INTER-AMERICAN COURT OF HUMAN RIGHTS

Maricruz Hinojoza et al.

Applicants

v.

The Republic of Fiscalandia

Respondent

REPRESENTATIVES OF THE VICTIMS

TABLE OF CONTENTS

TABLE OF CONTENTS 2

INDEX OF AUTHORITIES 5

I. Cases 5

A. Inter-American system of human rights 5

1. Opinions 5

2. Cases 5

a) IACtHR 5

b) IACHR 8

B. Other international courts 8

II. Legal books and articles 8

III. Reports 9

A. IACHR 9

B. Other international organizations 9

STATEMENT OF THE FACTS 11

LEGAL ANALYSIS 15

I. Admissibility 15

1. Exhaustion of domestic remedies 15

1.1. Petition 225-17/Mariano Rex v. State of Fiscalandia 15

1.2. Petition 110-17/Magdalena Escobar v. the State of Fiscalandia 16

1.3. Petition 209-18/Maricruz Hinojoza, et al. v. the State of Fiscalandia 16

II. Arguments on the merits 19

1. Application of the iura novit curia principle 19

2. The obligation to respect and ensure the rights of the Convention - Article 1 ACHR . 19

3. The positive obligations under the Convention - Article 2 ACHR 20

4. The right of access to justice - Articles 8 and 25 ACHR 20

4.1. The right to effective judicial review 20

4.2. The right to an independent tribunal 21

4.3. The right to be judged by an impartial tribunal 24

4.4. The right to simple and effective remedies 25

4.5. The obligation to investigate 26

5. The principle of legality - Article 9 ACHR 28

5.1. The unlawful removal of Mr. Rex 29

5.2. Ending the transitional period of Magdalena Escobar on an illegal basis 31

6. The right to honor and dignity - Article 11 ACHR 32

7. The right to freedom of thought and expression - Article 13 ACHR 33

7.1. State censorship 34

7.1.1. The silencing of Judge Mariano Rex 35

7.1.2. The expression of Magdalena Escobar was subjected to government control 38

7.2. The right to access state-held information 40

8. The right to participate in government - Article 23 ACHR 42

9. The right to equal protection - Article 24 ACHR 44

9.1. Discrimination based on sex 45

9.2. Discrimination based on political views 46

9.3. Terminating the appointment of Ms. Escobar amounts to discrimination 47

III. Request for relief 49

INDEX OF AUTHORITIES

I. Cases

A. Inter-American system of human rights

1. Opinions

Advisory Opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism, IACtHR, (1985).....33,34,39

Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, IACtHR, (1987).....17,25

Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, IACtHR, (2003).....44

2. Cases

a) IACtHR

Almonacid Arellano et al. v. Chile, (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006……...……..23

Andrade Salmón v. Bolivia, (Merits, Reparations and Costs, 1 December 2016……...32

Apitz Barbera et al. v. Venezuela, (Preliminary Objections, Merits, Reparations and Costs), 29 November 2006.....22,24,29,31,36,47

Argüelles et al. v. Argentina, (Preliminary Objections, Merits, Reparations and Costs), 20 November, 2014.....22

Baena Ricardo et al. v. Panama, (Merits, Reparations and Costs), 18 November 2001.....28

Barrios Altos v. Peru, (Merits), 14 March 2001……...23,27

Castillo Páez v. Peru, (Preliminary Objections, Merits, Reparations and Costs), 3 November 1997.....20

Castillo Petruzzi et al v. Peru, (Preliminary Objections), 4 September 1998.....16

Claude Reyes et al. v. Chile, (Merits, Reparations and Costs), 19 September 2006.....37,41

Constitutional Tribunal (Camba Campos et al.) v. Ecuador, (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013.....29,30,42,43

Dismissed Cong. Emp. (Aguado Alfaro et al.) v. Peru, (Preliminary Objections, Merits, Reparations and Costs), 24 November, 2006.....25,26

Espinoza González v. Peru, (Preliminary Objections, Merits, Reparations and Costs), 20 November 2014.....20

Favela Nova Brasilia v. Brazil, (Preliminary Objections, Merits, Reparations and Costs), 16 February 2017.....26

Flor Freire v. Ecuador, (Preliminary Objections, Merits, Reparations and Costs), 31 August 2016.....32

Garrido and Baigorria v. Argentina, (Reparations and Costs), 2 February 1996.....33

Girls Yean and Bosico v. Dominican Republic, (Preliminary Objections, Merits, Reparations and Costs), 8 September 2005…….…….44

Herrera Ulloa v. Costa Rica, (Preliminary Objections, Merits, Reparations and Costs), 2 July 2004.....34,37

Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, (Merits, Reparations and Costs), 21 June 2002.....19

Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and their Members v. Panama, (Preliminary Objections, Merits, Reparations and Costs), 14 October 2014.....20

López Lone et al. v. Honduras, (Preliminary Objections, Merits, Reparations and Costs), 5 October 2015.....15,36,39,43

Manuel Cepada Vargas v. Colombia, (Preliminary Objections, Merits, Reparations and Costs), 26 May 2010.....36

Mapiripàn Massacre v. Colombia, (Merits, Reparations and Costs), 15 September 2005…….. 27

Massacres de Ituango v. Colombia, (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006.....23,27

Mémoli v. Argentina, (Preliminary Objections, Merits, Reparations and Costs), 22 August 2013……...34

Moiwana Community v. Suriname, (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005……...27

Norín Catrimán et al. v. Chile, (Merits, Reparations and Costs), 29 May 2014…….44,45

Quintana Coello et al. v. Ecuador, (Preliminary Objections, Merits, Reparations and Costs), 23 August 2013.....42

Reverón Trujillo v. Venezuela, (Preliminary Objections, Merits, Reparations and Costs), 30 June 2009.....22,35,42

Usón Ramírez v. Venezuela, (Preliminary Objections, Merits, Reparations and Costs), 20 November 2009.....29

Uzcategui et al. v. Venezuela, (Merits and Reparations), 3 September 2012.....39

Vélasquez Rodríguez v. Honduras, (Reparations and Costs), 19 January 1989.....15,19

