álvarez Miranda and he decided to maintain payment according to the current value principle, but changing the methodology to conversion of payment into dollars; for this reason, the secretary who is the defendant in these proceedings should have provided the drafts other than the one that he had signed, which was dated July 9, 2013, but on July 16, 2013, all the Justices already had the alternative draft (second draft) that he had proposed; at that time, discussion took place and Justice Carlos Mesía expressed his disagreements with this new draft, placing his disagreement on the record, but he approved the draft that had been submitted signed by Carlos Mesía and him, choosing to erase his signature from that first draft since the draft that is now known as the final decision had been submitted, and handed over the copies; he also states that he was the author of the draft that was eventually signed by the three Justices. With regard to the removal of his signature from the draft that he signed with Mesía Ramírez, furthermore, in

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plenary session on July 16, 2013, his signature was shown as crossed out, which he states are the normal methods when Justices change from an original draft as a result of their discussions; **therefore, the draft was left with only the signature of Mesía Ramírez, and accordingly it could be discarded**, but the authorities of the Constitutional Tribunal decided to make use of that discarded draft as the “dissenting opinion” of Justice Mesía Ramírez and when the decision of the Constitutional Tribunal was published, and the dissenting opinion appeared, he submitted questions and a complaint, since he had requested to be given the 48 hours that a Justice is allowed to issue his dissenting opinion, but in addition he states that he was never aware that his signature had been erased with liquid paper [white out] on the said draft; he also states that Justice Mesía Ramírez questioned the [secretary] reporter and the Presiding Justice of the Tribunal – Urviola, with regard to this attitude.

- 5.5 Now, in light of the facts investigated, although it is true in relation to this indictment [sic], the defendant **Oscar Arturo Díaz Muñoz has indicated in his statement, at pages 1504/1509**, that he is innocent and that this case involves Case No. 22-1996-PI (Land Bonds case), in which the Tribunal issued its decision in 2001; this being an enforcement proceeding, it has no hearing on the merits; therefore, once the tribunal’s opinion in this case had been drafted by the Justice rapporteur, in this case Eto Cruz, it was set down for hearing by the tribunal sitting *en banc* on the orders of the Presiding Justice of the Tribunal, at that time Oscar Urviola Hani, for discussion and voting; in this case the Justice Rapporteur (Eto Cruz) delivered an initial draft opinion, which was adopted and signed also by Justice **Carlos Fernando Mesía Ramírez**, the alleged victim in these proceedings, but on the date when this case was set down for hearing by the full tribunal, July 16, 2013, Justice Eto Cruz delivered a new draft opinion, as recorded in the document that the same Justice signed on July 15, 2013, as recorded in the record of the plenary session held on July 16, 2013, a copy of which is on file; Justice Eto Cruz defended this new draft opinion (that is to say, the second one) before the other Justices of the Constitutional Tribunal and as stated in the said record, “Justice Mesía Ramírez expressed his disagreement with this new draft opinion”, ratifying the opinion he had previously submitted for that plenary session, stating that he was not prepared to change his vote, since he had already given his opinion (it was the first opinion delivered by Eto Cruz).
- 5.6 In the same statement the defendant also states that the said record of July 16, 2013, gives the result of the vote: “the new opinion by Justice Eto Cruz was adopted by Justices Urviola Hani and Álvarez Miranda, the result at the end of voting was four votes in favor of the opinion of Justice Eto Cruz (the second one delivered by him), on account of the casting vote of Urviola Hani (because the Presiding Justice’s vote counts as two), since the vote had been deadlocked as laid down in Article 10-A of the



