Team 102

INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

MARICRUZ HINOJOZA, *et al.*

Petitioners

v.

REPUBLIC OF FISCALANDIA

Respondent

MEMORIAL FOR THE REPRESENTATIVES OF THE VICTIM

II. TABLE OF CONTENTS

II. TABLE OF CONTENTS 2

III. INDEX OF AUTHORITIES 3

IV. STATEMENT OF FACTS 9

V. LEGAL ANALYSIS 16

A. ADMISSIBILITY 16

1. Statement of Jurisdiction 16

2. The Exhaustion of Domestic Remedies 16

B. ARTICLE 13 - FREEDOM OF EXPRESSION 20

1. Nature and Scope of Article 13 20

2. Violation of Article 13 22

C. ARTICLE 24 - RIGHT TO EQUAL PROTECTION 24

1. Scope and Nature of Article 24 24

2. Violation of Article 24 26

D. ARTICLES 8 & 25 - RIGHTS TO A FAIR TRIAL AND JUDICIAL PROTECTION 30

1. The Reasonable Time Requirement 31

2. The Requirement of an Independent and Impartial Tribunal 33

3. Due Guarantees 40

VI. REQUEST FOR RELIEF 41

III. INDEX OF AUTHORITIES

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IV. STATEMENT OF FACTS

The Republic of Fiscalandia identifies itself as a wholly democratic State, devoted to the adherence and endorsement of the doctrines of separation of powers, judicial independence, human dignity and respect for human rights.[1] Further to this, the State has cemented their allegiance to the pillars of democracy by ratifying, *inter alia*, the American Convention on Human Rights (1969), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the American Convention against Corruption (1996), and the United Nations Convention against Corruption (2003).[2]

Contrary to the principles of democracy and the international human rights instruments, corruption runs rampant in the State.[3] A plethora of concerns reverberate through the media regarding the complex and well-organized web of corruption and influence peddling involving public officials within the government.[4] Consequently, the citizens' fundamental human rights have been repeatedly and blatantly disregarded.[5]

Executive Branch

The 2006 Constituent Assembly aimed to effectuate and retain democracy in the Republic subsequent to the late 2005 coup d'etat by enacting Article 50 of the Constitution[6] which precludes presidential re-election.[7] Despite this fundamental objective, President Obregon attempted to reintroduce presidential re-election alleging that it is in contravention with his right to elect and be

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[1] Hypothetical, para 2.
[2] Hypothetical, para 3.
[3] Hypothetical, para 19.
[4] Hypothetical, para 18.
[5] Hypothetical, paras 44, 47 & 51.
[6] Hypothetical, para 16.
[7] Hypothetical, para 2.

elected.[8] However, the First Constitutional Court of Berena has expressed that the right to elect and be elected is not absolute and was a reasonable measure to attain democracy[9] after nearly 20 years of uninterrupted government.[10]

The Supreme Court, which is the highest body of the judicial system offering final and unappealable judgements,[11] ruled that a Prosecutor General is appointed for a lifetime.[12] Nevertheless, President Obregon removed Magdelena Escobar from office,[13] without good cause,[14] two days after she launched the investigation concerning the corruption in the government.[15] Magdalena sought injunctive relief, at which point the court temporarily suspended the President's call for candidates on the grounds that going forward with the selection process could cause irreparable harm to her rights to irremovability from office, due process, her right to work, and the guarantee of the autonomy of the Office.[16] The decision was however overturned by the Second Chamber of Appeals of Berena, despite the infringement of her fundamental rights.[17]

Following this, President Obregon directly appointed all members of the Nomination Board, pursuant to his Extraordinary Presidential Decree. Among those chosen, was the Minister of Justice, a member of his own presidential cabinet.[18] In accordance with the law, the Board's sessions were deemed fully confidential.[19] Contrastingly, President Obregon maintained access to

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[8] Hypothetical, para 16.
[9] Hypothetical, para 40.
[10] Hypothetical, para 2.
[11] Hypothetical, para 7.
[12] Hypothetical, para 13; Clarification Questions & Answers, 25.
[13] Hypothetical, para 19.
[14] Hypothetical, para 13; Clarification Questions & Answers, 45.
[15] Hypothetical, para 19.
[16] Hypothetical, para 24.
[17] *Ibid.*
[18] Hypothetical, para 25.
[19] Hypothetical, para 26.

the private deliberations, demonstrated by his acquisition of a photo of the session and posting it on his Twitter account.[20] The procedure resulted in the appointment of Domingo Martinez, who had worked as a legal advisor in the Berena Mayor's Office during the administration of Manuel Alberto Obregón (the President's brother), had attended the wake of the President's mother, was listed as an individual donor to the #MenosEsMás party, and owned a luxury car that was acquired a week before his selection, was selected.[21] "The President's Man,"[22] was selected only five minutes after the conference was concluded.[23]

Nominating Board

The Nominating Board published an announcement dictating the timeline for the selection process of the Prosecutor General as well as the minimum documents required for the candidates. The dates published were not adhered to.[24] In addition, at the stage where board members would assign each candidate a score between 1 and 100, it was established that all candidates who scored lower than 75 would be eliminated.[25] After seeing the candidates who would be eliminated, the board published a corrective resolution, reducing the minimum score to 65.[26] Sandra del Mastro and Maricruz Hinojosa were the only candidates who obtained a perfect score at this stage.[27] Using the scheme of selection generated by the Nominating Board, Sandra and Maricruz ranked first in all categories.[28] Despite this, three males who ranked way below both females were shortlisted, further resulting in the appointment of Domingo Martinez.[29] Though Article 2 of Law 266 of 1999

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[20] Hypothetical, para 27.
[21] Hypothetical, para 37.
[22] Hypothetical, para 37.
[23] Hypothetical, para 36.
[24] Hypothetical, paras 26 & 30.
[25] Hypothetical, para 31.
[26] *Ibid*.
[27] Clarification Questions & Answers, 54.
[28] Clarification Questions & Answers, 64.
[29] Hypothetical, para 36.

establishes that: "The Nominating Boards will screen candidates based on the principles of transparency, merit, morality, honesty, efficiency and citizen participation,"[30] the Nominating Board refused to state their reasons for appointing Domingo Martinez when it was requested by the Petitioners.