Vélez Loor v. Panama, (Preliminary Objections, Merits, Reparations and Costs), 23 November 2010……...44

Yatama v. Nicaragua, (Preliminary Objections, Merits, Reparations and Costs), 23 June 2005……...45

b) IACHR

Eduardo Rico v. Argentina, IACHR, 5 July 2017.....43

Tracy Lee Housel v. United States, IACHR, 27 February 2004.....15

B. Other international courts

Baka v. Hungary, ECtHR, 23 June 2016.....40

Harabin v. Slovakia, ECtHR, 20 February 2013.....35

Kononov v. Latvia, ECtHR, 17 May 2010.....28

Micallef v. Malta, ECtHR, 10 October 2009.....24

Mitrinovski v. The Former Yugoslav Republic of Macedonia, ECtHR, 30 April 2015…….25

Oleksander Volkov v. Ukraine, ECtHR, 9 april 2013.....32

Soratha Bandaranyake v. Sri Lanka, Human Rights Committee, 21 February 2005.....35

II. Legal books and articles

Pasqualucci, J., *The Practice and Procedure of the Inter-American Court of Human Rights*, 2013, CUP, 410p.....27,35

Medina, C., *The American Convention on Human Rights: Crucial Rights and their Theory and Practice,* 2016, Intersentia, 373p.....24,28,44

Antkowiak, T., Gonza, A., *The American Convention on Human Rights: Essential Rights,* 2017, OUP, 416p.....26,34

Lautenbach, G., *The Concept of the Rule of Law and the European Court of Human Rights*, 2003, OUP, 217p.....20

III. Reports

A. IACHR

IACHR, *The Inter-American Legal Framework regarding the Right to Access to Information* (2009).....41

IACHR, *Guarantees for the Independence of Justice Operators. Towards Strengthening Access to Justice and the Rule of Law in the Americas* (2013).....39

IACHR, *Resolution 1/18 Corruption and Human Rights,* (2018).....20,21,42

IACHR, *Corrupción y derechos humanos*, (2019).....24,26,27,34,42

B. Other international organizations

Council of Europe, *Resolution (97)24 on the Twenty Guiding Principles for the Fight Against Corruption* (1997).....39

Council of Europe, *Rule of Law Checklist*, (2016).....21,22

CEDAW, *General Recommendation No. 23, political and public life,* (1997).....45

UNHRC, *General Comment No. 18: Non-Discrimination,* (1989).....44

UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers,* (2012).....38,41

Venice Commission, *Report on the Independence of the Prosecution,* (2010).....21,22,38,41

Venice Commission, *Report on the Freedom of Expression of Judges*, (2015).....35

Venice Commission, *Report on Term Limits: Part I - Presidents,* (2018).....24,35

STATEMENT OF THE FACTS

The Fiscalandian Constitution establishes four branches of government: the executive branch, the legislative branch, the judiciary and the public oversight branch.[1] It recognizes the principles of the separation of powers and judicial independence and establishes that all institutions of the public oversight branch enjoy constitutional autonomy.[2] However, these principles sharply contrast with the reality in the Republic of Fiscalandia (hereinafter: Fiscalandia), as the executive branch exerts control over the composition of the judiciary and the public oversight branch. The President, head of the executive branch, can do so under the Nominating Boards Law.[3] This law establishes that he forms the boards that make up lists of suitable candidates for the most important positions in the judiciary, such as the Supreme Court of Justice (hereinafter: Supreme Court), and in the public oversight branch, such as the Office of the Prosecutor General.[4] Regarding the latter, the President appoints the Prosecutor General based on a shortlist of three candidates proposed by the Nominating Board.[5] Since both the judiciary and the public oversight branch have the duty to counterbalance the power of the executive branch, the President wields significant powers. Two claims brought before the Inter-American Court of Human Rights (hereinafter: IACtHR) pertain to the public oversight branch. Magdalena Escobar was the former Prosecutor General, and Maricruz Hinojoza and Sandra del Mastro were candidates in the selection process for that position.

[1] Hypothetical, §4.
[2] *Ibid.*, §2.
[3] *Ibid.*, footnote 1.
[4] *Ibid.*
[5] *Ibid.*

Ms. Escobar served as Prosecutor General from September 1, 2005 until September 15, 2017.[6] She was forced out of her position after the appointment procedure for a new Prosecutor General had ended.[7] The appointment procedure started on June 14, 2017, two days after Ms. Escobar initiated an investigation into corruption allegations that existed *vis-à-vis* the President's brother.[8] On June 16, 2017, Ms. Escobar filed a motion to vacate the call for candidates issued by Extraordinary Presidential Decree and simultaneously sought injunctive relief.[9] The injunctive relief granted at first instance was overturned on appeal and the motion to vacate was ultimately found inadmissible by the Supreme Court on January 2, 2018.[10] On August 1, 2017, Ms. Escobar filed a petition with the Inter-American Commission on Human Rights (hereinafter: IACHR), which declared her petition admissible on December 30, 2018 and issued its Merits Report on August 1, 2018.[11] The IACHR found violations of Articles 1, 8, 24 and 25 of the American Convention of Human Rights (hereinafter: ACHR or 'the Convention').[12] Since the State has failed to comply with any of the recommendations of the IACHR, the case was submitted to the jurisdiction of the IACtHR on December 15, 2019.[13]

Maricruz Hinojoza and Sandra del Mastro are career prosecutors that were candidates for the position of Prosecutor General.[14] During the proceedings and after the proficiency test, they were ranked as the top two candidates for the position.[15] However, after the subsequent interviews,

[6] Hypothetical, §14; CQ, §10.
[7] CQ, §10.
[8] Hypothetical, §19.
[9] *Ibid.*, §23.
[10] *Ibid*., §24,42.
[11] *Ibid*., §47.
[12] *Ibid*.
[13] *Ibid*., §48.
[14] *Ibid*., §32.
[15] *Ibid*.

