IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

CASE OF MARICRUZ HINOJOZA, ET AL.

Petitioners

v.

THE REPUBLIC OF FISCALANDIA

Respondent

MEMORIAL FOR THE PETITIONERS

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STATEMENT OF FACTS

1. The Republic of Fiscalandia ("**Fiscalandia**") is a young representative democracy. It was birthed from a turbulent coup-d'état which overthrew former President Santa María who led the government for 20 uninterrupted years.[1] Fiscalandia has four branches of government: the executive, the legislature, the judiciary and the public oversight branch.[2]

I. POLITICAL CORRUPTION IN FISCALANDIA

2. Although the 2007 Constitution recognizes the separation of powers in principle,[3] it is not practiced. The President as a member of the executive branch has full discretion to elect members of a Nominating Board, who in turn determine key judicial and legal appointments.[4] The nominating boards screen candidates for the Supreme Court, the position of Prosecutor General, the Court of Auditors and the Judicial Council, then send a shortlist to the President to appoint one of the names.[5]

3. The nominating boards operate outside the other branches of government and are not subject to the same general accountability and liability regime as government bodies and civil servants.[6] Additionally, each Nominating Board approves its own evaluation parameters and tools.[7] Multiple instances of corruption have occurred under this system lacking accountability. A series of emails and audio recordings were released, evincing

[1] Hypothetical, [2].
[2] *Ibid*., [4].
[3] *Ibid*., [2].
[4] *Ibid*., footnote 1.
[5] Hypothetical, [11]; footnote 1.
[6] Clarification Question ("**CQ**") 31.
[7] CQ9.

coordination and negotiations between President Obregón's adviser and Nominating Board members shortlisting five judges for the Court of Auditors (the "**META emails**").[8] The adviser recommended that specific persons who "*shared this government's perspective*" be selected.[9] Four of those judges were ultimately chosen. They then dismissed oversight proceedings against President Obregón's older brother in relation to contracts he entered into as mayor of Berena.[10] Shortly after the META emails were released, multiple journalists discovered and published more communications from the Presidential adviser. These communications revealed a "*complex and well-organized web of corruption and influence peddling"* in the selection processes of senior officials, including judges and prosecutors.[11] Influence peddling and corruption are criminalized under Fiscalandia's Criminal Code.[12]

4. As the highest body of the judicial system, the Supreme Court renders final decisions on all matters, including *amparo*.[13] The Chief Justice, who was elected by the Legislative Assembly in 2010 after being screened by a Nominating Board,[14] has also been accused of corruption. He allegedly manipulated the composition of regional courts in Amazonas Alto and Amazonas Bajo to benefit oil exploitation companies and illegal logging groups there.[15] Numerous complaints lodged with the Legislative Assembly by organizations

[8] Hypothetical, [17].
[9] *Ibid.*
[10] *Ibid.*
[11] Hypothetical, [18].
[12] CQ43.
[13] Hypothetical, [7]; CQ23: *Amparo* is a simple and prompt challenge that any citizen can bring, in order to challenge "*any act or omission, by any official, authority, or person, that threatens or violates human rights and fundamental freedoms recognised by the Republic of Fiscalandia.*"
[14] CQ60.
[15] Hypothetical, [8], [9]; CQ43.

defending indigenous peoples' human rights were all dismissed without any decision on their merits.[16]

II. FACTS SURROUNDING JUDGE MARIANO REX

5. President Obregón was elected in February 2017 for a 5-year term.[17] On 1 April 2017, he filed a writ of *amparo*, challenging the ban on presidential re-election under Art 50 of the Constitution.[18] Judge Mariano Rex ("**Judge Rex**") denied President Obregón's application at first instance after applying the legally recognised "*balancing*" technique to conclude that the constitutional ban was appropriate, necessary, and proportionate. He also found that the right to elect and be elected was not absolute.[19]

6. On appeal, the Supreme Court reversed Judge Rex's decision on the constitutional ban, and simultaneously instituted disciplinary proceedings against him for a "*serious breach of his duty to properly state the reasoning for his decisions*" in that judgement.[20] During the disciplinary proceedings, Judge Rex argued that a mere difference of opinion between himself and the Supreme Court on President Obregón's application cannot evince a serious breach of his duty.[21] He further maintained that the Supreme Court failed to provide any rationale for the "*serious*" and "*inexcusable*" nature of his alleged breach of duty.[22] Yet, he was removed from the bench by the full Supreme Court on those very grounds.[23]

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[16] Hypothetical, [9].
[17] *Ibid*., [15].
[18] *Ibid*., [16].
[19] Hypothetical, [40]; CQ1.
[20] Hypothetical, [41].
[21] CQ19.
[22] *Ibid*.
[23] Hypothetical, [41].

III. FACTS SURROUNDING MAGDALENA ESCOBAR

7. Magdalena Escobar ("**Escobar**") was appointed Prosecutor General on 1 September 2005 for a 15-year term, and confirmed in that position by Presidential Decree in 2008.[24] On 12 June 2017, Escobar swiftly established a special unit to investigate possible crimes arising from the leaked META emails.[25] 2 days later, President Obregón issued an Extraordinary Presidential Decree ("**EPD**") to replace Escobar without formally dismissing her.[26]

8. Art 103 of the Constitution clearly states that a Prosecutor General can only be removed by the President directly, on serious grounds and for good cause.[27] To date, the only justification given was the "*transitional*" nature of the current Prosecutor General's term and the need for a new permanent appointee.[28] However, the Supreme Court held in 2003 that where a public official's term of office is unspecified, it is a lifetime appointment.[29] The Prosecutor General's term of office is not established in the 2007 Constitution.[30] President Obregón thus has no discretion to determine the Prosecutor General's term of office, as Supreme Court judgements on constitutional matters bind all public authorities.[31]

9. Escobar filed a petition to the Court on 16 June 2017, for:

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[24] Hypothetical, [14].
[25] *Ibid*., [19].
[26] Hypothetical, [19]; CQ62.
[27] Hypothetical, [13]; CQ45.
[28] Hypothetical, [19].
[29] *Ibid*., [13].
[30] CQ25.
[31] CQ7; CQ25.

(1) an order refraining President Obregón from initiating the selection process for her successor until her position is officially vacated ("**motion to vacate**");[32] and

(2) an injunction temporarily suspending the selection process from proceedings as it could cause "*irreparable harm to her rights*" ("**injunction application**").[33]

10. Escobar's injunction application, initially granted by the Tenth Administrative Court of Berena, was overturned on appeal ten days later.[34] This allowed the selection process to proceed. Her motion to vacate was adjudicated only on 2 January 2018, more than 7 months after her application.[35] By then, Domingo Martínez ("**Martínez**") was appointed the new Prosecutor General on 15 September 2017, and had taken office the next day.[36] The Supreme Court ruled the motion to vacate inadmissible since Martínez's appointment was "*impossible to reverse*",[37] and rendered Escobar's motion moot.

IV. FACTS SURROUNDING HINOJOZA AND DEL MASTRO

11. Hinojoza and del Mastro were experienced career prosecutors who applied for the position of Prosecutor General.[38] They were not shortlisted. Instead, the Nominating Board shortlisted three male candidates who ranked 18th, 21st and 25th respectively.[39] The rationale for the shortlist was not made public.[40]

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[32] Hypothetical, [23].
[33] Hypothetical, [23].
[34] *Ibid*., [24].
[35] *Ibid*., [42].
[36] Hypothetical, [36]; CQ3.
[37] Hypothetical, [42].
[38] *Ibid*., [32].
[39] *Ibid*., [36].
[40] CQ58.