Constitutional Tribunal's Regulation, and consequently the vote of Justice Mesía Ramírez remained in the minority, becoming a dissenting opinion, together with the dissenting opinions of Justices Vergara Gotelli and Calle Hayen"; he states that it is important to point out from the said record that Justice Mesía Ramírez ratified the opinion that had previously been delivered (the one he signed together with Justice Eto Cruz), and stated that he was not prepared to change that vote, and accordingly it was not applicable and there was no need to wait for forty-eight hours to issue a dissenting opinion, which at the time was allowed by Article 44 of the Constitutional Tribunal's Regulation; therefore, the voting having concluded as shown in the record dated July 16, 2013, in Case No. 22-1996-PI (Land Reform Bonds Case), and since Justice Eto Cruz had withdrawn his signature from the first draft opinion that he had signed together with Mesía Ramírez, the first draft opinion of Justice Eto Cruz became the dissenting opinion of Justice Mesía Ramírez, and for that reason the document contains the corrections made with correction fluid [white out] in order for this document to reflect the final outcome of the voting, basically, **he states that he corrected it where it read judgment of the Constitutional Tribunal, now it reads Dissenting Opinion of Justice Mesía Ramírez, and where the withdrawn signature of Justice Eto Cruz appears, correction fluid [white out] was also applied to it as it is crossed out, and** this decision of July 16, 2013 **was published on the website of the Constitutional Tribunal on the same day**, together with the three dissenting opinions, as happens with all decisions of the Constitutional Tribunal, and it is currently still there, more than three years later; he also states that on the following day, July 17, 2013, then-Justice Mesía Ramírez was interviewed by RPP Television at 20:21 hours as may be seen in the video that is on the record; when the said Justice was asked about the said decision (Agrarian Bonds Case No. 22-1996-PI) he raises no objection to the decision published on the website, or to his dissenting opinion published on the preceding day on which all the newspapers had commented, but he stated, "there has not been any pressure, but rather, what I believe in this case, is that what the Tribunal wanted to say, is that in this country there is legal certainty, private property is respected and the State honors its debts"; that can be found at minute thirteen zero seven, to minute thirteen twenty of the interview.

- 5.7 The defendant continues, stating that six days after the publication of the decision in the Agrarian Bonds case, and the respective dissenting opinions, Justice Mesía Ramírez sends to the Presiding Justice of the Constitutional Tribunal, Justice Urviola Hani, on July 22, 2013, a letter stating that although during the plenary session the decision in the Agrarian Bonds case was approved (a session attended by Justice Mesía), his opinion published on the Constitutional Tribunal website six days previously,

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allegedly contains modifications not authorized by him, and he therefore requested that he be allowed to reissue his dissenting opinion; it must be pointed out that Justice Mesía Ramírez merely mentions in his letters that his opinion on the website contained modifications, without stating what they are; it must also be highlighted that in the said letter, Justice Mesía Ramírez says “my opinion posted on the website”, he does not say **“the opinion attributed to me”**, that is to say that he does not deny that it is his opinion; this letter was answered by the Presiding Justice of the Constitutional Tribunal on August 1, 2013; and, in respect of the outcome of the voting in Case No. 22-1996-PI, and what the final vote of Justice Mesía was, Presiding Justice Urviola Hani told Mesía Ramírez that his application for annulment was accordingly inadmissible; in a second letter from Justice Mesía Ramírez dated August 9, 2013, that is to say, almost one month after the publication of the Agrarian Bonds case on the Constitutional Tribunal website, it was addressed to him, he immediately forwarded it to the Presiding Justice of the Constitutional Tribunal, who answered Justice Mesía Ramírez in similarly dismissive terms as his first communication; thus, on August 13, 2013, that is to say, on a date after the exchange of these two letters between Justice Mesía Ramírez and the Presiding Justice of the Constitutional Tribunal Urviola Hani, a plenary session was held, the record of which was signed by Mesía Ramírez and the other five Constitutional Tribunal Justices, which is on the record and at point 5, in relation to Case No. 22-1995[sic]-PI, it was agreed as follows: **“Justice Mesía Ramírez referred to Case No. 22-1996-PI/TC and to the controversy that has arisen as a consequence of that decision, in the media and within this institution, as a result of the majority, individual votes and dissenting opinions. After extensive debate in which all the Justices took part, it was agreed that this is a closed case’. Justice Mesía Ramírez recognizes the validity of his vote and accepts that any discussion on it has been settled by the Constitutional Tribunal sitting *en banc*.”**; a similar statement was also made by Justice Mesía Ramírez on August 19, 2013 to the newspaper *La Primera*, where he states at page 6: **“last Tuesday, August 13, 2013, a meeting of the full Tribunal was held, and as happens with all collegiate bodies, the majority rules, and almost unanimously, (with the exception of Justice Calle), agreed that those who had made the judgment should make the decision, and with that my petition was declared closed”**.