In the instance of the appointment of the five judges of the Court of Auditors, coordination and negotiations between presidential advisor Pedro Matalenguas and members of the Nominating Board was the subject of scrutiny by the independent media.[31] A series of emails and recordings evidenced the "recommendations" given by the advisor, indicating to the Nominating Board the candidates who the advisor believed were in alignment with President Obregon's motives.[32] Only one of the "recommended" persons were not ultimately selected.[33]

Corruption in the Public Oversight Branch

The newly appointed Prosecutor General, Domingo Martinez, caused the collapse of the initial body devised to investigate the corrupt activities revealed in the META emails; before even one week had elapsed since his appointment, he replaced the entire Special Unit with prosecutors of his choice.[34] Since Domingo Martinez's interference, no developments of the investigation nor information from the witnesses which the former Prosecutor General, Magdalena Escobar, garnered, have been made known to the public.[35] Less than a month after appointment, Domingo Martinez signed a resolution authorizing the rejection of Magdalena Escobar's request to be reinstated as a specialized organized crime prosecutor.[36] Instead, he authorized her assignment as

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[30] Clarification Questions & Answers, 37.
[31] Hypothetical, para 17.
[32] *Ibid.*
[33] *Ibid.*
[34] Hypothetical, para 37.
[35] Clarification Questions & Answers, 4.
[36] Clarification Questions & Answers, 10.

prosecutor in the district of Morena, two hours from Berena, which is known for its high rates of gang violence.[37]

Judiciary

The Supreme Court of Fiscalandia, the highest body of the judicial system, is presided over by Chief Justice Angel Lobo.[38] The Justice has been a subject of the citizens' allegations concerning corruption in the State on countless occasions.[39] The Organizations defending the human rights of indigenous peoples (who make up 25% of the population)[40] have complained about him manipulating the composition of the regional courts to avail oil exploitation and illegal logging.[41] The Justice seated a relative in the Amazonas Alto as well as mandated that the judge presiding over the Amazonas Bajos be replaced with another judge who has been recognized as continuously ruling in favor of extractive industries.[42] All these complaints have been dismissed without any decision on the merits.[43]

The Supreme Court is responsible for the suspension and removal of all judges.[44] On October 10, 2017, the Court contended that Judge Mariano Rex's ruling was excessive and infringed the President's human right to be re-elected.[45] However, the former judge, in his defence to the charges made against him, highlighted that a difference in opinion with the Supreme Court was not sufficient to constitute a serious administrative misconduct.[46] Furthermore, almost all of

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[37] *Ibid*.
[38] Hypothetical, para 9.
[39] *Ibid.*
[40] Hypothetical, para 2.
[41] Hypothetical, para 9.
[42] Clarification Question & Answers, 27.
[43] Hypothetical, para 9.
[44] Hypothetical, para 7.
[45] Hypothetical, para 41.
[46] Clarification Questions & Answers, 19.

the complaints lodged against the Petitioner were closed at the preliminary stage due to a lack of evidence.[47]

A motion to vacate was filed by Magdalena Escobar to, *inter alia*, declare null and void the Extraordinary Presidential Decree since August 13, 2017.[48] At the same time she requested a temporary suspension of the search for a new Prosecutor General.[49] Though granted, the injunctive relief was shortly overturned by the Second Chamber of Appeals of Berena.[50] As a corollary, the Supreme Court ruled that the motion was inadmissible due to the irreversible decision to appoint Domingo Martinez as the Prosecutor General on September 15, 2017.[51] This judgement was not made until January 02, 2018.[52]

Proceedings Before the Inter-American Court

Judge Mariano Rex filed a petition with the IACHR on December 15, 2017.[53] He alleged the violation of his right to a fair trial (Article 8).[54] On August 8, 2018, the Commission declared the petition admissible.[55] In the Merits Report issued on February 14, 2019, it found that the State had violated the former judge's rights under Article 8.1 as well as Article 25, both in relation to Articles 1.1 and 2 of the ACHR.[56]

On August 01, 2017, Magdalena Escobar filed a petition with the Inter-American Commission on Human Rights (IACHR) for the violation of a number of rights enshrined in the

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[47] Clarification Questions & Answers, 21.
[48] Hypothetical, para 22.
[49] *Ibid*.
[50] *Ibid.*
[51] Hypothetical, para 42.
[52] *Ibid*.
[53] Hypothetical, para 43.
[54] *Ibid.*
[55] Hypothetical, para 44.
[56] *Ibid.*

ACHR.[57] The Supreme Court of Fiscalandia ruled on January, 02, 2018, that the motion to vacate filed by Magdalena Escobar was inadmissible. The IACHR declared the petition admissible on December 30, 2018.[58] On August 01, 2019, the merits were issued, finding the State of Fiscalandia internationally responsible for the violation of Article 8.1, Article 24, and Article 25 under the American Convention on Human Rights, all in relation to Article 1.1 thereof.[59]

On April 1, 2018, Maricruz Hinojosa and Sandra del Mastro filed a petition with the IACHR.[60] It was declared admissible on December 30, 2018.[61] In the merits report issued on August 12, 2019, the Commission found that the State violated the petitioners' rights under Articles 8, 13, 24, and 25 of the ACHR; all in relation to Article 1.1 of the same instrument.[62]

The State failed to comply with the recommendations.[63] Consequently, all three petitions were consolidated and submitted to the jurisdiction of the Inter-American Court of Human Rights on December 15, 2019.[64]

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[57] Hypothetical, para 45.
[58] Hypothetical, para 47.
[59] *Ibid.*
[60] Hypothetical, para 49.
[61] Hypothetical, para 51.
[62] *Ibid*.
[63] Hypothetical, paras 44, 48 & 52.
[64] *Ibid.*

V. LEGAL ANALYSIS

A. ADMISSIBILITY

1. Statement of Jurisdiction

Article 44 of the American Convention on Human Rights (hereinafter, the "ACHR" or the "Convention") asserts that "any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." The State of Fiscalandia ratified the Convention and accepted the contentious jurisdiction of the Inter-American Court of Human Rights (the "Court") in 1970. All the events in question transpired subsequent to the date of ratification. As a corollary, the Inter-American Commission on Human Rights (the "Commission" or the "IACHR") has jurisdiction *ratione temporis*; it is vested with the authority to receive and examine the complaints lodged by the petitioners regarding the alleged violation of the human rights enumerated in the Convention.[65]

2. The Exhaustion of Domestic Remedies

Article 46(1)(a) of the ACHR posits that a petitioner is required to pursue and exhaust the remedies under domestic law before the Commission renders the petition lodged as admissible. The Court has echoed that it is not its or the Commission's responsibility to identify *sua sponte* the domestic remedies to be exhausted; rather a State which avers that domestic remedies have not been exhausted is required to specify what those remedies are as well as demonstrate that such recourse would have been effective under the circumstances.[66] Fiscalandia avers that the IACHR erred in

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[65] Article 45(1), ACHR.
[66] IACHR, *Ana Victoria Sanchez Villalobos v Costa Rica,* Case No. 12.361, Report No. 25/04, March 11, 2004 para. 61; IACtHR, *Case of Chocron v Venezuela*, (Preliminary Objection, Merits, Reparations and Costs) Series C No. 227, Judgement of July 1, 2011, para. 23.

its decision that the petitions were admissible as the aforesaid requirement was not satisfied. However, the exhaustion rule is not absolute. Pursuant to the ACHR and the IACHR's Rules of Procedure, there are circumstances in which a petitioner neither has to pursue nor exhaust the remedies under domestic law.[67] In cases such as *Las Palmeras v Columbia*,[68] *Tracy Lee Housel*,[69] and *Isamu Carlos Shibayama*,[70] the Court opined that in addition to the formal existence of domestic remedies, they ought to be effective. That is, they must be available to the interested party, resolve the issue in question efficaciously and in a coherent manner as well as potentially provide the appropriate reparation.[71] Accordingly, the IACHR postulates that domestic remedies are regarded as ineffective in circumstances where there is a lack of prospects for success as this invokes the exception to the domestic remedies outlined in Article 31(2)(b) of the IACHR's Rules of Procedure.[72] Article 31(2)(b) of the Rules[73] is tantamount to Article 46(2)(b) of the ACHR. They express that a petitioner need not fulfil the exhaustion requirement where he or she has been denied access to the remedies under domestic law or has been prevented from exhausting them.