12. Within five minutes of receiving the shortlist, President Obregón announced Martínez as Prosecutor General. It was revealed the next day that Martínez had acquired a luxury car a week prior to his selection, acted as legal adviser to President Obregón's brother during his tenure as mayor, and was a donor to President Obregón's political party.[41] In his first week in office, Martínez replaced the prosecutors in the Special Unit investigating the META emails, prematurely halting investigations.[42] To date, Martínez has not provided any updates regarding developments in the META emails investigations.[43]

13. Hinojoza and del Mastro filed a writ of *amparo* to the Second Constitutional Court of Berena, challenging all resolutions passed by the Nominating Board as well as President Obregón's appointment of Martínez.[44] The writ was declared inadmissible because appointing the Prosecutor General is a "*sovereign power of the executive branch*" not subject to review via *amparo* proceedings.[45] This decision was subsequently affirmed on appeal, and an extraordinary appeal filed with the Supreme Court was also denied on the merits.[46] The Supreme Court held that the appointment of the Prosecutor General was a political act of the President unregulated by law, and thus immune to challenge.[47] It also held that the Nominating Board's resolutions cannot be challenged via a motion to vacate as they are "*intermediate entities*" outside the government.[48]

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[41] Hypothetical, [37].
[42] *Ibid.*
[43] Hypothetical, [22]; CQ4.
[44] Hypothetical, [38].
[45] *Ibid.*, [39].
[46] Hypothetical, [39]; CQ35.
[47] CQ35.
[48] *Ibid.*

LEGAL ANALYSIS

I. STATEMENT OF JURISDICTION

14. Fiscalandia ratified the American Convention on Human Rights ("**ACHR**") in 1970, and accepted the contentious jurisdiction of this Court on 20 September 1980.[49] Judge Rex, Escobar and Hinojoza and del Mastro filed their respective petitions with the Inter-American Commission of Human Rights ("**the Commission**") on 15 December 2017, 1 August 2017 and 1 April 2018 respectively.[50] The Commission declared all their petitions admissible:

(1) Fiscalandia was found to have violated Arts 8, 13, 24 and 25 to the detriment of Hinojoza and del Mastro, in relation to Art 1(1) of the ACHR.[51]

(2) Fiscalandia was found to have violated Arts 8(1) and 25 to the detriment of Judge Rex, both in relation to Arts 1(1) and 2 of the ACHR.[52]

(3) Fiscalandia was found to have violated Arts 8(1), 24 and 25 to the detriment of Escobar, in relation to Art 1(1) of the ACHR.[53]

15. Fiscalandia has failed to implement the Commission's order. The Commission thus refers the matter to this Court pursuant to Art 45(1) of the ACHR.[54] All the alleged facts occurred

[49] Hypothetical, [3]; CQ46.
[50] Hypothetical, [43], [45], [49].
[51] *Ibid*., [51].
[52] *Ibid*., [44].
[53] *Ibid*., [47].
[54] Hypothetical, [52]; American Convention of Human Rights ("ACHR"), Art 45(1).

after Fiscalandia's ratification of the ACHR. Therefore, this Court has jurisdiction to hear this case pursuant to Art 62(3) of the ACHR.[55]

[55] ACHR, Art 62(3).

II. MERITS

A. FISCALANDIA BREACHED ITS ACHR OBLIGATIONS TO HINOJOZA AND DEL MASTRO UNDER ARTS 8, 13, 24 AND 25 IN CONJUNCTION WITH ART 1(1).

16. Fiscalandia violated the ACHR by (i) depriving Hinojoza and del Mastro of their rights to judicial process with due guarantees, (ii) unlawfully restricting their access to state-held information, and (iii) discriminating against them on the basis of gender.

1. Hinojoza and del Mastros' petition is admissible as they had exhausted all available domestic remedies.

17. Art 46(1) of the ACHR states that for a petition to be admissible, remedies under domestic law should be pursued and exhausted. This is fulfilled on the facts.

18. Hinojoza and del Mastros' final extraordinary appeal for *amparo* was denied on 17 March 2018.[56] The Nominating Board is not part of the government, hence its resolutions cannot be challenged by a motion to vacate.[57] Therefore, the motion to vacate was not available as a remedy under Fiscaline law, and Hinojoza and del Mastro had exhausted the sole *amparo* remedy available to them.

2. Fiscalandia violated Arts 8 and 25 of the ACHR by failing to ensure a fair, independent and impartial nomination procedure for the appointment of a Prosecutor General.

19. Fiscalandia violated Hinojoza and del Mastros' rights to due process guarantees, by (i) allowing for an unfair and politically motivated nomination procedure for the selection of Prosecutor General in violation of Art 8 of the ACHR, and (ii) failing to provide access to effective judicial remedies in violation of Art 25 of the ACHR.

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[56] CQ35.
[57] *Ibid.*

a. <u>Fiscalandia's nomination procedure has to comply with due process guarantees enshrined in Arts 8 and 25 of the ACHR.</u>

20. All state bodies, including nominating boards and disciplinary tribunals, must respect due process guarantees in their proceedings.[58] The scope of Arts 8 and 25 extend to all administrative decisions "*affecting the rights of persons*".[59] The procedural body is irrelevant, as what matters is the protection of a substantive right.[60]

21. In ***Yatama v Nicaragua,*** the Supreme Electoral Council ("SEC") excluded candidates of an indigenous regional political party from standing for local elections. This Court found that the decisions of the SEC must comply with Art 8 as they had a direct effect on the victims' right to political participation.[61] This Court also applied a broad interpretation to tribunal in ***Baena Ricardo v Panama*** and held that though the "*general directors and the boards of directors of the State enterprises are not either judges or tribunals in a strict sense…the decisions adopted by them affected rights of the workers, for which reason it was indispensable for said authorities to comply with*" Art 8 of the ACHR.[62]

22. Likewise, though the Nominating Board's decisions pertaining to shortlisting persons for public office is not currently subject to any domestic accountability or liability regime,[63] they nonetheless have a direct effect on applicants' political rights to have access under general conditions of equality to the public service of their country.[64] Further, Art 2 of the ACHR requires that Fiscalandia adopt "*such legislative or other measures as may be*

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[58] *Baena Ricardo v. Panama*, IACtHR (2001), [127].
[59] *Ibid*.
[60] *Yatama v. Nicaragua*, IACtHR (2005), [147].
[61] *Ibid*., [151].
[62] *Baena Ricardo v. Panama*, IACtHR (2001), [130].
[63] CQ31.
[64] ACHR, Art 23(1)(c).

necessary to give effect to those rights or freedoms" referred to in Art 1.[65] Therefore, the Nominating Board is a tribunal within this Court's broad interpretation and must hence comply with due process guarantees.

b. Fiscalandia violated Art 8 by failing to provide Hinojoza and del Mastro with a selection process that was independent and impartial.

23. Fiscalandia violated Hinojoza and del Mastros' Art 8 rights under the ACHR by failing to ensure an independent and impartial tribunal during the nomination procedure for Prosecutor General.