- 5.8 Nevertheless, it is possible to establish clearly and objectively that the disputed judgment in relation to the dissenting opinion has been tampered with by the defendant precisely as he has indicated in his statement, for the purpose of making it appear and publishing it on the Constitutional Tribunal website as if it had been issued by the victim Carlos Mesía, since it contains the latter’s signature and that of Eto Cruz (a signature that the latter had previously withdrawn), being the original draft

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submitted by Eto Cruz, which has been demonstrated by means of the forensic expert's report that appears on the record at pages 348/376 carried out on the disputed document that was crossed out in blue ballpoint pen (a fact stated by Eto Cruz), which was subsequently erased with liquid paper [white out], in respect of which he states that he was also unaware of this fact, and therefore, in this state of affairs, we are faced with a public document that has been tampered with, which has been made to appear as if the victim, Carlos Mesía, had issued the said dissenting opinion, when he has stated that that is false, and furthermore, he never issued his dissenting opinion, despite being present during the discussion and indicating his agreement with the decision, but not with the method of payment, in which case, as stated by the author of the discarded draft that is the subject of these proceedings Justice Gerardo Eto Cruz in making his statement during the preliminary investigation that appears at pages 256/261, which as laid down by Article 62 of the Code of Criminal Procedure⁴ has probative value and must be taken into account as it states expressly "That a draft was originally prepared that we all signed including Justice Ernesto Álvarez, but as there were studies relating to the budgetary impact we rejected that draft that I had already signed together with Justice Carlos Mesía, because Presiding Justice Urviola brought us an alternative draft that he asked me to sign as the Justice rapporteur, since I was practically the Justice rapporteur in the bonds case; and that is how that draft was signed both by me and by Presiding Justice Urviola and Ernesto Álvarez, and accordingly the original draft that I had signed together with Justice Mesía was in fact discarded; nevertheless, by virtue of these complaints, I have become aware that the draft was used under the presidency of Urviola to be kept as a Dissenting Opinion; what should have happened according to the proper procedure is that Justice Mesía should have been given time to decide on his vote; nevertheless, that opinion was used, on which I have become aware that my signature has been erased to leave only Mesía's signature and to pass it off as an dissenting opinion"; finally, the former Justice of the Constitutional Tribunal states "this document that was shown to me has been tampered with because it was as I have stated an original draft, but not the dissenting opinion of Justice Mesía Ramírez; rather, as a draft judgment on which the signature that I originally placed there has been erased...", which corroborates the indictment brought against the defendant.

- 5.9 It must also be taken into account that this type of offense does not require the existence of a detriment, it only requires the potential to cause a detriment; in respect of the detriment, it must be

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⁴ Article 62 – "The prior police investigation carried out with the involvement of the Public Prosecutor's Office is evidence that must be assessed at the appropriate time by the Justices and the Courts, as provided for in Article 283 of the Code."



taken into account that in defining the offense, “if its use may give rise to some detriment” implies a possibility that such circumstances descriptive of the offense may occur, which must be focused on the harm to public trust, which arises in the case under examination, since it is made to appear as if the victim were in agreement with the entire content of the decision issued by the three Justices, when, as has been shown during the investigations, that was not the case, since, as stated by former Justice Mesía, he did not agree with the criterion for updating the debt, as he states expressly during the preliminary investigation at pages 54/57, “That, voting means raising one’s hand during the plenary session after the debate, if one is not with the majority, the regulations grant one 48 hours to issue one’s dissenting opinion, which is nothing other than a written document, in which one explains one’s reasons for not sharing the majority view, or even if one shares it but does not agree with the arguments; in this specific case, I voted on a show of hands in order to declare the application well-founded, together with the other Justices, but with a difference regarding the criterion for updating the debt”, and in concordance with the statement of former Justice Eto Cruz he states that the disputed document was a draft judgment that has nothing to do with the dissenting opinion that he should have expressed, and that in addition it had actually been discarded.