three men who had substantially lower proficiency scores were shortlisted.[16] Unlike all other candidates, Ms. Hinojoza and Ms. del Mastro were each only asked one question after being congratulated on their careers.[17] As they received no explanation for the different way in which they were treated and since it had far-reaching consequences, they filed a writ of *amparo* to challenge the selection process.[18] Their action was declared inadmissible at first instance. The inadmissibility was affirmed on appeal, and the Supreme Court denied an extraordinary appeal on March 17, 2018.[19] Ms. Hinojoza and Ms. del Mastro filed a petition with the IACHR on April 1, 2018.[20] The petition was found admissible on December 30, 2018 and in its Merits Report of August 12, 2019 the IACHR found violations of Articles 8, 13, 24 and 25 ACHR.[21] The case was brought before the IACtHR on December 15, 2019.[22]

On April 1, 2017, President Obregón, then in office for just two months, filed a writ of *amparo* with the First Constitutional Court of Berena to challenge Article 50 of the Constitution, which establishes that a President cannot be re-elected for a second term.[23] The Court, presided by Mariano Rex, held that the right to re-election on which President Obregón based himself was not absolute and that the constitutional limitation was reasonable and proportionate.[24] The decision was appealed and the Supreme Court ruled that Article 50 of the Constitution entailed an excessive limitation, infringing the "human right to re-election" that presidents enjoy.[25] In the same

[16] *Ibid*., §36; CQ, §64.
[17] Hypothetical, §35.
[18] *Ibid*., §35,38.
[19] *Ibid*., §38,39.
[20] *Ibid*., §49.
[21] *Ibid*., §50,51.
[22] *Ibid*., §52.
[23] *Ibid*., §16,40.
[24] *Ibid*., §40; CQ, §1.
[25] Hypothetical, §41.

judgement the Supreme Court ordered Mr. Rex to be investigated for having committed a serious breach of his duty to state the reasoning for his decision.[26] Since the Supreme Court also conducts disciplinary actions against judges, on December 1, 2017 it ordered the removal of Mr. Rex after investigations.[27] On December 15, 2017, former judge Rex filed a petition with the IACHR to challenge his removal.[28] The IACHR found the petition admissible on August 8, 2018 and issued its Merits Report on February 14, 2019, finding violations of Articles 8 and 25 ACHR.[29] The case was submitted to the jurisdiction of the IACtHR after the requisite time had elapsed and Fiscalandia had failed to comply with the recommendations.[30]

[26] *Ibid.*
[27] Hypothetical, §41; CQ, §18,19.
[28] Hypothetical, §44.
[29] *Ibid.*
[30] *Ibid.*

LEGAL ANALYSIS

I. Admissibility

1. Exhaustion of domestic remedies

1.1. Petition 225-17/Mariano Rex v. State of Fiscalandia

At the admissibility stage, Fiscalandia claimed that Mr. Rex failed to exhaust domestic remedies because he had not started domestic legal action to challenge the disciplinary penalty of the Supreme Court.[31] Mr. Rex formally had two options to challenge the decision. He could have filed a motion for reconsideration with the Supreme Court or he could have filed a writ of *amparo*.[32] Under Inter-American law, the fact that domestic remedies formally exist is not sufficient to establish that the applicant has failed to exhaust them. The IACtHR has consistently held that resorting to domestic remedies should not be a senseless formality, and that they must be capable of producing the result for which they are designed.[33] In *López Lone et al. v. Honduras* it was stated that the exhaustion of domestic remedies would amount to a senseless formality if the judiciary lacks the requisite independence to rule with impartiality.[34] These principles have been formalized in Article 46(2) ACHR.

Since the Supreme Court has the authority to render final and unappealable decisions regarding *amparo* actions,[35] any of the remedies open to Mr. Rex would have been adjudicated by the Supreme Court. The Supreme Court had ordered an investigation and ultimately the removal

[31] Hypothetical, §44.
[32] CQ, §23,51.
[33] *Tracy Lee Housel v. United States*, IACtHR, (2004), §31; *Velásquez Rodríguez v. Honduras*, IACtHR, (1988), §66.
[34] *López Lone et al. v. Honduras*, IACtHR, (2015), §247.
[35] Hypothetical, §7.

of Mr. Rex on illegitimate grounds (*cfr*. 5.1). Since the Supreme Court is not independent (*cfr*. 4.2), nor impartial (*cfr*. 4.3), the pursuit of these ineffective remedies would be a mere formality.

In sum, no effective domestic review was available to Mr. Rex. Therefore, Fiscalandia's objection must be dismissed based on the exception established in Article 46(2)(a) ACHR.

1.2. Petition 110-17/Magdalena Escobar v. the State of Fiscalandia

At the admissibility stage, the State alleged that Ms. Escobar failed to exhaust domestic remedies because the judgement on the merits of her motion to vacate had not been issued at the time she filed a petition before the Commission.[36] The State's inadmissibility argument however, takes no account of the case law of the IACtHR. It has clarified in the past that a petition before the Commission can be filed in this exact situation, as long as the Commission does not act before a judgement on the merits is issued.[37] Ms. Escobar filed her petition on August 1, 2017 and her motion to vacate was adjudicated on January 2, 2018. The Commission only considered the case for the first time by declaring the petition admissible on December 30, 2018. Consequently, the State's objection of a failure to exhaust domestic remedies must be dismissed.

1.3. Petition 209-18/Maricruz Hinojoza, et al. v. the State of Fiscalandia

At the admissibility stage, Fiscalandia alleged that Ms. Hinojoza and Ms. del Mastro failed to exhaust domestic remedies because they did not file a motion to vacate. The State claims that this - and not the *amparo* remedy that they had sought - would have been the appropriate remedy for challenging the decision of the president and the resolutions passed by the nominating board.[38] However, the IACtHR considers that the mere existence of domestic remedies does not entail that

[36] *Ibid.*, §46.
[37] *Castillo Petruzzi et al. v. Peru*, IACtHR, (1998), §54-55.
[38] Hypothetical, §50.

applicants have failed to exhaust them if their pursuit would amount to a senseless formality (*cfr.* 1.1). In addition, the *amparo* remedy as a procedural institution should be a simple and prompt remedy protecting *all* fundamental rights.[39]