24. The Nominating Board that oversaw the selection process for Prosecutor General was not independent and impartial. It is trite law that the right to a fair trial includes the right to be heard by an independent and impartial authority. The authority must be independent from other state powers to ensure it can function impartially. Impartiality entails that the authority "*has no direct interest in, no pre-established viewpoint on, no preference for one of the parties, and that are not involved in the controversy*" (***Palamara Iribarne v Chile***).[66] Specifically, the authority's members must be "*free from any prejudice"* so that "*no doubts whatsoever may be cast*" on the exercise of the its functions.[67]

25. The Nominating Board is not functionally independent as the President has the power to directly select all of its members.[68] The President can further his political agenda by selecting members of the Nominating Board who support his administration. Where the evidence indicates that a decision-making body has a "*pre-established viewpoint*" on the

[65] ACHR, Arts 1 and 2.
[66] *Palamara Iribarne v. Chile*, IACtHR (1997), [146].
[67] *Ibid*., [147].
[68] Hypothetical, footnote 1.

case at hand, that body is not impartial. There is no rigid rule in international law regarding the amount of proof necessary to support a court's judgement.[69] Rather, courts have the power to weigh the evidence freely in order to "*protect the victims, and to provide for the reparation of damages resulting from the acts of the States responsible*" (***Velásquez Rodríguez v Honduras) ("Velásquez Rodríguez").***[70] On the available evidence, the appointment process for the Prosecutor General and its outcome casts doubts on the Nominating Board's impartiality. Domingo Martínez was shortlisted by the Nominating Board despite his close political and financial ties to the Obregón administration,[71] and being ranked near the bottom after the background assessment stage.[72] President Obregón then appointed him within 5 minutes of obtaining the shortlist.[73] This took place against the backdrop of the META emails evincing Fiscalandia's deep-rooted problem of political corruption, especially rampant in the selection processes of public officials.[74] The only conclusion that can be drawn from the available facts is that Domingo Martínez was unfairly selected because he provides political and financial support to President Obregón's administration. This violates Art 8 of the ACHR.

c. Fiscalandia violated Arts 1(1) and 25 of the ACHR by restricting Hinojoza and del Mastros' access to effective judicial remedies.

26. Fiscalandia violated Arts 1(1) and 25 of the ACHR by exempting the Nominating Board from any action of *amparo*, and consequently denying Hinojoza and del Mastro access to the *amparo* remedy.

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[69] *Velásquez Rodríguez v. Honduras*, IACtHR (1988), [134].
[70] *Ibid*.
[71] *See* Statement of Facts, [11-12].
[72] Hypothetical, [36].
[73] *Ibid*.
[74] *See* Statement of Facts, [3].

27. Fiscalandia's restriction of *amparo*'s procedural availability renders the remedy ineffective because it prevents state actions from being contested by individuals in contravention of Arts 1(1) and 25 of the ACHR. This Court has unequivocally held that declaring *amparo* filings inadmissible when individuals contest a "*state action*" violates Art 25 of the ACHR.[75] This is because where a State tolerates "*circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights"*, it consequently violates Art 1(1) of the ACHR.[76] In ***Camba Campos v Ecuador,*** all the dismissed judges of the Constitutional Tribunal tried to contest their termination through *amparo* and were immediately rejected. Since the judges could not defend their rights or argue that Congress's decision to remove them was unconstitutional or illegal, this Court held that their rights under Art 25(1) of the ACHR were violated.[77]

28. Presently, the *amparo* remedy was procedurally restricted because the domestic courts held that appointing the Prosecutor General is a "*sovereign power of the executive branch*" not subject to review via *amparo* proceedings.[78] This frustrates the purpose of *amparo* as established by Fiscalandia's own laws, which provide that *amparo* can be used to challenge "*any act or omission, by any official, authority, or person, that threatens or violates human rights and fundamental freedoms*".[79] Consequently, Hinojoza and del Mastro are left with no other available remedy to vindicate violations of their ACHR rights, since the Supreme Court held that nominating boards are not part of the government and their decisions cannot

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[75] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, IACtHR (2013), [238].
[76] IACHR, Advisory Opinion No. 11, [29-31].
[77] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, IACtHR (2013), [233].
[78] Hypothetical, [39].
[79] CQ23.

be challenged by a motion to vacate.[80] Therefore, Fiscalandia violated Arts 1(1) and 25 by preventing Hinojoza and del Mastro from pursuing both the *amparo* remedy and a motion to vacate to challenge the Nominating Board's resolutions.

3. Fiscalandia violated Art 13 of the ACHR by unlawfully restricting the right to access state-held information.

29. Fiscalandia's Nominating Board violated Art 13 of the ACHR by unlawfully restricting Hinojoza and del Mastros' access to state-held information. The restricted information which should have been released to Hinojoza and del Mastro includes the Board's evaluation parameters, grades awarded and minutes of deliberations, as well as reasons for Hinojoza and del Mastros' exclusion from the shortlist.[81]

30. Art 13 upholds the right to freedom of thought and expression and encompasses the right of access to state-held information. States are obligated to ensure "*maximum disclosure*".[82] This principle is incorporated into the legislation of multiple OAS Member states,[83] and enables parties to obtain "*at any time, any reports, copies, reproductions, and certifications they request.*"[84] Access to state-held information should be interfered with minimally as informing citizens is an essential component of democracy and "*enables effective*

[80] CQ35.
[81] Hypothetical, [29], [33]; CQ58.
[82] Art 13(1) ACHR; OAS General Assembly, Resolution 2607 (XL-O/10), adopting a "*Model Inter-American Law on Access to Public Information*." (2010); 80% of OAS Member states have incorporated the principle of maximum disclosure into their domestic legislation.
[83] Chile's Law on Transparency of Public Functions and Access to State Administration Information, Law 20.286 of 2008, Article 11(d); Guatemala's Law on Access to Public Information (LAIP), Decree No. 57-2008, Article 1(4); Mexico's Federal Transparency and Access to Governmental Public Information Act (LFTAIPG), Article 6; El Salvador's Access to Public Information Law, Art 4.
[84] Political Constitution of the Republic of Guatemala (1985) (Reformed by Legislative Accord No. 18-93, November 17, 1993).

participation in government".[85] Both Art 4 of the Inter-American Democratic Charter and Art 7(1) of the UN Convention on Corruption ("**UN Convention**") further entrench the importance of transparency in government activity, public administration and freedom of speech, especially in the hiring of public officials.[86]

31. In order to justifiably restrict access to this state-held information, three requirements must be met under the ACHR. First, the restriction must be established in the domestic law of the state.[87] Second, it must be necessary to ensure the rights and reputations of others, national security, public order, public health, or another purpose allowed by the Convention.[88] Third, the restriction must (i) be proportionate to the public interest, (ii) be appropriate to achieve its purpose, and (iii) minimally interfere with the right to freedom of thought and expression under Art 13 of the ACHR.[89] Fiscalandia has not discharged its burden of proving that the three requirements are met, and the restrictions do not apply.

a. <u>The restriction is not expressly established in Fiscaline law.</u>

32. The restriction to access state-held information is not established in Fiscalandia's domestic law. In ***Claude Reyes v Chile***, this Court held that Chile had not complied with the ACHR as there was no legislation regulating the issue of restrictions to access state-held information.[90] Likewise, there are no established laws restricting access to the evaluation criteria in the selection process of public officials in Fiscalandia. While the Nominating

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[85] *Claude Reyes v. Chile*, IACtHR (2006), [79], [91].
[86] Organisation of American States, *Inter-American Democratic Charter*, Art 4; United Nations, Convention on Corruption, 31 October 2003, Art 7(1)(a).
[87] *Claude Reyes v. Chile*, IACtHR (2006), [77].
[88] *Ibid*., [90].
[89] *Ibid*., [91].
[90] *Ibid*., [94].