- 5.10 As has been stated, the incrimination for having tampered with a discarded draft judgment in order to be redesigned as the dissenting opinion of a Justice of the Constitutional Tribunal, constituted at the time sufficient grounds for opening a criminal investigation, within which to determine whether that objective criterion for punishability was present in the case, taking into account that the Principle of Detriment raises one of the main protective principles of criminal law, in addition to the fact that the “detriment” requires only a likelihood of existence and not a specific aspect or exact consummation.
- 5.11 By way of conclusion, on the evidence we are faced with the fact that, as stated previously, in July 2013, the Constitutional Tribunal was debating the enforcement of a decision in the Land Bonds case, and the Justice rapporteur was then-Justice Eto Cruz, who put forward a draft that laid down that said Bonds should be repaid and updated according to the consumer price index; on July 16, 2013, the final vote was held in the Constitutional Tribunal, in which the draft opinion had been replaced by a new draft opinion that was finally approved, which was based on the current value standard, but changing the methodology of the consumer price index, that the bonds were to be updated by conversion into dollars plus the rate of return of the bonds of the

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US Treasury (see witness statement of Gerardo Eto Cruz at pages 2455/2462), to which Justice Carlos Mesía was opposed, and the new draft opinion proposed by Justice Urviola to Justice Eto Cruz, as he has recognized, he asked him to restructure it [with] his advisor Johan León Florián and to sign it as Justice rapporteur (see page 256); it was accepted at a vote by Justices Urviola, Eto and Álvarez, as the presiding Justice counted as two votes and although Justice Carlos Mesía had voted in a show of hands, in view of the need to document the voting process, the defendant Oscar Díaz Muñoz, in his capacity as Secretary-Reporter of the Constitutional Tribunal, was responsible for certifying the legality of the voting process, and accordingly he should have waited 48 hours for Justice Carlos Mesía to deliver his dissenting opinion as laid down in the Constitutional Tribunal's Regulation; instead of doing so, the defendant took a discarded draft judgment, previously presented to the Constitutional Tribunal, that bore the signature of Justice Mesía; paragraphs were erased using correction fluid [white out] and it was overwritten, tampering with it in order to pass it off as the dissenting opinion of Justice Mesía, particularly when the said tampered decision was posted on the website of the Constitutional Tribunal despite it being prohibited for a public document to be published with such observations.

- 5.12 It is worth mentioning that in this case there is no dispute as to the form, or challenge to the decision on the merits (whether or not he deserved the period of 48 hours to issue his dissenting opinion), since the Tribunal has already reached its decisions with regard to these details; accordingly, just as stated, what is under discussion and analysis in this case is the tampering with the alleged dissenting opinion of Justice Carlos Mesía, which has been shown to have occurred, and the person responsible has also been identified as the defendant, who has stated that he made the said modifications, and although he claims that this is a practice that was used in the Tribunal when he started [to] work [there], we are faced here with a specific fact, that a draft decision that should have been discarded was tampered with, and subsequently used as if it had been issued by Justice Carlos Mesía as a dissenting opinion; and although the said defendant indicates that nobody has been caused any detriment, since the said Justice is in agreement with the holding of the decision, it is also the case that that does not imply that what is the subject of examination has been done, which has been shown to have occurred, also to the detriment of the State, since the defendant was working for a body of the State – the Constitutional Tribunal – and took advantage of that to publish a decision containing as a dissenting opinion a draft decision that had already been discarded, as stated by the Justice rapporteur in the said judgment;
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although it is true that the Legal Counsel for the Constitutional Tribunal states that it does not consider that it has suffered any detriment, a clear detriment to the State can be perceived from the proceedings.