Judge Mariano Rex

In relation to Petition 255-17, the State alleged that Mariano Rex had failed to exhaust domestic remedies pursuant to Article 46(1)(a) of the ACHR by not bringing any domestic legal action to challenge the administrative decision to remove him from office.[74] Conversely, it is submitted that

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[67] Article 46(1)(a), ACHR; IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, Article 31(1).
[68] IACtHR, *Case of Las Palmeras v Colombia*, (Merits) Judgement of December 6, 2001, Series C No. 90, paras. 58.
[69] IACHR, *Tracy Lee Housel v United States*, (Admissibility) Petition 129-2002, Report No. 16/04, February 27, 2004, para 36.
[70] IACHR, *Isamu Carlos Shibayama et al. v United States,* (Admissibility) Petition 434-03, Report 26/06, March 16, 2006, para. 48.
[71] IACtHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.)* (Preliminary Objections, Merits, Reparations and Costs) Judgement of November 24, 2006. Series C No. 158, para 126.
[72] IACHR, *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v United States*, (Admissibility) Petition 161-06, Report No. 18/12, March 20, 2012, para 48.
[73] IACHR, Rules of Procedure of the Inter-American Commission on Human Rights.
[74] Clarification Questions & Answers, 23.

the former judge was prevented from exhausting domestic remedies as an action before the Supreme Court would be rendered futile and therefore, ineffective.[75]

The procedure was restricted and did not satisfy the petitioner's right to challenge the judgement for several reasons.[76] The administrative decision was arrived at by a ⅔ majority[77] in the Supreme Court[78] which is vested with the power (by the 2007 Constitution of Fiscalandia) to apply penalties against judges of all levels and specialization.[79] These judgements are binding on all public authorities[80] and the Court also has the power to render them final and unappealable.[81] Moreover, The judge had effectively exercised his right to a defence in compliance with the prescribed procedure.[82] Consequently, an expectation to yield any positive or different result is nothing less than 'an affront to common sense and logic.'[83] The Commission, therefore, did not err in its decision to admit the former judge's petition.

Magdalena Escobar

Contrary to the averment by Fiscalandia that Magdalena Escobar had failed to exhaust domestic remedies because the judgement on the merits of the motion to vacate had not been issued when Petition-110-17 was filed, it is submitted that all domestic remedies were exhausted by the time of admissibility. The Commission has the autonomy and independence to rule on the admissibility of a petition in light of the facts before it, at the moment in which it examines the complaint.[84] The

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[75] IACHR, *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, Admissibility (*supra)* para. 48
[76] *Ibid* at para. 58.
[77] Clarification Questions & Answers, 18.
[78] Hypothetical, para 41.
[79] Hypothetical, para 7.
[80] Clarification Questions & Answers, 7.
[81] Hypothetical, para 7; Clarification Questions & Answers, 51.
[82] Hypothetical, para. 18.
[83] ACHPR, *Sir Dawda K. Jawara v. Gambia*, Communication 147/957&149/96, 27th Ordinary Session, 11 May 2000, para. 34.
[84] IACHR, *Cistoria Jimenez Morgan and Sergio Jimenez v Costa Rica, (supra)*; IACHR, *Ana Victoria Sánchez Villalobos et al. v Costa Rica*, *(supra)* para. 45; IACHR, *Jose Rodriguez Danin v Bolivia*, Petition 506-05, Report No. 2/08, March 6, 2008, para. 56.

Commission evaluates the admissibility of a petition at the time in which it is being evaluated rather than the filing date.[85]

The IACHR had rendered the petitioner's complaint admissible on December 30 2018.[86] By that time the domestic remedies had been exhausted. This is evinced by the Supreme Court of Fiscalandia's ruling, on January 02, 2018, that the motion to vacate filed by Magdalena Escobar was inadmissible since the decision to appoint Domingo Martinez as the new Prosecutor General was irreversible.[87]

Further, the Court has opined that the means of attaining justice and preserving legal certainty should not be renounced for the sake of mere formalities.[88] The Commission's conduct should not be reviewed unless there has been an egregious error that infringes a party's right of defence.[89] A complaint or difference of opinion of the Commission's action is insufficient.[90] Thus, the onus of proof is on the party averring the violation to demonstrate how a specific procedure or practice infringed its right of defence. Therefore, the State of Fiscalandia has a heavy burden to prove that the IACHR has infringed its right of defence. As can be seen from the facts, the State's right to defence has not been interfered with.

Maricruz Hinojosa, et al.

On March 17, 2018, the Supreme Court of Justice denied the petitioners' extraordinary appeal.[91] Notwithstanding this, the State claims that the petitioners had failed to exhaust domestic remedies

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[85] *Ibid*.
[86] Hypothetical, para 47.
[87] Hypothetical, para 42.
[88] IACtHR, *Cayara Case*, (Preliminary Objections) Judgment of February 3, 1993, Ser. A No. 14, para. 42.
[89] IACtHR, *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) (supra)*, para. 66; IACtHR, *Case of the Saramaka People v. Suriname*. (Preliminary Objection, Merits, Reparations, and Costs) Judgment of November 28, 2007, Series C No. 172, para. 32.
[90] IACtHR, *Case of Castañeda Gutman v. México*, (Preliminary Objections, Merits, Reparations, and Costs) Judgment of August 6, 2008, Series C No. 184, para. 42.
[91] Hypothetical, para 39.

by not filing a motion to vacate. Contrarily, the Supreme Court of Fiscalandia has held that since Nominating Boards were "intermediate entities", their actions could not be challenged in a motion to vacate.[92] Thus, the filing of a motion to vacate before that same Court had no reasonable prospect of success[93] and would be rendered futile.[94]

Moreover, the Commission has posited that an alleged victim need not exhaust all remedies available; it is sufficient that the petitioner utilized any lawful and appropriate alternative under the domestic law and that the State had the opportunity to remedy the matter within its jurisdiction.[95] The filing of the extraordinary appeal by the petitioners illustrates their attempt to resort to a lawful and appropriate alternative and the Supreme Court was given the opportunity to remedy the complaint within Fiscalandia. Consequently, all domestic remedies were exhausted. For these reasons, the Commission rightfully admitted Petition 209-18 pursuant to Article 46.[96]

B. ARTICLE 13 - FREEDOM OF EXPRESSION

1. Nature and Scope of Article 13

Article 13 of the American Convention elucidates the right to freedom of thought and expression. It is imperative to highlight that such a right is multifaceted; not confined to the parameters of protection of the expression of one's own thoughts, but affords protection of the right and freedom to seek, receive and impart information and ideas of all kinds.[97] Article 13.1 has both an individual

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[92] Clarification Questions & Answers, 35.
[93] IACHR, *Juvenile Offenders Sentenced to Life Imprisonment Without Parole (supra)*, para. 47.
[94] IACHR, *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, *(supra)* para. 48.
[95] IACHR, *Marcela Andrea Valdes Diaz v Chile*, (Admissibility) Petition 12.337, Report No. 57/03, October 10, 2003, para. 40.
[96] ACHR.
[97] IACtHR, *Case of Claude-Reyes et al.* (Merits, Reparations, and Costs) Judgment of September 19, 2006, Series C No. 151, para 76.

and social dimension.[98] Both dimensions provide robust guarantees for the freedom of thought and expression,[99] facilitated by the generous approach adopted in their application.[100] As a corollary, the guaranteed relationship between the receipt and expression of information is to be recognized as a mechanism essential to the maintenance of a democratic society.