Board cited its ability to assess candidates "*at its own discretion*",[91] empowering the Board to assess according to its own evaluation parameters is not equivalent to restricting access to the assessment criteria at law. As a restriction was not established at law, the Nominating Board should make available to the public the content of their Guidelines on appointing public officials such as the Prosecutor General in line with the principle of "*maximum disclosure*".

33. Even if the State can restrict state-held information, it must provide a justification to the requesting individuals.[92] In this case, the Nominating Board failed to provide any justification grounded in domestic law for restricting access to the state-held information pertaining to the selection process for Prosecutor General.[93]

b. <u>The restriction is not proportionate to the public interest.</u>

34. Fiscalandia's restriction of access to the Nominating Board's evaluation criteria is neither necessary to ensure the rights and reputations of others, nor does it protect national security. Thus, Fiscalandia's restriction of access to state-held information violates Art 13 and is incompatible with the ACHR.

35. First, Fiscalandia cannot avail itself of the justification under Art 13(2)(a), that the purpose behind restricting access to the state-held evaluation criteria was to protect the "*rights or reputation of others*". This Court held that the reputation of whom the statement implicates should be assessed "*in relation to the value in democratic society of open debate regarding matters of public interest or concern*".[94] This proportionality exercise was demonstrated in

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[91] Hypothetical, [33]; CQ9.
[92] *Claude Reyes v. Chile*, IACtHR (2006), [77].
[93] CQ8.
[94] *Ricardo Canese v. Paraguay*, IACtHR, (2004), [105]; *Tristán Donoso v. Panama*, IACtHR (2009), [123].

the case of ***Tristán Donoso v Panama*** ("***Tristán Donoso***"). The Attorney-General in ***Tristán Donoso*** had issued an order to wiretap Donoso's telephone conversation with a client. In the recorded conversation and later at a press conference, Donoso made statements regarding the Attorney-General's corrupt behavior. The Attorney General later commenced criminal proceedings against Donoso for defamation. Although Donoso's statements implicated the Attorney General's reputation, this Court found that Art 13(2)(a) should not apply and consequently, that Panama had breached Donoso's Art 13 rights. This was because the Court considered Donoso's statements to be of utmost public interest, in light of intense public debate surrounding the National Attorney General's and courts' authority to wiretap and record telephone conversations.[95] Therefore, if the information sought is of great public interest, it forms part of "*public debate*" and should not be restricted even if it impacts the rights or reputation of others.[96]

36. On the facts, disclosing the evaluation parameters utilized to select candidates for a public office position is of significant importance in Fiscalandia given its existing climate of political corruption set out in [3] above.[97] This was exemplified when the eventual appointee for Prosecutor General, Martínez, was partisan and had close financial ties to President Obregón's political party, in breach of Art 103 of Fiscalandia's Constitution.[98] Moreover, there is evidence suggesting that Martínez received a bribe of a luxury car because he replaced all the prosecutors in the Special Unit investigating the META emails within a week of assuming office.[99] This leads to the irresistible inference that Martínez's

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[95] *Tristán Donoso v. Panama*, IACtHR, (2009), [121].
[96] *Ibid*.
[97] *See* Statement of Facts,[3].
[98] Hypothetical, [12], [37].
[99] Hypothetical, [37].

appointment was politically motivated in order to further President Obregón's agenda and perpetuate the crime of influence peddling. Thus, even if the information sought about the process reveals corruption and tarnishes the reputation of the Nominating Board members, there is still great public interest in the disclosure of this information. Further, releasing the information sought will not tarnish the reputation of other applicants given that (i) all the applicants' backgrounds are already published online and publicly accessible;[100] and (ii) the information sought relates to reasons for Hinojoza and del Mastro's exclusion from the shortlist specifically and does not engage the reputation of other applicants. In any event, even if the information sought is detrimental to other applicants' reputation, it must be weighed against the larger public interest analogous to ***Tristán Donoso***. Here, public interest in fighting corruption and ensuring transparency in the selection of public officials far outweighs any collateral reputational damage. Therefore, Fiscalandia must disclose the requested information to Hinojoza and del Mastro in line with its international obligations under the UN Convention and its failure to do so is correspondingly a violation of Art 13 of the ACHR.

37. Second, Fiscalandia cannot avail itself of the justification under Art 13(2)(b), that the purpose behind restricting access to the state-held evaluation criteria was for the "*protection of national security*". Fiscalandia's obligation to guarantee the full exercise of an individual's right access to information held by the state can only be derogated from in exceptional circumstances. The threshold to meet an Art 13(2)(b) restriction is high – there must be "*a real and imminent danger that threatens national security in democratic*

[100] Hypothetical, [29].

societies". [101] While Fiscalandia might argue that the President ordered the establishment of the Nominating Board to appoint a new Prosecutor General on grounds of national security,[102] it has yet to prove that these grounds meet the high threshold of a "*real and imminent danger*". The EPD merely stated that it was necessary to nominate a new, permanent appointee due to the transitional nature of the current Prosecutor-General's term of office,[103] without providing any justification or evidence of a "*real and imminent danger*". Even if the State can argue that a transitional term of office poses a real risk to national security, this is not the case. In 2003, the Supreme Court of Fiscalandia had issued a judgement holding the office of Prosecutor-General was a lifetime appointment,[104] and such judgements on constitutional matters bind all public authorities.[105] Thus, Fiscalandia has failed to provide a justification for restricting Hinojoza and del Mastros' access to information on the basis of a real and imminent threat to national security under Art 13(2) of the ACHR.

38. In conclusion, Fiscalandia violated Art 13 of the ACHR by restricting access to the state-held evaluation criteria information pertaining to the nomination process for the Prosecutor General. Fiscalandia has failed to prove that (i) this restriction was established in domestic law, and that (ii) this unjustified restriction would be proportionate to a competing public interest under Art 13(2) of the ACHR.

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[101] IACHR, 'Declaration of Principles on Freedom of Expression', (2000).
[102] CQ6.
[103] Hypothetical, [19].
[104] *Ibid.*, [13].
[105] CQ7.

4. Fiscalandia violated Art 24 of the ACHR by discriminating against Hinojoza and del Mastro on the basis of gender during the selection process for a new Prosecutor General.

39. By intentionally overlooking the female applicants on the shortlist, Fiscalandia discriminated against Hinojoza and del Mastro on the basis of gender. This is a violation of Arts 1 and 24 of the ACHR, which protect the right to non-discrimination and to equal protection of the law.

40. Women are a protected class, as established by two instruments binding on parties to the ACHR, namely the Convention on the Elimination of all Forms of Discrimination Against Women ("**CEDAW**") and the Convention of Belém do Pará ("**BDP**"). Fiscalandia is thus obligated under the ACHR and the BDP to ensure that all possible appointees for the position of Prosecutor-General are given the equal opportunity to apply and be considered for the position.