V.- SENTENCING UNDER THE THREE-TIER SYSTEM

For the purposes of determining the sentence, the applicable laws are Article 45 (as amended by the First Additional Amending Provision to Law No. 30364, published on November 23, 2015), Article 45-A (incorporated by Article 2 of Law No. 30076, published on August 10, 2013) and Article 46 (as amended by the single article of Legislative Decree No. 1237, published on September 26, 2015), of the Criminal Code, because it constitutes procedural regulations of immediate application,⁵ and accordingly the determination of the amount of the sentence will also take into account the said assumptions.

On this basis, having identified the sentencing range on the basis of the sentence laid down for the criminal offense of falsification of documents contained in Article 427 of the Criminal Code, [which] provides for a sentence of imprisonment for not less than two and not more than ten years, and since the conduct of the defendant displays mitigating circumstances, such as the lack of previous convictions, accordingly, the specific sentence to be imposed on the defendant falls in the bottom third of the sentencing range for the criminal offense under examination, which is to say between (02) years and (04) years 08 months imprisonment, in accordance with Article 45-A(2)(a) of the Criminal Code.

Consequently, in view of the absence of the circumstances referred to in Article 45-A of the Criminal Code, or any of the procedural mitigating circumstances that would involve reducing the sentence prudently within the sentencing range indicated to the limits below the legal minimum; since the defendant has denied the charges, he must be sentenced to TWO YEARS' imprisonment.

V.- CIVIL REPARATION

Civil reparation under Article 93 of the Criminal Code includes: **a)** Restitution of the property, or if this is not possible, payment of its value;

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⁵ See point 8 of the reasoning in the Judgment handed down by the Constitutional Tribunal on December 10, 2003, in Case No. 2196-202-HC/TC, the case of Carlos Saldaña, which states as follows: "(...) 8. In the case of criminal procedural rules, the governing principle is *tempus regit actu*, which is the principle that the procedural law applicable at the time is that which is in force at the time the act is completed. That implies the immediate application of the procedural law, but it does not mean that it governs procedural acts already performed under the earlier legislation (...)"



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b) compensation for damages; and just as stated in the Final Decision of the Supreme Court dated April 28, 2005, Application for Annulment No. 594-2005, Lima, in the sense that “Civil reparation implies the reparation of the harm and compensation for material losses and non-pecuniary damages, and depends on the direct and necessary consequences that the offense caused to the victim; that the assessment of the amount of civil reparation must be reasonable and prudent and aimed at fulfilling the reparatory purpose of that function institution [sic] (...)”⁶

In light of the preferential comments made, in the present case, the commission of the offense and the criminal liability of the defendant for the offense of “**Falsification of documents**”, which is an offense of endangerment, having been demonstrated, and accordingly, the defendant having denied the charges, and the facts having been demonstrated, this Public Prosecutor’s Office accordingly considers that the proper and necessary amount at which to set the civil reparation is the sum of ONE THOUSAND SOLES for each of the victims.

V.- DECISION

On account of the foregoing considerations and in accordance with the powers granted by Article 95(7) of Legislative Decree No. 052 – Basic Law of the Public Prosecutor’s Office, the undersigned Public Prosecutor in accordance with Article 4 of Legislative Decree No. 124 and Articles 11, 12, 29, 45, 46, 93, 185 and section 5 of the first part of Article 186 of the Criminal Code, **FILES AN INDICTMENT** against **OSCAR ARTURO DIAZ MUÑOZ** for the commission of an offense against Public Trust – **Falsification of a Public Document**, against the State and against Carlos Fernando Mesía Ramírez, and **REQUESTS** a sentence of **THREE YEARS’** imprisonment and a fine of ninety days; and payment of the sum of **Two Thousand Soles** for each of the victims, as civil reparation in favor of the victims.

FIRST ADDITIONAL PLEADING: The file is attached in five volumes at page 2529 (I, II, III, IV, V and VI).

Lima, April 23, 2018

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⁶ Pérez Arroyo, M “*La Evolución de la Jurisprudencia en el Perú 2001-2005* [The Development of Case-Law in Peru 2001-2005]”, Volume II, Lima, 2006, Editorial San Marcos, p.806.