Ms. Hinojoza and Ms. del Mastro filed a writ of *amparo* before the Second Constitutional Court of Berena.[40] Their action was found inadmissible. The Court held that one of the actions under review, namely the appointment of the Prosecutor General, is part of the sovereign power of the executive branch of government, and is therefore not subject to review.[41] The Second Appellate Chamber of Berena affirmed this judgement and the Supreme Court denied the extraordinary appeal of Ms. Hinojoza and Ms. del Mastro.[42] The State did not convincingly clarify on what legal grounds it was held that the appointment falls outside the scope of Fiscalandia's domestic definition of *amparo*, which includes "*any act or omission, by any official, authority, or person, that threatens or violates human rights and fundamental freedoms recognized by the Republic of Fiscalandia*".[43] In any case, filing a motion to vacate would be ineffective, as the reason on the basis of which the writ of *amparo* was found inadmissible before these courts related to the nature of the action whose review was sought, and not to the nature of the procedure used. This ineffectiveness follows from the fact that this judgement of the Supreme Court, and in particular its interpretation of Fiscalandia's definition of *amparo*, is binding on the administrative court which the motion to vacate would be filed with.[44]

[39] *Advisory Opinion OC-9/87 Judicial Guarantees in States of Emergency*, IACtHR, (1987), §23.
[40] Hypothetical, §39.
[41] *Ibid.*
[42] *Ibid*.
[43] CQ, §23.
[44] CQ, §7,32.

Given the fundamental status of the *amparo* remedy, it cannot be held that a remedy with less judicial guarantees can constitute an effective remedy that should have been exhausted instead. What is more, the Supreme Court held that actions of the nominating board cannot be challenged in a motion to vacate.[45] Hence, regarding the resolutions adopted by the nominating board, Ms. Hinojoza and Ms. del Mastro exhausted all domestic remedies by filing a writ of *amparo* and pursuing the subsequent proceedings.

In conclusion, the objection Fiscalandia raised must be dismissed, as Ms. Hinojoza and Ms. del Mastro exhausted domestic remedies.

[45] CQ, §35.

II. Arguments on the merits

1. Application of the iura novit curia principle

Under the *iura novit curia* principle, the IACtHR has the judicial power to analyze possible violations of the ACHR that were not included in the filed petitions or briefs.[46] In *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* the IACtHR concluded that it had "*the power and the duty to apply juridical provisions relevant to a proceeding, even when the parties did not expressly invoke them*".[47]

Therefore, the applicants wish to invoke the following rights: the freedom from *ex post facto* laws (Article 9 ACHR), the right to honor and dignity (Article 11(1) ACHR), the freedom of thought and expression (Article 13 ACHR) and the right to participate in government (Article 23 ACHR).

2. The obligation to respect and ensure the rights of the Convention - Article 1 ACHR

As Article 1 ACHR obliges States to respect and ensure the rights and freedoms incorporated in the Convention, Fiscalandia violated this obligation. Mariano Rex's rights under Articles 2, 8, 9, 13, 23 and 25 ACHR were violated by Fiscalandia. With regard to Magdalena Escobar, Fiscalandia has violated her rights under Articles 2, 8, 9, 11, 13, 24 and 25 ACHR. Additionally, the rights of Maricruz Hinojoza and Sandra del Mastro under Articles 2, 8, 13, 23, 24 and 25 ACHR were violated by Fiscalandia.

[46] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* IACtHR, (2002), §107,187; *Velasquez Rodriguez v. Honduras*, IACtHR, (1988), §163.
[47] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* IACtHR, (2002), §107,187.

3. The positive obligations under the Convention - Article 2 ACHR

Fiscalandia violated its positive obligation under Article 2 ACHR. Fiscalandia has failed to create real judicial protection and ensure an independent and impartial judiciary, as it should under Articles 8 and 25 ACHR (*cfr.* 4). Fiscalandia has also failed to provide access to state-held information, thereby violating its obligations under Article 13 ACHR (*cfr.* 7.2). Fiscalandia failed to take measures to increase the participation of women in government, as it is obliged to do under Article 24 ACHR (*cfr*. 9.1).

4. The right of access to justice - Articles 8 and 25 ACHR

The right of access to justice refers to the constellation of guarantees for victims of human rights violations.[48] More so, an independent and impartial justice system is indispensable for effectively combating corruption.[49] Therefore, the right to have access to effective judicial review by an independent and impartial tribunal will be discussed under this encompassing right.

4.1. The right to effective judicial review

The IACtHR has held that the right to access to justice is not only one of the fundamental pillars of the American Convention, but also of the rule of law in a democratic society.[50] Essential to the rule of law is the principle of legality, that not solely requires governments to act on the basis of and within the limitations set by law, but also requires the judiciary to prevent discrepancies between the law and acts of government.[51]

[48] *Espinoza González v. Peru,* IACtHR, (2014), §237.
[49] *Resolution 1/18 Corruption and Human Rights*, IACHR, (2018), p3.
[50] *Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and their Members v. Panama,* IACtHR, (2014), §167-169; *Castillo Páez v. Peru*, IACtHR, (1997), §82.
[51] G. LAUTENBACH, *The Concept of the Rule of Law and the European Court of Human Rights*, 2003, OUP, p42.

The Second Constitutional Court of Berena refused to examine the merits of the *amparo* action brought before it by Ms. Hinojoza and Ms. del Mastro.[52] It found their action inadmissible, arguing that it could not review the appointment of the Prosecutor General, as this concerned a sovereign power of the executive branch.[53] By refusing to examine whether the President's appointment of Mr. Martínez to the position of Prosecutor General complied with the legal requirements,[54] the Second Constitutional Court of Berena acted in violation of the principle of legality, endangering the rule of law. In addition, the IACtHR has found violations of the obligation to provide effective review when the judicial power lacks the fundamental independence to render impartial decisions.[55] Since Fiscalandia's judiciary does not meet this requirement (*cfr*. 4.2), the applicant's right to effective judicial review is additionally violated on this ground.

Since review of the fundamental rights of Ms. Hinojoza and Ms. del Mastro was denied, Fiscalandia has violated its obligations under Articles 8 and 25 *juncto* Article 1 ACHR.