The consolidation and development of democracy depends upon the existence of freedom of expression.[101] Meaning, the development of knowledge and understanding among people will lead to a true tolerance and cooperation among the nations, however this can only be achieved through the right to freedom of expression.[102] Consequently, freedom of expression is an indispensable requirement for the existence of a democratic society.[103] In fact, the right gains its prominence and importance from its structural relationship to democracy.[104] The function bestowed upon the right entails the prevention of the consolidation of authoritarian systems, the facilitation of personal and collective self- determination[105] and the maintenance of effective citizen oversight and complaint mechanisms, rendering it the key instrument for the exercise of fundamental human rights.[106]

The right to access information held by the State is a particularly indispensable concept to the strengthening and preservation of a democratic society.[107] The undeniable connection between the

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[98] IACtHR, *Case of Ricardo Canese*, (Merits, Reparations and Costs) Judgment of August 31, 2004, Series C No. 111, paras. 77-80.
[99] Antkowiak T and Gonza A, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017).
[100] IACtHR, Advisory Opinion OC-5/85, on *Compulsory Membership in an Association Prescribed by law for the Practice of Journalism*, November 13, 1985, Series A No. 5, para. 50.
[101] IACtHR, *Case of Ricardo Canese v. Paraguay, (supra)*; *Case of Claude Reyes et al v. Chile, (supra).*; Declaration of Principles on Freedom of Expression, 2000. IACHR, OAS.
[102] IACHR, Declaration of Principles on Freedom of Expression, Preamble.
[103] IACHR, Declaration of Principles on Freedom of Expression, Principle 1.
[104] IACtHR, *Case of Perozo et al. v Venezuela*. (Preliminary Objections, Merits, Reparations, and Costs) Judgment of January 28, 2009. Series C No. 195, para. 116.
[105] IACtHR, *Case of Rios et al. v Venezuela*. (Preliminary Objections, Merits, Reparations, and Costs) Judgment of January 28, 2009, Series C No. 194, para. 105.
[106] *Ibid.*
[107] IACHR, Declaration of Principles on Freedom of Expression.

right to access information and democracy[108] is alluded to in San Miguel Sosa v Venezuela.[109] The judgment establishes that the lack of explanations by the State strengthened the hints that the women were dismissed due to political reasons and "without an effective guarantee to freedom of expression, the democratic system weakens and they suffer the break of pluralism and tolerance.[110] This also demonstrates the positive obligation of the State to ensure the full and free enjoyment of human rights.[111]

2. Violation of Article 13

The State is responsible for the acts of its organs as a matter of *jus cogens.*[112] Article 13 of the UN Convention Against Corruption, which the State of Fiscalandia has ratified in July 2004, provides that Each State Party shall take appropriate measures to fight corruption by: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes and (b) Ensuring that the public has effective access to information.[113]As such, the state owed a duty to the petitioners to ensure effective access to information and enhance transparency in decision making processes, which the State failed to do when the Nominating Board failed to provide reasons.

Further, Article 13 effectively protects the right of individuals to request access to State-held information and confers a positive obligation on the State to provide it so that the individual will be sufficiently answered where there has been a request.[114] This is done through the emission of

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[108] UN Special Rapporteur for Freedom of Thought And Expression, OEA/Ser.L/V/II. Doc. 30, 17 March 2019
[109] IACtHR, *Case of San Miguel Sosa et al. v. Venezuela*, (Merits, Reparations and Costs) Judgment of February 8, 2018, Series C No. 348.
[110] *Ibid.*
[111] IACtHR, *Case of Velásquez Rodríguez v. Honduras.* (Merits) Judgment of July 29, 1988, Series C No. 4, para.166.
[112] IACtHR, *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, (Merits, Reparations and Costs) Judgment of February 5, 2001. Series C No. 73.
[113] UN Convention Against Corruption, Art. 13.
[114] IACtHR, *Case of Claude - Reyes et al* . (supra) para. 76.

the principle of maximum disclosure which must guide the interpretation of the right to seek, receive and impart information in a democratic society.[115] The effect of such a principle is that any information in the State's control is presumed to be accessible which means the reasons of the Nominating Board for the exclusion of the petitioners should be available to them upon request. This is also supported by the IACHR in the Inter-American Juridical Committee Resolution CJI/RES.147 (LXXIII-O/08). [116]

The principle of maximum disclosure, as well as the contents of Article 13.2, asserts that the right to access information is not absolute, however exceptions should be interpreted very restrictively.[117] In order to determine whether the restriction is valid, the considerations must be derived from the stipulations of Article 13.2, those being; 1) the restrictions must be previously established by law; 2) they must be intended to ensure the rights or reputation of others or to protect national security, public order, or public health or morals; and 3) they must be necessary in a democratic society.[118] Specifically pertaining to access to information, only exceptional limitations that are previously established by law in the case of a real and imminent danger that threatens national security in democratic societies are permitted.[119] In the case at hand, these conditions are not met. The restriction, which would be the failure to disclose reasons, is not previously established in law and cannot be, in the proper sense of the word, "necessary" in a democratic society such as Fiscalandia, in that it is not required by a compelling government interest.

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[115] IACtHR, *Case of Claude-Reyes et al.* (supra) para. 76.
[116] Inter-American Juridical Committee. Resolution 147 of the 73rd regular period of sessions. Principles on the Right of Access to Information. August 7, 2008. Principle 1.
[117] IACtHR, *Case of Herrera-Ulloa,* (Preliminary Objections, Merits, Reparations and Costs) Judgment of July 2, 2004. Series C No. 107, para. 120.
[118] *The Right to Access to Public Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks*. III. Series. OAS official records; OEA/Ser.L/V/IICIDH/RELE/INF.7/12 para.15; *Case of Herrera-Ulloa. (supra)*, para. 120.
[119] IACHR, Declaration of Principles on Freedom of Expression, principle 4.

The State is in violation of Article 13 through the acts of the Nominating Board. The Nominating Board failed to provide reasons to the petitioners pertaining to their non-selection for the position of Prosecutor General, which was owed to them under Article 13 as demonstrated throughout the discussion. The restriction imposed cannot be deemed valid as it does not satisfy the enumerated requirements, therefore there is no justification for the failure to provide reasons.

C. ARTICLE 24 - RIGHT TO EQUAL PROTECTION

1. Scope and Nature of Article 24

All persons are equal before the law.[120] Consequently, they are entitled, without discrimination, to equal protection of the law.[121] The right enshrined in Article 24 restates the principle established in Article 1(1) which provides that all States must respect and ensure the enshrined rights, without discrimination regarding "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[122] Contrastingly however, crucial to its application is the irrefutable distinct reference to discrimination as a whole in Article 24 which welcomes a generous interpretation, as opposed to Article 1(1) which prohibits discrimination specifically with regards to enumerated rights.[123] The distinction must herald a distinction in interpretation and application; Article 24 mirrors the values succinctly portrayed in Article 1(1), but goes beyond this scope, being empowered by the generality in its wording, to provide and promote equality before the law.