41. Art 1 of CEDAW defines discrimination as "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise… of human rights*".[106] This definition from Art 1 of CEDAW applies here as (i) CEDAW is applicable law, pursuant to Art 31(3)(c) of the Vienna Convention on the Law of Treaties ("**VCLT**"),[107] and (ii) this Court has recognised and utilized CEDAW as a fundamental human rights instrument in the protection of violence against women in the form of discrimination.[108] Further, all the States party to the ACHR[109] are

[106] CEDAW, Art 1.
[107] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art 31(3)(c).
[108] *Veliz Franco v. Guatemala*, IACtHR (2014), [207],
[109] "State Parties to the American Convention on Human Rights." www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm.

also party to CEDAW.[110] Women's rights to non-discriminatory equal protection is reinforced by the Convention of Belém do Pará ("**BDP**"), which enshrines "*the right of women to be free from all forms of discrimination*" under Art 6.[111] Art 7(h) of BDP requires the State to adopt such measures as may be necessary to give effect to the BDP Convention. This Court has utilized and affirmed CEDAW and the BDP Convention when applying and finding a violation of Art 24 by Guatemala.[112] Therefore, their respective scope substantially overlaps with the right to equal treatment under Art 24 of the ACHR.

42. This Court should adopt the European standard of proof in gender discrimination cases. The State has to rebut a presumption of discrimination, which arises when sufficient evidence suggests discriminatory treatment.[113] The ECtHR takes facts presented by victims which appear credible and consistent with available evidence as proved unless the state offers a convincing alternative explanation.[114] This is consistent with this Court's approach regarding the amount of proof necessary to support a judgement (***Velásquez Rodríguez***).[115] This is because the motive behind discriminatory treatment often exists only in the minds of State actors as well as the requisite information to make out a violation of the *in pari materia* Art 14 of the ECHR.[116] Fiscalandia's restriction of access to state-held information

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[110] "State Parties to Convention on the Elimination of All Forms of Discrimination against Women." www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.
[111] BDP Convention, Art 6(a).
[112] *Veliz Franco v. Guatemala*, IACtHR (2014), [207].
[113] European Court of Human Rights, 'Handbook on European non-discrimination law', Council of Europe Publishing (2011), p.232, available at: https://www refworld.org/docid/4d886bf02 html [accessed 9 April 2020] ("**European Court of Human Rights, 'Handbook on European non-discrimination law'**").
[114] *Nachova and Others v. Bulgaria*, ECtHR (Grand Chamber Judgement), 6 July 2005, [147]; *Timishev v. Russia*, ECtHR, (Chamber Judgement), 13 December 2005, [39]; *D.H. and Others v. the Czech Republic*, ECtHR (Grand Chamber Judgement), 13 November 2007, [178].
[115] *See* Merits, [25].
[116] European Court of Human Rights, 'Handbook on European non-discrimination law', p.232.

pertaining to the selection process further shows the need to adopt a European standard of proof as the material information to make out discrimination has been restricted by the very State actors whose actions are being complained of.[117] Nonetheless, the available facts provide sufficient evidence that the selection process discriminated against women generally and Hinojoza and del Mastro in particular.

43. First, the process was prejudiced against women generally. The number of male candidates who were invited to the final interview disproportionately outweighed the number of female candidates who made it to that stage. Hinojoza and del Mastro were the only 2 out of 8 female candidates who were invited to the final interview.[118] In contrast, 25 out of 75 male candidates were invited to the final interview. [119] While this is arguably attributed to the smaller pool of female candidates, women are a protected class and the lack of equal opportunity to be considered for the position was a violation of Arts 1(1) and 24 of the ACHR.

44. Second, the selection process was specifically discriminatory against Hinojoza and del Mastro. Even though Hinojoza and del Mastro were ranked first and second during the proficiency and background assessments, their top rankings were overturned at this final interview stage with no justification. Instead, three male candidates in the bottom half of the rankings were shortlisted. [120] Despite a wealth of experience as career prosecutors, including investigating serious human rights violations committed by state security forces

[117] Hypothetical, [29], [33]; CQ58.
[118] Hypothetical, [28], [32].
[119] *Ibid.*
[120] Hypothetical, [36].

in the 1980s, they were also not given the same opportunity to explain the reasons for their candidacy. In fact, after being congratulated on their careers, they were each only asked one question regarding their work history.[121] The combined 60% weightage of the proficiency and background assessments far outweighed the 40% weightage of the interview in the selection process.[122] In contrast, the male candidates were given ample opportunity to explain the reasons for their candidacy and field questions from the Nominating Board on their past work experiences or their future plans should they be selected to be Prosecutor General.[123] The stark contrast in treatment between Hinojoza and del Mastro and the male candidates unequivocally points towards discrimination, as the only basis for this distinction in treatment is gender.

45. Therefore, Fiscalandia's selection process for the Prosecutor General was discriminatory towards female applicants including Hinojoza and del Mastro, and violated Art 24 of the ACHR.

B. FISCALANDIA BREACHED ITS *ACHR* OBLIGATIONS TO JUDGE REX UNDER ARTS 8.1 AND 25.

1. Judge Rex's petition is admissible as Fiscalandia violated Art 25 of the ACHR by failing to ensure its domestic remedies were effective.

46. Judge Rex need not exhaust available domestic remedies because they are not "*adequate and effective*".[124] It follows that where the available remedies are ineffective, Fiscalandia has violated Judge Rex's right to judicial protection under Art 25 of the ACHR.

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[121] Hypothetical, [35].
[122] CQ64.
[123] *Ibid.*
[124] *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), [63].

Effectiveness means that domestic remedies must be capable of producing the result for which they were designed.[125] The "*authority in charge of the procedure to remove a judge must behave impartially*" (***Constitutional Court v Peru).***[126] Where the authority lacks the requisite impartiality, remedies are deemed illusory and ineffective.[127] Impartiality entails that the authority is not involved in the controversy.[128]

47. In the analogous case of ***Constitutional Court v Peru,*** three justices of the Constitutional Court of Peru were dismissed for signing a judgement, declaring a law permitting President Alberto Fujimori's re-election inapplicable. This Court found that Peru violated Art 25 of the ACHR because the same persons who took part in the judges' impeachment proceeding in Congress had heard their *amparo* application. Thus, the requirements of impartiality were not met.[129] Similarly, in ***López Lone v Honduras,*** four judges who protested the ousting of President Rosales in a 2009 military coup were subsequently subject to disciplinary proceedings and removed from their positions. The dismissed judges' application for *amparo* against the decision of the Judicial Service Council would have been adjudicated by the Constitutional Chamber of the Honduran Supreme Court, which had already taken part in the disciplinary proceedings against the victims. This Court held the *amparo* remedy to be ineffective as there was no guarantee as to the impartiality of such judges.[130]

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[125] *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), [66]; *Advisory Opinion OC-11/90 Exceptions to the Exhaustion of Domestic Remedies*, IACtHR, (1990), [36].
[126] *Constitutional Court v. Peru*, IACtHR (2001), [74].
[127] *López Lone v. Honduras*, IACtHR (2005), [247].
[128] *See* Merits, [24].
[129] *Constitutional Court v. Peru*, IACtHR (2001), [96].
[130] *López Lone v. Honduras*, IACtHR (2005), [249].

48. Likewise, any *amparo* remedy sought by Judge Rex to challenge the decision to remove him would have to be adjudicated at the first instance by the very Supreme Court which had ordered his removal.[131] Moreover, the penalty of removal imposed by the full Supreme Court can only be challenged by a motion for reconsideration filed with the same full Court.[132] Since the full Supreme Court was involved in the controversy, Fiscalandia would be unable to guarantee the impartiality of the judges presiding over either an *amparo* hearing or a motion for reconsideration. Thus, in line with this Court's reasoning in ***Constitutional Court v Peru,*** the Supreme Court's partiality renders the *amparo* remedy ineffective because it is incapable of producing the result for which it was designed.[133] Fiscalandia has violated Art 25 of the ACHR by failing to provide Judge Rex with an effective remedy, and his petition should thus be found admissible.