4.2. The right to an independent tribunal

The independence of the judiciary is a requirement that is an integral part of the fundamental democratic principle of the separation of powers. It is also vital to the right to a fair trial.[56] Judicial independence is key to combating corruption.[57] The principles of separation of powers and the right to a fair trial are regarded by the European Commission for Democracy through Law

[52] Hypothetical, §39.
[53] *Ibid.*
[54] *Ibid*., §12.
[55] *Advisory Opinion OC- 9/87, Judicial Guarantees in States of Emergency*, IACtHR, (1987), §24.
[56] *Rule of Law Checklist*, Council of Europe, (2016), p34; *Report on the Independence of the Prosecution*, Venice Commission, (2010), p16.
[57] *Resolution 1/18 Corruption and Human Rights*, IACHR, (2018), p3.

(hereinafter: Venice Commission)[58] as inconceivable without independent judges.[59] Signatory States to the Convention have a duty to ensure both the independence of the judiciary and the independence of individual judges.[60] The independence of a tribunal or judge refers to its autonomy in relation to other branches of government and their members.[61] Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch.[62]

All applicants were involved in proceedings before the Supreme Court, which plays a vital role in Fiscalandia. It renders ultimate decisions in civil, criminal and administrative law matters, its decisions in constitutional matters are binding on all public authorities, it can initiate disciplinary investigations against judges and finally, it adopts any penalty that might follow from these investigations.[63] It is therefore of paramount importance that the independence of the Supreme Court is institutionally guaranteed.

From an institutional viewpoint, there are insufficient guarantees to ensure the separation of powers. First, the Nominating Board Law empowers the President to control the composition of different high-level judicial entities, among which the Supreme Court.[64] By abusing this law, the executive branch has exerted influence during the appointment proceedings for positions in the Court of Auditors and the Office of Prosecutor General. With regard to the former, a series of

[58] The Venice Commission helps European States to bring their legal and institutional structures in line with European standards and international experience in the fields of democracy, human rights and the rule of law.
[59] *Report on the Independence of the Prosecution*, Venice Commission, (2010), p16.
[60] *Argüelles et al. v. Argentina*, IACtHR, (2014), §147; *Reverón Trujillo v. Venezuela*, IACtHR, (2009), §67.
[61] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §55.
[62] *Rule of Law Checklist*, Council of Europe, (2016), p34.
[63] Hypothetical, §7; CQ, §7,18,19.
[64] Hypothetical, footnote 1.

emails and audio recordings indicate that staff of the President's office succeeded in having their preferred candidates selected.[65]

Second, the Legislative Assembly both appoints the members of the Supreme Court and evaluates their practices.[66] *Ergo*, if the Supreme Court would adopt decisions against the interest of justice, but in the interest of the Legislative Assembly, there is no mechanism to remedy this situation. The lack of independence of the judiciary is embedded in Fiscalandia's constitutional organization.

There are clear indications that the current Supreme Court is not independent. The Chief Justice of the Court, Justice Ángel Lobo, has on multiple occasions been accused of manipulating the composition of regional courts to benefit oil exploration and exploitation companies, to the detriment of indigenous peoples rights.[67] In the case of *Amazonas Alto*, Ángel Lobo allegedly seated a relative as a judge on the competent regional court.[68] In *Amazonas Bajo*, a case brought by an indigenous community against an oil exploration company, Mr. Lobo purportedly transferred a presiding judge and replaced him with a judge who consistently ruled in favor of extractive industries in the past.[69] When faced with allegations of such a nature, Articles 8 and 25 ACHR oblige a State to conduct an investigation into their merits. *A fortiori*, this is the case when the allegation concerns those with the highest function in the judiciary.[70] However, the Legislative Assembly has dismissed all allegations with no decision on the merits.[71] Additionally, the lack of independence of the Supreme Court has led to an absurd decision on appeal that both overturned

[65] *Ibid*., §17.
[66] Hypothetical, §6.
[67] *Ibid*., §9.
[68] CQ, §27.
[69] *Ibid.*
[70] *Almonacid Arellano et al. v. Chile*, IACtHR, (2006), §112; *Massacres de Ituango v. Colombia.* IACtHR, (2006), §402; *Barrios Altos v. Peru.* IACtHR, (2001), §41.
[71] Hypothetical, §9.

the decision of the Second Constitutional Court of Berena and foresaw in disciplinary proceedings against former judge Rex. In its judgement the Supreme Court found the "human right to re-election", which as such does not exist,[72] to be *lex superior* over the term limitation of Article 50 of the Constitution.[73] All this can only be understood if one assumes that the Supreme Court exclusively has the interests of the President in mind.

In sum, given the institutional deficiencies and the particularities of the Supreme Court's composition and behavior, it must be concluded that the Supreme Court is not an independent judicial institution. Therefore, the rights of the applicants under the Articles 8 and 25 *juncto* Articles 1 and 2 ACHR are violated.

4.3. The right to be judged by an impartial tribunal

The impartiality of a tribunal refers to the relation of a tribunal with the parties in the specific matter before it.[74] To be impartial and able to make a fair ruling, a court must be free from prejudice or bias as regards its relationship with the parties in a given proceeding.[75] In order to impose a disciplinary measure, the authority responsible for imposing the measure must also conduct itself impartially.[76] According to the European Court of Human Rights' (hereinafter: ECtHR) established case law, the impartiality of justice operators must be both subjective and objective.[77] The subjective impartiality relates to the personal convictions and behavior of a justice operator,

[72] *Report on Term Limits, Part I: Presidents*, Venice Commission, (2018), §86.
[73] Hypothetical, §41.
[74] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §55-56.
[75] C. MEDINA, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice*, Intersentia, 2016, p264.
[76] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §74.
[77] *Micallef v. Malta*, ECtHR, (2009), §93.

while the objective impartiality relates to whether the tribunal itself offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[78]

The double capacity in which the Supreme Court acts in disciplinary matters is inconsistent with the required impartiality. Since the Supreme Court already ruled that a disciplinary investigation is justified, it cannot be considered an impartial tribunal when it subsequently adjudicates on the consequences of the investigations. In *Mitrinovski v. Macedonia* the applicant judge complained that the State Judicial Council (hereinafter: SJC) plenary, which dismissed him for professional misconduct, was not an independent and impartial tribunal since the judge who initiated the proceedings also took part in the SJC's decision to dismiss.[79] The ECtHR considered that the judge's dual role in initiating proceedings and taking part in the decision to dismiss the applicant failed both the subjective and objective tests of impartiality.[80]

Given the double capacity of the Supreme Court as both the instantiator of disciplinary proceedings and the judge of disciplinary measures, Mr. Rex was not judged by an impartial tribunal. Consequently, his rights under Articles 8 and 25 *juncto* Articles 1 and 2 ACHR were violated.