Direct discrimination occurs when, for a reason related to one or more prohibited grounds, a person or group of persons is treated less favourably than another person or another group of persons is,

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[120] Article 24, ACHR.
[121] *Ibid.*
[122] Article 1(1), ACHR.
[123] IACtHR, *Case of Gretel Artavia Murillo et al ("In Vitro Fertilization") v. Costa Rica*, (Preliminary Objections, Merits, Reparations and Costs) Judgement of November 28, 2012, Series C No. 257, para 17.

has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.[124] The link between human rights and democracy indicates that the prohibition of discrimination is an essential tenet to the foundation of a democratic society. The Inter American Democratic Charter confirms this, recognizing the respect for human rights and fundamental freedoms as displayed in Article 24 as being a crucial element of representative democracy,[125] stating that the principle of non-discrimination is one of the pillars of any democratic system and a fundamental basis[126] of the system of human rights protection established by OAS.[127]

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual in a freely democratic society.[128] That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority.[129] It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.[130] The unequal treatment of a human being before the law which is directly attributable to his uniqueness and individuality is impermissible according to the standards of international law. The principle of non-discrimination and the right

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[124] Declaration of Principles on Equality 2008 The Equal Rights Trust.
[125] IACHR Alerts About Further Weakening of Rule of Law in Venezuela Ahead of New Presidential Mandate. January 09, 2019. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2019/005.asp
[126] IACHR, *Maria Eugenia Morales de Sierra v Guatemala,* Case 11.625, Report No 4/01, January 19, 2001, para. 36.
[127] IACHR, Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non- Discrimination, Section A, Annual Report of the Inter- American Commission on Human Rights, 1999, Chapter VI.
[128] IACtHR, Advisory Opinion OC-4/84 on *'Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica'*, January 19, 1984, Series A No. 4.
[129] *Ibid.*
[130] *Ibid.*

to equal protection of the law, "which are the essence of human rights, are norms of jus cogens."[131] Hence, it is evidenced that the right enshrined in Article 24 is of crucial importance and should be enforced accordingly.

2. Violation of Article 24

In the case herein, there are two petitions in which petitioners, Magdalena Escobar, Maricruz Hinojosa and Sandra del Mastro, have asserted that the State has violated their rights enshrined in Article 24.[132] The Courts are empowered to make such inferences based on the well-founded evidence and impositions of fact presented in the case,[133] as such a positive case lies within the assertions. When discrimination results from distinctions based on one of the enumerated categories included in non-discrimination provisions of human rights treaties, such as Article 1(1) of the American Convention, thereby giving rise to what the Commission has termed "suspect categories," a higher standard of analysis than "objective and reasonable" should be employed.[134] This means that the restriction must be "overriding or urgent" and "least restrictive of the protected right".[135] The aims behind the restriction may not be unjust or unreasonable; they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[136] Since "sex" and "political opinion" are enumerated, this is the standard which must be applied. In addition, in demonstrating the violation, arguments presented by the national judicial authorities, their actions, the language used, and the context the judicial decisions must be analyzed.[137]

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[131] IACtHR, Advisory Opinion OC -18/03 on '*Juridical Conditions and Rights of the Undocumented Migrants'*, September 17, 2003, Series A No. 18.
[132] Hypothetical, paras. 24 and 38.
[133] IACtHR, *Case of Gangaram Panday*, (Merits, Reparations and Costs) Judgment of January 21, 1994, Series C No.16.
[134] *Gretel Artavia Murillo et al ("In Vitro Fertilization") v. Costa Rica, (supra)* para 21.
[135] *Ibid.*
[136] IACtHR, Advisory Opinion OC-4/84 on *'Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica'*, *(supra)*, para. 57.
[137] *Ibid.*

With respect to Maricruz Hinojosa and Sandra del Mastro, for the position of Prosecutor General, 75 men applied and 8 women.[138] The rules of scoring the candidates were clearly stated, communicating that those who did not acquire 75 or higher would be discarded.[139] After scoring, the Board did not adhere to this, applying other regulations which resulted in 25 men and 2 women remaining.[140] Both women had the highest score,[141] including a perfect score on the proficiency test,[142] yet they were not selected. While the decision was one at the discretion of the Board, it was clear that both women had the most impressive careers, and were most apt for the position in comparison to the other 25 men. This was demonstrated as they were congratulated in the interviews and only asked one question.[143] The overall scores and weight of the different methods of assessment were revealed, confirming that both women had attained significantly higher than Mr. Martinez.[144] Yet, Domingo Martinez, who was ranked significantly lower than both women and maintained undeniable ties with the President Obregon, was chosen.[145]

The seemingly automatic appointment of Domingo Martinez, in addition to his numerous connections with the President, raises the strong presumption that his appointment was politically motivated. There was no information presented which one could reasonably ascertain that he had some quality setting him apart from the other candidates as more suitable for the position. Coupled with the profound successful reputation and suitability of the Petitioners for the position, discrimination on the basis of political opinion is evident. The facts of the situation indicate clearly, that both petitioners were more suitable for the position. The context of the situation, being

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[138] Hypothetical, para. 28.
[139] Hypothetical, para. 31.
[140] Hypothetical, paras. 31 and 32.
[141] Hypothetical, para. 32.
[142] Clarification Questions & Answers, 54.
[143] Hypothetical, para. 35.
[144] Clarification Questions & Answers, 64.
[145] Hypothetical, para. 36.

characterized by the numerous actions being brought against the State depicting the wrongdoings and corrupt activities of President Obregon, confirms the likelihood of discriminatory practices on numerous bases.

Furthermore, Domingo Martinez, making it his first point of duty to interfere with the investigation of the President, leaves little hope for the absence of discrimination in his appointment, against Maricruz Hinojosa and Sandra del Mastro. The actions of the newly appointed Prosecutor General reiterate the strong affiliation and allegiance to the political motives of the President. Sandra del Mastro and Maricruz Hinojosa have presented no such connection or willingness to conform to any corrupt motives or political bias towards the President, had they been elected. The difference in political opinion is surely distinct enough to be apparent to the President and the Nominating Board, as evidenced by the appointment. The State, therefore, is in breach of Article 24 due to the discrimination against the petitioners on the basis of political opinion; the restriction was definitely not overriding or urgent in nature, nor was it the least restrictive option.

The Convention on the Elimination of All Forms of Discrimination against Women which Fiscalandia has ratified states that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; and (c) The right to free choice of profession and employment.[146] Maricruz Hinojosa and Sandra del Mastro, were the two most qualified candidates at the conclusion of the grading of the background of the candidates. All other 25 men ranked below them. Despite this, the Nominating Board, which issued the ranking

[146] Convention on the Elimination of All Forms of Discrimination Against Women, Article 11.

themself, indicating the acknowledgement of the fact that both women were most qualified, chose a man. This is to be interpreted against the background of gender inequality in Fiscalandia which desperately needs intervention, exhibited by the initiative in the Legislative Assembly for a Gender Parity Law.[147] The general attitude towards gender equality in the organs of State can be represented by the Chief Justice's public opposition to the implementation of laws promoting gender equality[148] and the fact that only two women were appointed as heads of oversight bodies and they were in the Judicial Council.[149] There is no evidence to suggest that the restriction was overriding or urgent or the least restrictive method, in fact, this is extremely doubtful given the nomination board's failure to state reasons. Accordingly, it is asserted that Maricruz Hinojosa and Sandra del Mastro's right to equal protection of the law, enshrined in Article 24 of the Convention has been violated by the State as they have been discriminated against on the grounds of political opinion and gender.