2. Fiscalandia violated Judge Rex's rights to a fair trial and judicial protection under Arts 8.1 and 25 of the ACHR.

49. Fiscalandia violated Judge Rex's rights to a fair trial and judicial protection under Arts 8(1) and 25 of the ACHR respectively as the Supreme Court that adjudicated over his disciplinary proceedings was not impartial and failed to sufficiently justify valid grounds for his removal from the bench.

a. The adjudicating Supreme Court was not impartial.

50. Fiscalandia violated Judge Rex's right to fair trial under Art 8(1) of the ACHR as the court that adjudicated his disciplinary proceedings was not impartial. Impartiality means that the

[131] Hypothetical, [44]; CQ18; CQ23.
[132] CQ51.
[133] *Constitutional Court v. Peru*, IACtHR (2001), [96]; CQ23.

tribunal must not be "*involved in the controversy*".[134] The test for impartiality under Art 8(1) as set out in ***Castillo Petruzzi v Peru ("Castillo Petruzzi")***[135] is similar to [49] – [51] above. The victims in ***Castillo Petruzzi*** were accused of terrorism, tried before faceless military tribunals and found guilty of treason. This Court agreed with the Commission's arguments in ***Castillo Petruzzi*** that serious and legitimate doubts arose as to the impartiality of the military tribunals because (i) the armed forces which were fully engaged in the counter-insurgency struggle also prosecuted persons associated with insurgency groups; and (ii) the same judge or court conducted both the preliminary inquiry and the trial.[136]

51. The same facts outlined in [48] highlight the partiality of Fiscalandia's Supreme Court. Therefore, Fiscalandia violated Judge Rex's right to fair trial under Art 8(1) of the ACHR.

b. <u>Judge Rex's removal was without valid grounds.</u>

52. Fiscalandia violated Judge Rex's right to a fair trial under Art 8(1) of the ACHR by (i) instituting disciplinary proceedings to penalise him for mere reasonable differences in legal interpretation; and (ii) failing to sufficiently justify the decision to remove him.

53. First, Fiscalandia violated Judge Rex's right to have his independence safeguarded under Art 8(1) of the ACHR.[137] Judges cannot be removed solely because one of their decisions was overturned on appeal. Otherwise, they will feel compelled to placate an appellate body (***Apitz Barbera v Venezuela) ("Apitz Barbera")***.[138] In ***Apitz Barbera***, three judges were removed from Venezuela's First Court of Administrative Disputes after being accused of

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[134] *Palamara Iribarne v. Chile*, IACtHR (1997), [146].
[135] *Castillo Petruzzi v. Peru*, IACtHR (1999).
[136] *Castillo Petruzzi v. Peru*, IACtHR (1999), [125], [130].
[137] *Supreme Court of Justice (Quintana Coello et al) v. Ecuador*, IACtHR (2013), [153]; *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, IACtHR (2013); *Lopez Lone et al. v. Honduras*, IACtHR (2015).
[138] *Apitz Barbera v. Venezuela*, IACtHR (2008), [84].

committing an "*inexcusable judicial error*" in granting an *amparo*.[139] This Court found that the First Court judges' decision "*embodied a plausible legal interpretation of the scope of the precautionary amparo*", thus they were penalized because their duly supported legal positions did not correspond to those of the appellate body.[140] Accordingly, this Court held that Art 8(1) in relation to Art 1(1) of the ACHR was violated.[141]

54. Similarly, Fiscalandia's Supreme Court equated mere reasonable differences in legal interpretation on appeal with an "*inexcusable judicial error*" in instituting disciplinary proceedings against Judge Rex.[142] In concluding that the ban on presidential re-election was appropriate, necessary and proportionate, Judge Rex had duly supported his position by using the right legal test to weigh both parties' arguments.[143] Despite that, he was accused of a serious breach of the obligation to properly state the grounds for his decision.[144] Since reasonable differences in legal interpretations should be distinguished from an "*inexcusable judicial error*" (***Apitz Barbera*),**[145] the mere fact that the Supreme Court reached a different conclusion is not an "*inexcusable judicial error*" that warranted Judge Rex's removal. Fiscalandia thus violated Art 8(1) of the ACHR by failing to safeguard Judge Rex's right to independence.

55. Secondly, Fiscalandia violated Judge Rex's due process guarantees enshrined in Arts 8(1) and 25 of the ACHR when he was removed from the bench without sufficient

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[139] *Ibid*., [2].
[140] *Apitz Barbera v. Venezuela*, IACtHR (2008), [90].
[141] *Ibid*., [91].
[142] Hypothetical, [41]; CQ1.
[143] Hypothetical, [16], [40]; CQ1.
[144] Hypothetical, [41]; CQ1.
[145] *Apitz Barbera v. Venezuela*, IACtHR (2008), [90].

justification.[146] The duty to state grounds forms part of the due process guarantees enshrined in Art 8(1) as it demonstrates that parties have been heard and affords the opportunity for appeal.[147] In ***Apitz Barbera,*** this Court found that Venezuela violated Art 8(1) when the disciplinary committee failed to comply with its duty to state grounds.[148] Specifically, the disciplinary committed failed to state reasons for the serious nature of the alleged offense committed and the proportionate nature of the penalty recommended and eventually applied.[149] Similarly, Fiscalandia's Supreme Court failed to provide any rationale for the "*serious*" and "*inexcusable*" nature of Judge Rex's alleged breach of duty, yet removed him from the bench on those very grounds.[150]

56. In conclusion, the manner in which the Supreme Court removed Judge Rex from the bench violated his due process guarantees, which is a violation of his right to fair trial and to judicial protection under Arts 8(1) and 25 of the ACHR respectively.

C. FISCALANDIA BREACHED ITS *ACHR* OBLIGATIONS TO ESCOBAR UNDER ARTS 8.1, 24 AND 25.

57. Fiscalandia violated Arts 24, 8(1) and 25 of the ACHR by discriminating against Escobar for her neutral political affiliation towards the Obregon administration, and by failing to provide her with a fair trial and access to effective remedies.

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[146] *Ibid*., [77-8].
[147] *Ibid*., [78].
[148] *Apitz Barbera v. Venezuela*, IACtHR (2008), [91].
[149] *Ibid.*
[150] Hypothetical, [41]; CQ19.

1. Escobar's petition is admissible as she had exhausted all available domestic remedies.

58. Escobar's petition is admissible as she exhausted the domestic remedies available to her. After it was announced that a nominating board would be established to select a new Prosecutor General, Escobar filed for a motion to vacate to challenge this call for candidates.[151] She simultaneously applied for injunctive relief to prevent the selection process from proceeding.[152] However, the injunctive relief was overturned on appeal ten days after it was granted.[153] Before her motion to vacate was adjudicated, Martínez was appointed the new Prosecutor General.[154] Therefore, Escobar had exhausted her remedies since the a new Prosecutor General had been appointed and the domestic courts did not have the power to remove a Prosecutor General.[155]

2. Fiscalandia violated Art 8.1 of the ACHR by failing to hear Escobar's motion to vacate within a reasonable time.

59. Fiscalandia violated Art 8(1) of the ACHR when Escobar's motion to vacate was not heard within a reasonable time. Whether a matter has been heard within a reasonable time depends on (i) the complexity of the matter; (ii) the judicial activity of the interested party; (iii) the behaviour of the judicial authorities; and (iv) the seriousness of the consequences of the procedural delay for the party.[156] The State bears the burden of showing that each of these elements justifies the "*current absence of a final decision on the merits*".[157] This

[151] Hypothetical, [23].
[152] Hypothetical, [24].
[153] *Ibid.*
[154] Hypothetical, [36]; CQ3.
[155] Hypothetical, [24].
[156] *Valle Jaramillo v. Columbia*, IACtHR (2008), [155]; *Díaz-Peña v. Venezuela*, IACtHR (2012), [49].
[157] *Apitz Barbera v. Venezuela*, IACtHR (2008), [172].