4.4. The right to simple and effective remedies

The judicial proceedings following the writ of *amparo* of Ms. Hinojoza and Ms. del Mastro violated the human rights standards under Article 25 ACHR. According to Article 25 ACHR, an *amparo* action should provide a simple, prompt and effective review of fundamental rights.[81] In *Aguado Alfaro et al. v. Peru*, the IACtHR found a violation after observing that "*it is clear that*

[78] *Ibid*.
[79] *Mitrinovski v. The Former Yugoslav Republic of Macedonia*, ECtHR, (2015).
[80] *Ibid.*, §45.
[81] *Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency*, IACtHR, (1987), §23.

the [victims] had no certainty about the proceeding they should or could use" to redress the violations they suffered.[82]

The Second Constitutional Court of Berena refused to examine both the appointment of the Prosecutor General and the resolutions adopted by the nominating board.[83] The latter issue was neither adjudicated on the admissibility, nor on the merits. The Court stated that the applicants should have filed a motion to vacate instead of a writ of *amparo*, if they wanted their rights assessed.[84] This argument of the Court is not only inconsistent, as it also argued that the appointment was a non-reviewable act of the executive, it is moreover in clear violation of the requirement of simplicity that *amparo* reviews should adhere to.[85] The lackluster reasoning of the Second Constitutional Court of Berena created confusion and uncertainty about the proceedings that should or could have been used, which in the past led the IACtHR to establish a violation of Article 25 ACHR.[86] The Second Appellate Chamber of Berena and the Supreme Court which examined these issues on appeal, also denied any review.[87]

For all these reasons, Fiscalandia's failure to provide a simple, prompt and effective review of fundamental rights constitutes a violation of Article 25 *juncto* Articles 1 and 2 ACHR.

4.5. The obligation to investigate

The IACtHR has defined impunity as "*the failure as a whole to investigate, prosecute, capture, try, and convict those responsible for violations of the rights protected by the American*

[82] *Dismissed Cong. Emp. (Aguado Alfaro et al.) v. Peru*, IACtHR, (2006), §129.
[83] Hypothetical, §38,39.
[84] *Ibid*.
[85] T. ANTKOWIAK, A. GONZA, *The American Convention on Human Rights: Essential Rights*, OUP, 2017, p233.
[86] *Dismissed Cong. Emp. (Aguado Alfaro et al.) v. Peru*, IACtHR, (2006), §129.
[87] Hypothetical, §39.

Convention".[88] One of the factors contributing to the transformation of corruption into a structural phenomenon is the impunity of those who engage in these practices.[89] The obligation of the States to investigate conduct that affects the human rights protected in the Convention derives from Article 1(1) *juncto* Articles 2 and 25 ACHR.[90] Whenever the State authorities become aware of conduct that has affected the rights protected in the Convention they must promptly initiate a serious, impartial, and effective investigation by all available legal means, aimed at determining the truth.[91] If there is no serious investigation, it would engage the international responsibility of the State for failure to comply with the duty to act and investigate with due diligence.[92] When State actors may be involved, States have a special obligation to establish the facts and prosecute those responsible.[93]

Ms. Escobar stated in a press conference on August 13, 2017 that new witnesses who were cooperating as part of a plea bargain had provided key information to open fresh lines of investigation "*that could reach even the highest spheres of political power*".[94] After the filing of the complaint by Ms. Escobar at the 40th Criminal Court of Fiscalandia, some hearings have been held, but no first instance judgement has been issued yet. Ever since Domingo Martínez took office as Prosecutor General, there have not been any recent developments in the investigation.[95] In cases of corruption, the obligation to investigate is an obligation of means entailing the duty to direct the efforts of the State apparatus to unravel the structures that allowed these affectations, their causes,

[88] *Favela Nova Brasilia v. Brazil*, IACtHR, (2017), §181.
[89] *Corrupción y derechos humanos*, IACHR, (2019), §268.
[90] *Ibid.*, §262.
[91] *Mapiripán Massacre v. Colombia,* IACtHR, (2005), §219; *Moiwana Community v. Suriname,* IACtHR, (2005), §147;
[92] J. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights,* CUP, 2012, p185.
[93] *Massacres de Ituango v. Colombia.* IACtHR, (2006), §402; *Barrios Altos v. Peru.* IACtHR, (2001), §41; .
[94] Hypothetical, §22.
[95] CQ, §4.

their beneficiaries, their consequences and to discover, prosecute and sanction those involved immediately.[96] To unravel this web of corruption, it is necessary to investigate extra leads and witnesses. By falling short of doing so, Fiscalandia has failed to comply with the duty to act and investigate with due diligence.

The duty to investigate corruption allegations is given further weight under Article 2(1) of the Inter-American Convention Against Corruption and Article 1(a) of the UN Convention Against Corruption (hereinafter: UNCAC). The purpose of these Conventions is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively.

For all these reasons, Fiscalandia violated its obligations under Articles 8 and 25 *juncto* Articles 1 and 2 ACHR.

5. The principle of legality - Article 9 ACHR

Article 9 ACHR establishes that everyone is free from *ex post facto* laws. In its jurisprudence, the IACtHR has attached the right to only be penalized on the basis of law to this provision.[97] A penalty conforms to the principle of legality if it is legal in two respects. The law must be law in a formal sense, meaning that it is established in law, and material sense, meaning that it is general in application.[98] According to the ECtHR, a law is law in the material sense if it is foreseeable, accessible and if it contains the elements necessary for a person to be able to know with precision what conduct is prohibited.[99]

[96] *Corrupción y derechos humanos*, IACHR, (2019), §266.
[97] *Baena Ricardo et al. v. Panama*, Merits, IACtHR, (2001), §106.
[98] C. MEDINA, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice*, Intersentia, 2016, p336.
[99] *Ibid.*, p337; *Kononov v. Latvia*, ECtHR, (2010), §185.