Magdalena Escobar's situation should also be viewed in light of the same context, as these were the conditions present in the democratic society of Fiscalandia at the time. The President of the Republic instituted a resolution to remove Magdalena two days after she ordered the immediate creation of a special unit to investigate possible crimes stemming from the META emails which involved him and his relatives.[150] It is evident that Magdalena and the President had conflicting political opinions, or at the very least, that the President did not agree with Magdalena's actions which would affect the political sphere. It was made very clear that President Obregon was particular about persons in such high-ranking positions "sharing his government's perspective on

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[147] Clarification Questions & Answers, 33.
[148] *Ibid.*
[149] Clarification Questions & Answers, 47.
[150] Hypothetical, para. 19.

the country,[151] which Magdalena did not. President Obregon's disdain could be further demonstrated where she was assigned to serve as a district prosecutor in Morena, two hours from Berena, which is known for its high rates of gang violence,[152] seemingly punishing her for her political difference and ensuring that she was prevented from interfering with the META case. Article 1(1) of the convention confirms that discrimination may be on the grounds of political opinion.[153] As such, where equal protection was not afforded to Magdalena, because of her difference in political opinion, there was a violation of her right enshrined in Article 24. This restriction was not urgent or overriding, nor was it the least restrictive option. Accordingly, the State is in violation of Article 24, for the discrimination against Magdalena on the grounds of political opinion.

D. ARTICLES 8 & 25 - RIGHTS TO A FAIR TRIAL AND JUDICIAL PROTECTION

The right to a fair trial is a primary due process provision. Pursuant to Article 8.1, "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." The right to a fair trial is further buttressed by Article 25 which mandates that the domestic recourse should be simple, prompt and effective. "According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. As such it is emphasized that for a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must

[151] Hypothetical, para. 17.
[152] Clarification Questions & Answers, 10.
[153] Article 1(1), ACHR.

be truly effective in establishing whether there has been a violation of human rights and in providing redress. Therefore, a remedy which proves illusory because of general conditions prevailing in the country, or even in the particular circumstances of the case, cannot be considered effective."[154]

The Commission proffered direction on the relationship between both Articles in *Velásquez-Rodríguez v. Honduras*, stating that "States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1))."[155] The Court has maintained this view with constancy in cases such as *Pueblo Bello Massacre*,[156] *Almonacid Arellano*,[157] and *Chitay Nech v Guatemala*.[158] Furthermore, the Articles must be taken into consideration in light of Fiscalandia's obligations under Articles 1(1), that is the obligation of Non-Discrimination, as well as 2 of the Convention.

1. The Reasonable Time Requirement

Article 8(1) explicitly grants persons the right to a hearing within a reasonable time. This due process provision is inextricably linked to Article 25, thus, a hearing delivered outside the scope of a 'reasonable time' is inevitably ineffective. 'Justice delayed is justice denied'. It is understood that judicial protection does not give rise to the guarantee of a favourable outcome; however, the desired outcome must be possible. In the instant case, the State of Fiscalandia has committed an

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[154] IACtHR, Advisory Opinion OC-9/87 on *'Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights'*, October 6, 1987, Series A No 9, para. 23.
[155] *Velásquez-Rodríguez v. Honduras*, *(supra)* para. 91.
[156] IACtHR, *Case of the Pueblo Bello Massacrre v Columbia*, (Merits, Reparations and Costs) Judgment of January 31, 2006 Series C No. 140, para 169.
[157] IACtHR, *Case of Almonacid Arellano et al v Chile,* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 26 2006, Series C No. 4, Separate Opinion of Judge A.A. Trinidade, para 24.
[158] IACtHR, *Case of Chitay Nech et al. v Guatemala*, (Preliminary Objections, Merits, Reparations, and Costs) Judgment of May, 25, 2010, Series C No. 212, page 52 at para 190.

egregious breach to Magdalena's rights to a fair trial and judicial protection by not delivering the final judgement within a reasonable time.

The Commission takes several factors into consideration whenever it is determining whether there was an unreasonable delay. In the case of *Suarez-Rosero v Ecuador*, the IACHR stated that it ought to consider the complexity of the case, procedural activity of the interested party, and the action of the judicial authorities.[159] Firstly, The complexity of the case includes what is at stake.[160] The Constitution of Fiscalandia states that a Prosecutor General stays in office for a lifetime subject to removal on serious grounds and for good cause.[161] Thus, the Petitioner's rights to irremovability from office, due process, work, and the guarantee of autonomy of the Office of the Prosecutor General were at stake.[162] In *Chan v Guyana*,[163] it was held that an adjournment of the trial for two days in a death penalty case amounted to a violation of the reasonable time requirement. The *Chan Case*[164] illustrates that the reasonableness of time depends on the circumstances of the case and not the factual amount of time that has elapsed. This also applies to civil cases. In *Milton Garcia*, the IACHR decided that the workers' social rights were not protected as the delay indicated a lack of effectiveness of the courts in protecting human rights.[165] Therefore, while a close to 7 months wait for a final judgement is *prima facie* reasonable, it amounted to unreasonable delay in this case.

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[159] IACtHR, *Case of Suárez-Rosero v. Ecuador*, (Merits) Judgment of 12 November 1997. Series C No. 35, para 72; IACtHR, *Case of García Asto and Ramírez Roja v Peru*, (Preliminary Objections, Merits, Reparations and Costs) Judgement of November 25, 2005. Series C No. 137, para 166.
[160] UN Human Rights Committee Report, *Case of Lawrence Chan v Guyana*, U.N. GAOR, 61st Sess., Supp. No. 40, U.N. Doc. A/61/40, Vol. II, Annex V, sect. E, at 23 (Jan. 1, 2006).
[161] Hypotethical, para 13.
[162] Hypothetical, para 23.
[163] *Case of Lawrence Chan v Guyana*, Report of the Human Rights Committee, *(supra).*
[164] *Ibid.*
[165] IACHR, *Milton García Fajardo et al. v. Nicaragua*, Case 11.381, Report No. 100/01, October 11, 2001, paras. 51 and 53.

Also, the Extraordinary Presidential Decree was announced on the 14 June 2017. Regarding the second criterion, the Petitioner took only two days to file a motion to vacate challenging its validity.[166] She also sought injunctive relief for a temporary suspension in order to preclude any irreparable harm to her rights.[167] It is submitted that Magdalena Escobar's actions illustrate her cooperation with the process to ensure that a simple, prompt and effective final judgement could be made.

On the other hand, the actions of the judicial authorities provide substantial evidence that there was in fact unreasonable delay. Although the temporary suspension was granted, the Second Chamber of Appeals of Berena overturned it ten days later[168] despite the possibility of this resulting in irreparable harm. Moreover, a general timeline of the selection process for the new Prosecutor General was published twice in the official newspaper of national circulation.[169] Hence, the motion to vacate could not have reasonably been adjudicated in January 2018 where the publications stated that the position in dispute was to be filled by September 2017. In light of the foregoing, the Petitioner's rights to a fair trial and judicial protection were infringed by Fiscalandia as a result of the unreasonable delay in delivering the final judgement.