Court has stressed that when the passage of time has an adverse impact on the individual, "*the proceedings should be carried out as soon as possible*".[158] Periods usually deemed reasonable cease to be so if exceptional diligence is required given the consequences of the case upon the petitioner's personal and professional life.[159] For instance, the ECtHR ruled that the domestic proceedings in ***X v France*** had exceeded a reasonable time in violation of the *in pari materia* Art 6 of the European Convention on Human Rights.[160] This is because the applicant who had tested HIV positive after being given blood transfusions, had attempted for two years to receive compensation from the State via its administrative courts. The ECtHR took the view that "*what was at stake in the contested proceedings was of crucial importance for the applicant, having regard to the incurable disease from which he was suffering and his reduced life expectancy*", thus this called for "*exceptional diligence*" as the Government had been familiar with the facts for some months and the seriousness of which must have been apparent to them.[161]

60. Applying this, Escobar's motion to vacate should have been heard as soon as possible as exceptional diligence was called for in order to effectively safeguard her right to work, as well as the autonomy of the office of Prosecutor General.[162] Considering President Obregón started the process of selecting a new Prosecutor General on 16 June 2017, there was a clear urgency and necessity for Escobar's motion to vacate to be heard as soon as possible, or in any event, prior to the completion of the selection process for a new

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[158] *Genie Lacayo v. Nicaragua*, IACtHR (1997), [81]; *Valle Jaramillo v. Columbia*, IACtHR (2008), [155].
[159] *X v. France*, ECtHR (1992), [47]; Dr. Jean-François Renucci**,** 'Introduction to the European Convention on Human Rights – The rights guaranteed and the protection mechanism', Council of Europe Publishing (2005) at p.80.
[160] *X v. France*, ECtHR (1992), [49], citing *H v. United Kingdom*, ECtHR (1987) and *Bock v. Germany*, ECtHR (1989).
[161] *X v. France*, ECtHR (1992), [47].
[162] CQ25.

Prosecutor General.[163] Since her injunction application to prevent the selection for a new Prosecutor General from proceeding was denied, this left her right to work and the permanence of the Prosecutor General position at peril and crucially hinged upon the motion to vacate. As a public figure at the center of the META emails investigation, the judicial authorities ought to have been aware of the facts surrounding Escobar's motion to vacate given their public and highly publicized nature, as well as its seriousness. Notably, the consequences of the delay had a profound impact on Escobar's professional life as well. Having lost her job without ever being formally dismissed or removed, Escobar was subsequently distanced from the META emails investigations and transferred by Martínez to serve as prosecutor in the Morena district, known for its high rates of gang violence.[164] There was thus an unreasonable seven-month delay between Escobar taking out the application for a motion to vacate in June 2017, and the application being heard in January 2018. Fiscalandia therefore violated Escobar's right to a fair trial under Art 8(1).

3. <u>Fiscalandia violated Art 25 of the ACHR by failing to remedy violations of Escobar's rights.</u>

61. Fiscalandia violated Art 25(1) of the ACHR when the unjustified delay prevented the violation from being remedied. Effective remedies must be timely and enable the remedy of a violation.[165] In assessing timeliness, this Court will take into account the "*urgency and necessity of judgement*".[166] As such, a remedy is ineffective by reason of a delay if it cannot

[163] Hypothetical, [36].
[164] Hypothetical, [23]; CQ10.
[165] *Juvenile Reeducation Institute v. Paraguay*, IACtHR (2004), [245].
[166] *Ibid.*

be "*decided within a time frame that enables the violation being claimed to be corrected in time*".[167]

62. For the same reasons as [62]-[63] above, the delay in adjudicating Escobar's motion to vacate is unjustified as an urgent judgement was needed. The unjustified delay rendered both Escobar's injunction application and motion to vacate moot as the violation being claimed could not be corrected in time. This is because Escobar's application injunctive relief to prevent the selection for Prosecutor General from proceeding was overturned on appeal ten days after it was granted.[168] This effectively removed her from office and infringed her right to work as a public official with tenure.[169] Subsequently, the Supreme Court ruled Escobar's motion to vacate inadmissible since Martínez's appointment was "*impossible to reverse*".[170] Therefore, Fiscalandia violated Art 25 of the *ACHR* by failing to provide an effective domestic recourse for Escobar to remedy the violations of her rights in time.

4. <u>Fiscalandia violated Arts 1.1 and 24 of the ACHR by discriminating against Escobar on the basis of her neutral political affiliation.</u>

63. Discrimination on the basis of political affiliation is a violation of Art 24 of the ACHR.[171] Escobar's neutral stance as Prosecutor General was a perceived threat to the incumbent President, who caused the loss of her position as Prosecutor General.[172] The Commission has maintained that any category of discrimination is prohibited under Art 1(1). In

[167] *Ibid.*
[168] Hypothetical, [24].
[169] Hypothetical, [23]; *See* Statement of Facts, [9-10].
[170] Hypothetical, [42].
[171] *Rocio San Miguel v. Venezuela*, IACtHR (2015), [174].
[172] Hypothetical, [19].

particular, discrimination on the basis of one's "*political or other opinion*" is considered a suspect category, meaning a category which faces increasing discrimination, and requires heightened scrutiny in examining laws and policies that create distinctions on this basis.[173]

64. This Court has established that individuals cannot be fired on the basis of their political opinion.[174] In ***Rocio San Miguel v Venezuela***, three individuals were fired from their government positions on the grounds that they supported a recall referendum petition of President Hugo Chávez's presidency. This Court held that Venezuela had violated their Art 24 rights by preventing them from carrying out their public functions because of their political opinion.[175]

65. A neutral stance towards a regime should constitute a "political opinion" under Art 24 of the ACHR.[176] One can also express a neutral political opinion through actions.[177] The United Kingdom Supreme Court ("UKSC") in ***RT (Zimbabwe) v. Secretary of State for the Home Department*** ("***RT (Zimbabwe)***") affirmed that political neutrality, or "apolitical[ness]" constitutes a political opinion.[178] Several apolitical Zimbabweans sought asylum in the United Kingdom on the grounds that they would face murder, rape or other