5.1. The unlawful removal of Mr. Rex

The IACtHR established that a law must conform to the principle of strict legality if it is part of a disciplinary system designed to allow suspension and removal penalties against members of the judiciary.[100] Accordingly, a precise definition of the punishable conduct and its elements must be given. In this regard, the IACtHR has found vague and broad definitions that give an unacceptable margin of discretion to the relevant authorities incompatible with the Convention.[101] In *Apitz Barbera et al. v. Venezuela,* the IACtHR found that in a situation where a higher judicial body can overturn a decision, judges cannot be removed on the grounds that they made an inexcusable judicial error.[102] The IACtHR concluded that such a vague norm is inconsistent with the Convention, as it endangers the independence of the judiciary.[103] In *Camba Campos et al. v. Ecuador* the IACtHR ruled that the legal opinion of a judge written in a decision can never constitute grounds for disciplinary sanctions.[104]

Article 55 of the Judiciary Act of Fiscalandia does not comply with the principle of strict legality, since it states that a failure to motivate can lead to the removal of a judge if the failure is serious and inexcusable.[105] However, the criterion "*serious and inexcusable failure to properly state the reasoning for judgments and judicial decisions*"[106] is vague, subjective and open to abuse as it gives an unacceptable margin of discretion to the Supreme Court.[107] It is therefore impossible for judges to know whether their behavior can constitute grounds for a disciplinary measure.

[100] *Usón Ramírez v. Venezuela*, IACtHR, (2009), §55.
[101] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §43-44.
[102] *Ibid.*, §82-84.
[103] *Ibid.*, §84.
[104] *Camba Campos et al. v. Ecuador*, IACtHR, (2013), §138.
[105] CQ, §19.
[106] *Ibid*.
[107] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §82-84.

Consequently, any disciplinary measure founded in this Article does not conform with the material requirement of law, and the Article itself violates the strict legality requirement.

The possibility of abuse of power that Article 55 of the Judiciary Act allows is not merely theoretical. The Supreme Court ruled that Mr. Rex had committed a "*serious breach of the obligation to properly state the reasoning of his decisions*". However, former judge Rex did extensively motivate his decision. In the appeal decision of the Supreme Court it argued that judge Rex had failed to give adequate weight to the "right to re-election" of the President when he balanced the different fundamental rights at issue.[108] *Ergo*, the decision of the First Constitutional Court of Berena was appealed because of a difference in legal opinion. The removal of former judge Rex is therefore inconsistent with the Convention.[109] It is therefore clear that Mr. Rex has been removed from the bench for alternative reasons than those officially stated (*cfr.* 7.1.1), meaning that the Supreme Court has abused its power.

For all these reasons, it must be concluded that the decision to remove Mr. Rex was not based in law. The vague and broad definition given in Article 55 of the Judiciary Act of Fiscalandia entails that any act based upon it must be considered illegal in the material sense and therefore incompatible with Article 9 ACHR. Hence, the disciplinary measure of the Supreme Court amounts to abuse of power and violates Article 9 *juncto* Article 1 ACHR. The vague criteria that were used to ground the removal penalty are incompatible with the independence of the judiciary and consequently violate Article 8(1) *juncto* Article 1 ACHR.

[108] CQ, §1.
[109] *Camba Campos et al. v. Ecuador*, IACtHR, (2013), §138.

5.2. Ending the transitional period of Magdalena Escobar on an illegal basis

The Extraordinary Presidential Decree that the President adopted to initiate an appointment procedure to select someone to the position of Prosecutor General ultimately forced Ms. Escobar from the position of Prosecutor General. This decree was based on national security grounds.[110] Nevertheless, it merely stated that the transitional period during which Ms. Escobar had held office, had come to an end.[111] The Ninth Provision to the Fiscalandian Constitution does not establish the duration of the transitional period, nor does it clarify how the duration can be established.[112]

While the Extraordinary Presidential Decree has the status of a legal norm, it fails to comply with the principle of legality understood in the material sense.[113] The IACtHR has observed that "*the States must grant provisional judges some sort of stability and permanence in office, for to be provisional is not equivalent to being discretionally removable from office*".[114] Given that it was impossible to determine the duration of the transitional period beforehand, invoking its termination was totally unforeseeable and discretionary, thereby opening the possibility of abuse of power.[115] Additionally, given that the position of Prosecutor General is of major importance in view of the separation of powers, such a deficiency is in clear violation of the Convention.[116]

Formally, the Extraordinary Presidential Decree makes conflicting and inconsistent claims. On the one hand it is adopted on national security grounds but on the other hand its *ratio legis* only

[110] CQ, §6.
[111] Hypothetical, §19.
[112] *Ibid*., §14.
[113] CQ, §6.
[114] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008), §43.
[115] *Ibid.*
[116] *Ibid.*

refers to the fact that the transitional appointment of Ms. Escobar came to an end. However, the transitional period coming to an end does not constitute a breach of national security, since these events should be foreseeable and in any case do not threaten the national security of the country. No other reasons were stated in the Decree that could amount to a national security threat. Since there is no threat, the Extraordinary Presidential Decree has no formal legal basis.

In conclusion, the Extraordinary Presidential Decree did not comply with the material and formal standards all laws should adhere to. Therefore, Fiscalandia has violated the rights of Ms. Escobar under Article 9 *juncto* Article 1 ACHR.