2. The Requirement of an Independent and Impartial Tribunal

Article 8.1 of the Convention guarantees the right to be heard by a competent, independent and impartial tribunal. Independence primarily refers to the autonomy of the bodies in question, this specifically relates to the body's relationship with other organs of State.[170] Impartiality, on the

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[166] Hypothetical, para 26.
[167] Hypothetical, para 27.
[168] Hypothetical, para 24.
[169] Hypothetical, para 26.
[170] IACtHR, *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, (Preliminary Objection, Merits, Reparations, and Costs) Judgment of August 5, 2008, Series C No. 182, paras. 55–56.

other hand, pertains to the handling of the issue itself. The doctrine of impartiality maintains that decision makers are prohibited from forming premeditated opinions which operate to sway the outcome of a decision.[171] The crucial importance of independence, with regards to the administration of justice, is demonstrated in the Follow-up Report-Access to Justice and Social Inclusion: the road towards strengthening democracy in Bolivia. The Inter-American Commission referred to the concept of independence as a condition *sine qua non* for compliance with the standards of due process established by international law.[172] It is inherent then, that any departure from independence is to be deemed an egregious breach of fundamental rights under international law.[173] Impartiality proves just as important. A decision maker must act fairly, being subjectively free from all prejudice to exclude the perception of doubt.[174] Both pillars, independence and impartiality, are enshrined in Article 8.1, proving that without their undoubtable presence, a State is in breach of the fundamental human rights to a fair trial as well judicial protection.

Mariano Rex

The former judge Mariano Rex was granted the necessary time to exercise his right of defence by the Supreme Court prior to its decision to remove him from the bench.[175] Prima facie, 'fairness' the hallmark of justice,[176] has been upheld. However, it is submitted that the State of Fiscalandia had violated the former judge's right pursuant to Article 8(1).[177] As illustrated above, the requirement of an independent and impartial judiciary, though inter-related, are distinct from one

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[171] *Ibid.*
[172] IACHR Annual Report 2009. Chapter V. Follow-up Report- Access to Justice and Social Inclusion: The Road towards strengthening democracy in Bolivia. OEA/Ser/L/V/II.135.Doc.40, August 7, 2009, para.77.
[173] Bantekas I and Oette L, *International Human Rights Law and Practice* (2nd edn Cambridge University Press 2016), page 378.
[174] Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, *(supra)*, para. 56
[175] Hypothetical, para 41.
[176] I Bantekas and L Oette, *International Human Rights Law and Practice*, *(supra)* page 379
[177] ACHR.

another. Therefore, it is in fact possible for the State of Fiscalandia to have violated Mariano Rex's right to a fair trial by merely conducting a hearing before a dependent tribunal. To prove that the Supreme Court of Fiscalandia lacks independence, regard must be had to the manner in which the justices were appointed, their security of tenure, the existence of safeguards against external pressure as well as the appearance of independence.[178] In the case of *Fell v United Kingdom*,[179] it was posited that these factors must be taken into consideration in order to decipher whether the body is independent notably of the executive and of the parties to the case. In relation to the latter, recall that the former judge was disciplined for his alleged violation of the President's right to be re-elected.[180] Thus, the President is a crucial party to the case. The Inter-American Court has stated that the independence required is not only hierarchical or institutional, but it must also be real.[181] The court has subsequently reiterated this requirement in precedents such as *Zambrano Velez v Ecuador*.[182]

Another crucial component of the guarantee of independence is the institutional independence of the judiciary from the executive and the legislature.[183] The justices of the Supreme Court are appointed, as well as suspended or removed in a single instance, by the Legislative Assembly.[184] The legislature is solely permitted to appoint judges from a list proposed by the temporary Nominating Board, whose members are directly selected by the President of Fiscalandia.[185] The

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[178] Trechel S, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), pages 53-61.
[179] ECHR, *Case of Campbell v United Kingdom*, (Merits and Just Satisfaction) Judgment of June 28th 1984 [1984] ECHR 8, para. 78.
[180] Hypothetical case, para. 41.
[181] IACtHR, *Case of Montero-Aranguren et al. (Detention Center of Catia) v Venezuela*, (Preliminary Objection, Merits, Reparations and Costs) Judgment of July 5, 2006. Series C No. 150, para. 81.
[182] IACtHR, Case of Zambrano Vélez et al v Ecuador, Zambrano Vélez et al v Ecuador, (Merits, Reparations and Costs), Judgment of July 4, 2007, Series C No 166.
[183] UN Human Right Committee, General Comment 32: Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (23 August 2007), para. 6.
[184] Hypothetical, paras. 6 and 7.
[185] Hypothetical, para. 6.

United Nations Human Rights Committee has suggested that a situation where the executive is able to control or direct the judiciary is incompatible with what constitutes an independent tribunal.[186] It is submitted that the independence of the Supreme Court is further tainted by the fact that there is no provision stated in relation to the justices' security of tenure. In addition, the sole domestic recourse to challenge the administrative decision to remove a judge from office can only be pursued within the same Supreme Court that is subject to the Legislative Assembly which is vested with the power to remove them.[187]

Moreover, the aforementioned requirement of a guarantee against external pressure has not been met. The facts admitted states that the President tweeted, subsequent to his decision to remove Magdalena Escobar from the Office of the Prosecutor General, that corrupt judges ought to be immediately removed. In the case of Apitz Barbera v Venezuela,[188] the Court acknowledged that although there is a guarantee to freedom of expression,[189] it is quintessential that those at the top of the Government exercise exceptional care when making public statements. Therefore, the right is not absolute. The Court also stated that those public statements are capable of amounting to "a form of interference with or pressure impairing judicial independence" that may induce other authorities to engage in activities that may lead to an abridgment of independence. It is submitted that the use of the phrase "removed IMMEDIATELY,"[190] amounts to threatening and intimidating language which is considered to be a threat or interference with judicial independence.[191] Despite

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[186] United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, paragraph 18.
[187] Hypothetical, para 44.
[188] *Case of Apitz Barbera et al.* ("First Court of Administrative Disputes*") v. Venezuela*, *(supra)*, para. 131.
[189] Article 13, ACHR.
[190] Hypothetical, para. 19.
[191] Principle 1.3 of Recommendation No. R (94) 12 of The Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers of the Council of Europe on October 13, 1994, at the 516th Meeting of the Ministers' Deputies.

the fact that Mariano Rex provided a valid reason for refusing to adjust the provision in the 2007 Constitution which prohibits re-election provision,[192] it is submitted that the President's threatening post may have coerced the full Court to regard the former judge's denial of the President's request as an alleged serious breach; especially because there is no security of tenure. This not only amounts to a breach of Mariano Rex's fundamental human right granted by 8(1), but also to his essential human right to an effective recourse.[193] It is submitted that a failure to comply with the requirements under Article 8(1) inexorably frustrates the former judge's right to a simple, prompt and effective recourse.