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[173] IACHR, *Access to Justice for Women Victims of Violence in the Americas* (2007), [83]; *Maria Eugenia Morales de Sierra* (Guatemala), IACHR, [36].
[174] *Rocio San Miguel v. Venezuela*, IACtHR (2015), [174].
[175] *Rocio San Miguel v. Venezuela*, IACtHR (2015), [174].
[176] *Bolanos-Hernandez v. Immigration and Naturalization Service*, 767 F.2d 1277, United States Court of Appeals for the Ninth Circuit, 19 December 1984, [1286]; *Rivera Moreno v. Immigration and Naturalization Service*, No. 98-71436, United States Court of Appeals for the Ninth Circuit, 23 May 2000; Stephen Meili, *The Right not to Hold a Political Opinion: Implications for Asylum in the United States and the United Kingdom*; James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge Univ. Press 2d ed. 2014) (1991)), [409-23].
[177] *Ramos-Vasquez v. Immigration and Naturalization Service*, 57 F.3d 857, 863, United States Court of Appeals for the Ninth Circuit, 16 June 1995, affirmed in *Rivera Moreno v. Immigration and Naturalization Service*, No. 98-71436, United States Court of Appeals for the Ninth Circuit, 23 May 2000.
[178] *RT (Zimbabwe) and others v. Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012,

forms of persecution if they refused to swear allegiance to the Mugabe regime. The UKSC referred to the UN Refugee Convention and the European Convention of Human Rights and stated that the applicants should be given asylum and protection because of their refusal to express a political opinion regardless of their motivation. The United Kingdom has effectively incorporated the European Convention into its domestic law when it included it as an appendix to the Human Rights Act, whichwent into effect in Scotland in July 1999, and Wales and England in October 2000.[179] This position is also supported by ***Bolanos-Hernandez,*** where the applicant had fled El Salvador for the US, and filed an application for asylum and refugee status with the American Board of Immigration Appeals. However, the Board of Immigration Appeals denied his application for refugee status on the basis that Bolanos had not proven that he would be subject to any danger in El Salvador, by virtue of his political opinion. At best, it could only be said that the applicant desired " *to remain neutral and not be affiliated with any political group*". The US Court of Appeal reversed this decision on the grounds that "*choosing neutrality and refusing to join a particular political faction…is as much an affirmative expression of a political opinion as is joining a side"*.[180] The position in ***Bolanos-Hernandez*** was followed in the United States Court of Appeals case of ***Rivera Moreno v. Immigration and Naturalization Service*** ("***Rivera Moreno***").[181] In ***Rivera Moreno***, the applicant was a nurse who refused to join the El Salvador guerilla movement to give care to their medically wounded. She fled El

[179] Richard Maiman, *Asylum Law Practice in the United Kingdom After the Human Rights Act, in The Worlds Cause Lawyers Make: Structure and Agency* in Legal Practice 410 (Austin Sarat & Stuart Scheingold eds., 2005).
[180] *Bolanos-Hernandez v. Immigration and Naturalization Service*, 767 F.2d 1277, United States Court of Appeals for the Ninth Circuit, 19 December 1984.
[181] *Rivera Moreno v. Immigration and Naturalization Service*, No. 98-71436, United States Court of Appeals for the Ninth Circuit, 23 May 2000.

Slavador for the US, and filed an application for asylum and refugee status with the American Board of Immigration Appeals. The court adopted the doctrine of "*hazardous neutrality*", which was defined as "*show[ing] political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces*".[182]

66. This Court can rely on a UKSC case and United States Court of Appeal cases pertaining to refugee law for the following reasons. Refugee law is *in pari materia* with the language of the ACHR as it interprets "*political opinion*" on evidence of discrimination or persecution. The ACHR as a human rights treaty should be interpreted in a *pro homine* manner, *i.e.*, in a way which is most protective of human rights. This principle is based on Art 31(1) of the VCLT, which provides for a teleological interpretation of international law.[183] This Court has taken a dynamic view to interpreting legal obligations pertaining to human rights,[184] and this aids in assessing new situations such as the present case. Additionally, it is not new for this Court to refer to national jurisprudence from OAS Member States,[185] and the United States is a member of the OAS.

67. Escobar demonstrated her political opinion of neutrality through her actions as Prosecutor-General when she announced investigations into possible crimes arising from the META

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[182] *Rivera Moreno v. Immigration and Naturalization Service*, No. 98-71436, United States Court of Appeals for the Ninth Circuit, 23 May 2000; *Sangha v. Immigration and Naturalization Service*, 103 F.3d 1482, 1488, United States Court of Appeals for the Ninth Circuit, 9 January 1999.
[183] *'Mapiripán Massacre' v. Colombia*, IACtHR (2005), [104-8]; *Ricardo Canese v. Paraguay*, IACtHR (2004), [181].
[184] Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (II) – General Course on Public International Law', 317 *Collected Courses of the Hague Academy of International Law* (2006) at p.62.
[185] *Yakye Axa Indigenous Community v. Paraguay*, IACtHR (2005), [126]; *Gómez-Paquiyauri Brothers v. Peru*, IACtHR (2004), [164]; *Villagrán-Morales v. Guatemala*, IACtHR (1999), [192-3].

emails scandal, which could implicate President Obregón's brother.[186] Her refusal to succumb to or affiliate with the incumbent President in carrying out her public functions resulted in her removal similar to ***Rocio San Miguel***, in favour of a candidate who was partisan to the administration and made decisions that benefitted the administration.[187] President Obregón failed to justify any serious grounds or good cause for him to remove Escobar from office in accordance with the Organic Law of the Office of the Prosecutor General.[188] By contrast, Martínez was appointed Prosecutor General despite failling to meet the eligibility criteria set out in Art 103 of Fiscalandia's Constitution,[189] given his financial and partisan ties to Obregón's administration.[190] Moreover, immediately after his appointment, Martínez replaced all the prosecutors in the Special Unit for the META emails case.[191] Therefore, Fiscalandia violated Art 24 of the ACHR by discriminating against Escobar on the basis of her neutral political affiliation and replacing her as Prosecutor-General.

III. PRAYER FOR RELIEF

Based on the foregoing submissions, the Petitioners respectfully request this Honorable Court to declare the present case admissible and to rule that Fiscalandia has violated Arts 8, 13, 24 and 25

[186] Hypothetical, [22].
[187] Hypothetical, [37].
[188] CQ45.
[189] Hypothetical, [12].
[190] *Ibid.*, [37].
[191] *Ibid.*

in conjunction with Arts 1(1) and 2 of the ACHR. Additionally, the Petitioners respectfully request that this Honourable Court:

1. **DECLARE** that Fiscalandia reinstate Judge Rex to his position as Judge,

2. **DECLARE** that Fiscalandia award pecuniary compensation to Judge Rex for his loss of livelihood,

3. **DECLARE** that Fiscalandia reinstate Escobar to her position of Prosecutor General,

4. **DECLARE** that Fiscalandia award pecuniary and non-pecuniary compensation to Escobar for the loss of her position and its corresponding impact on her reputation,

5. **DECLARE** that Fiscalandia award compensation to Hinojoza and del Mastro for the non-pecuniary harm caused to them,

6. **ORDER** that Fiscalandia publish all original documentation relating to the selection process for Prosecutor General in a complete and publicly accessible form,

7. **ORDER** that Fiscalandia conduct proceedings and investigations to identify procedural irregularities in the composition of the shortlist during the selection process for Prosecutor General and determine liability,

8. **ORDER** the implementation of laws necessary for the State of Fiscalandia to transcend its current climate of corruption by fostering transparent practices and providing access to state-held information,

9. **ORDER** the implementation of laws necessary for the State of Fiscalandia to exert due diligence to prevent repetitions of such rights violations by creating a holistic and sustained model of prevention, protection, punishment and reparations,

10. **ORDER** that the State publish the full judgement in a national newspaper, and

11. **ORDER** that the State publicly acknowledge responsibility.