Maricruz Hinojosa and Sandra del Mastro

The profound question of impartiality and independence, rooted in the case, centers the creation and operation of the Nominating Board. Though a Nominating Board is not identical to a Tribunal, Article 8.1 which enumerates the requirement for a competent, independent and impartial tribunal utilizes the term "Tribunal" as a very welcoming and embracing concept. Jurisprudence repetitively indicates that the guarantees of Article 8 are triggered where a public authority makes a determination which affects rights and obligations.[194] The Inter- American Court has held that although Article 8 is titled "Right to a Fair Trial", its application is not limited to judicial remedies in a strict sense, but rather to the sum of requirements that must be observed in legal proceedings, to the effect that individuals are able to adequately defend their rights in view of any type of act of

[192] Hypothetical, para. 40.
[193] Article 25, ACHR.
[194] IACtHR, *Case of Baena Ricardo et al. v. Panama,* (Merits, Reparations, and Costs) Judgment of February 2, 2001, Series C No. 72, paras. 124–134; IACtHR, *Case of Constitutional Court v. Peru,* (Merits, Reparations, and Costs) Judgment of January 31, 2001, Series C No. 71.

the State which might affect them.[195] Hence, the lack of independence and impartiality of a Nominating Board will constitute a violation of Article 8.1.

The independence of justice operators is viewed in light of two dimensions: functional independence which refers to the individual independence of the decision makers and institutional or systematic independence of the decision making body with respect to other branches of government.[196] In the case, the institutional independence is undermined as the President Obregon, directly appointed the members of the Nominating Board who were appointing the Prosecutor General, a member of the judiciary.[197] The President's interference, and by extension the executive branch's encroachment, was made evident as the President posted a photo of the Nominating Board's session, indicating his presence during the deliberation or his constant communication with the Nominating Board during a "confidential" process, which is contrary to the law.[198]

For impartiality to reign, the Nominating Board's members should not have any vested interest or preference for any parties involved in the case; impartiality requires the exclusion of personal feelings or biases in the decision-making process.[199] Despite this, the appointed members of the Board had personal relationships with President Obregon: The Minister of Justice, a member of President Obregon's cabinet, was appointed.[200] In addition, the Nominating Board did not adhere to the August 15 resolution which they published regarding the selection process.[201] The initial approach was that those who scored under 75 would be discarded, however after the marks were

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[195] *Baena Ricardo et al. v. Panama*, *(supra).*
[196]IACtHR, *Case of Zambrano Vélez et al. v. Ecuador*, *(supra)* para. 122.
[197] Hypothetical, para. 25.
[198] Hypothetical, para. 27.
[199] IACtHR, *Case of Argüelles et al. v. Argentina*, (Preliminary Objections, Merits, Reparations, and Costs) Judgment of November 20, 2014, Series C No. 288, para. 168; IACtHR, *Case of Palamara Iribarne v. Chile*, (Merits, Reparations and Costs) Judgment of November 22, 2005, Series C No. 135, para. 146.
[200] Hypothetical, para. 25.
[201] Hypothetical, para. 31.

attained, the board resorted to allowing those who reached 65 to remain.[202] This exhibits a strong presumption of existing preference and active personal feelings transferred from President Obregon.

Perhaps the strongest indication of preference and personal feelings running rampant in the decision making process is the selection of Domingo Martinez, who was not the highest scorer, nor was he in the top half of the highest scorers.[203] Domingo Martinez has also worked as a legal advisor in the Berena Mayor's office during the administration of Manual Obregon who is President Obregon's brother, attended President Obregon's mother's wake and was listed as an individual donor to the #MenosEsMas party.[204] Prior to his appointment, serving as the head of the internal oversight body, Mr. Martinez engaged in various attempts to gain access to information regarding the investigation of the META emails, indicating his personal interest in the matter,[205] which was shared by President Obregon himself. His personal connection with the affairs of President Obregon is undeniable. Furthermore, in his first week in office, he replaced five prosecutors in the Special Unit dealing with the META emails.[206] In addition, it is seen that Mr. Martinez signed the aforementioned resolution banishing Magdalena for her investigations against President Obregon.[207] This venture directly related to President Obregon's motives. The general context of the situation, being that President Obregon removed Magdalena after she launched the investigation into the META emails, appointed a Nominating Board to choose another Prosecutor

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[202] *Ibid*.
[203] Hypothetical, para. 36.
[204] Hypothetical, para, 37.
[205] Clarification Questions & Answers, 3.
[206] *Ibid.*
[207] Clarification Questions & Answers, 10.

General, who when appointed made it his first order of business to interfere with the META email investigations, calls for scrutiny of impartiality of the Nominating Board.

Accordingly, the State is indeed in violation of Article 8.1 due to the lack of impartiality and independence of the Nominating Board. Flowing from this, is a violation of Article 25 which is a provision remedying the breach of fundamental rights recognized either by the State or the ACHR.[208]. By not providing simple, prompt and effective recourse for the breach of Article 8.1, the State is responsible for the breach of Article 25.

3. Due Guarantees

"Due Guarantees", as required by Article 8.1, is determined by the courts on a case by case basis; there is no exhaustive list or set guarantees which apply in every situation, the Court will apply what is relevant in the context. The Court, in making such a determination, will consider the circumstances of a particular case or proceeding—its significance, its legal character, and its context in a particular legal system—among other factors. [209] Consistently, however, the Court has identified as a due guarantee the provision of reasons for a particular decision. A breadth of case law illustrates the courts requiring explicit reasoning for a decision handed down by a public authority or domestic body, where the decision affects fundamental human rights, thus identifying it as a due guarantee.[210] The reasoning behind this is that the reasons should be revealed upon which the decision is grounded so as to exclude any perception of arbitrariness, capriciousness or unreasonableness on the part of the decision making body.[211]

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[208] Article 25(1), ACHR.
[209] IACtHR, Advisory Opinion OC-11/90 on '*Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights'*, August 10, 1990. Series A No.11.
[210] IACtHR, *Case of J. v. Peru,* Preliminary (Objections, Merits, Reparations, and Costs) Judgement of November 27, 2013, Series C No. 275, para 224; IACtHR, *Case of YATAMA v. Nicaragua*, (Preliminary Objections, Merits, Reparations, and Costs) Judgement of June 23, 2005, Series C No. 127, para 125.
[211] *J. v. Peru, (supra)*, para 224.

In the present case, due to the overall context aforementioned, it is imperative that the courts view the duty to state reasons as a due guarantee. Similar to the *Claude Reyes*,[212] the public authority had received a request for information and did not disclose the information needed to justify the decision. By not providing a response, the decision may be deemed arbitrary and unreasonable, as such the duty to provide reasons is a due guarantee. The right conferred under Article 8.1 is violated through this, and by extension, Article 25 is also violated by the State.

VI. REQUEST FOR RELIEF

Wherefore, based on the foregoing submissions, the Representative for the Victims respectfully request this Honorable Court declare the instant case admissible and:

1. Adjudge and declare that the Republic of Fiscalandia violated Articles 8(1) and 25 of the Convention, in relation to both Articles 1(1) and 2, to the detriment of Judge Mariano Rex when the Supreme Court removed him from the bench.
2. Adjudge and declare that the Republic of Fiscalandia violated Articles 8(1), 24 and 25 of the Convention, all in relation to Article 1(1), to the detriment of Magdalena Escobar when she was removed from office.
3. Adjudge and declare that the Republic of Fiscalandia violated Articles 8, 13, 24 and 25 of the Convention, all in relation to Article 1(1), to the detriment of Maricruz Hinojoza and Sandra del Mastro when the Nominating Board refused to provide reasons.

[212] *Claude Reyes et al. v. Chile, (supra)* para. 122.