6. The right to honor and dignity - Article 11 ACHR

The IACtHR held in *Flor Freire v. Ecuador* that a disciplinary measure that amounts to discrimination and creates a negative perception of the person subjected to it, is in violation of Article 11(1) ACHR.[117] In *Andrade Salmón v. Bolivia* the IACtHR indicated that, in cases where the State has subjected an individual to "*hatred, stigma, public contempt, persecution or discrimination*", Article 11(1) has been violated.[118] The ECtHR ruled in *Oleksander Volkov v. Ukraine* that the illegitimate dismissal of a justice operator affects a wide range of his relationships with other persons, including relationships of a professional nature[119] resulting in a violation of the right to respect for private life.[120]

At the same moment that the Extraordinary Presidential Decree was published, the President tweeted "*Corruption is everywhere. Corrupt judges, prosecutors, and public servants*

[117] *Flor Freire v. Ecuador*, IACtHR, (2016), §152-158.
[118] *Andrade Salmón v. Bolivia*, IACtHR, (2016), §183.
[119] *Oleksander Volkov v. Ukraine*, ECtHR, (2013), §166.
[120] *Ibid*., §167.

must be removed IMMEDIATELY."[121] When the President replaced Ms. Escobar with Mr. Martínez by appointing the latter by tweet, he used the hashtags #ByeMagdalena and #IamCICIFIS.[122] This latter hashtag is part of a campaign to promote the creation of an International Commission against Impunity in Fiscalandia to combat widespread corruption.[123] The President's tweets in combination with the effects of the Extraordinary Presidential Decree leave the impression that Ms. Escobar was being removed because she is corrupt. However, the Decree never mentioned corruption charges, and there was never any substantiation of the corruption allegation.

The President's tweets amount to an attack on the honor and reputation of Ms. Escobar. The effects of the tweets on the honor and reputation of Ms. Escobar were intensified by the effects of the Extraordinary Presidential Decree, itself a discriminatory measure (*cfr*. 9.3). Since the President used his tweet to appoint Mr. Martínez to the position of Prosecutor General, it must be held that the President acted in his official capacity when he published these tweets. Therefore, the violation of Ms. Escobar's rights under Article 11(1) *juncto* Article 1 ACHR is attributable to Fiscalandia.[124]

7. The right to freedom of thought and expression - Article 13 ACHR

Article 13 of the Convention encompasses the right to freedom of thought and expression. The IACtHR considers freedom of expression to be a cornerstone upon which the very existence of a

[121] Hypothetical, §19.
[122] *Ibid*., §36.
[123] *Ibid.*, §20.
[124] *Kawas Fernández v. Honduras*, IACtHR, (2009), §85; *Garrido and Baigorria v. Argentina*, IACtHR, (1996), §10,27.

democratic society rests.[125] Moreover, the IACHR identifies this right as one of the most effective forms of combating corruption.[126]

7.1. State censorship

Article 13 ACHR essentially bans all forms of prior censorship.[127] Censorship entails "*the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to government control*".[128] The IACtHR holds that "*there are no individuals, a priori, excluded*" from its application.[129] This means that the inherent protection against prior censorship is applicable to both Mariano Rex and Magdalena Escobar. According to the IACtHR, "*it is logical and appropriate that statements concerning public officials should be given a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system*".[130] A higher threshold of protection is applied here,[131] since the statements made by Mr. Rex and Ms. Escobar both concerned the democratic functioning of Fiscalandia, making these statements in the "*community's interest*"[132]. Fiscalandia subjected their expression or dissemination of information to government control, resulting in a violation of their freedom of thought and expression in Article 13 *juncto* Articles 1 and 2 ACHR.

---

[125] *Advisory opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism*, IACtHR, (1985), §70.
[126] *Corrupción y derechos humanos*, IACHR, (2019), §185.
[127] T. ANTKOWIAK, A. GONZA, *The American Convention on Human Rights: Essential Rights*, OUP, 2017, p244.
[128] *Advisory opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism*, IACtHR, (1985), §54.
[129] *Ibid*., §34.
[130] *Herrera Ulloa v. Costa Rica*, IACtHR, (2004), §128.
[131] T. ANTKOWIAK, A. GONZA, *The American Convention on Human Rights: Essential Rights*, OUP, 2017, p238.
[132] Joint Partially Dissenting Opinion of Judges Ventura Robles, Vio Grossi and Ferrer Mac-Gregor, *Mémoli v. Argentina*, IACtHR, (2013).

7.1.1. The silencing of Judge Mariano Rex

Judge Rex presided over the First Constitutional Court of Berena, which pronounced itself on the constitutional ban on re-election, established in Article 50 of the Constitution and challenged by President Obregón. Mr. Rex ruled that the constitutional limitation was reasonable and proportionate. The Supreme Court subsequently removed Mr. Rex for an alleged failure to adequately motivate the judgement (*cfr.* 5.1*)*. However, the right to political participation is not violated by the imposition of term limits on a presidential term.[133] Removing the limits on re-election is a step backward in the process of democratic consolidation in Fiscalandia, as its constitutional introduction came after the dictatorial reign of former President Ramiro Santa María had ended.[134] Mr. Rex, therefore, defended Fiscalandia's democratic integrity when he denied the *amparo* action of President Obregón.

In *Reverón Trujillo v. Venezuela,* it was stated that "*the free removal of judges foments an objective doubt in the observer regarding the effective possibility they may have to decide specific controversies without fearing the retaliation*".[135] Additionally, a dismissal procedure of a judge that is not carried out with due process can "*constitute an attack on the independence of the judiciary*".[136] The ECtHR emphasized in *Harabin v. Slovakia* that due to the importance of the separation of powers and safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny.[137]

---

[133] *Report on Term Limits, Part I: Presidents*, Venice Commission, (2018), §86.
[134] Hypothetical, §2.
[135] *Reverón Trujillo v. Venezuela*, IACtHR, (2009), §78.
[136] *Soratha Bandaranyake v. Sri Lanka*, Human Rights Committee, (2005), §7.2.
[137] *Report on the Freedom of Expression of Judges*, Venice Commission, (2015), §65.; *Harabin v. Slovakia*, ECtHR, (2013), §149.

As stated, Mr. Rex was limited in his freedom of thought and expression, and his dissemination of information was limited by government control since he was removed, resulting in a case of prior censorship by Fiscalandia. The arbitrary dismissal of Mr. Rex violates the principles of judicial autonomy and independence,[138] while the decision to remove Mr. Rex from the bench was not based in law (*cfr.* 5.1). In *López Lone v. Honduras*, a judge was likewise removed after disciplinary proceedings because of his support for the preservation of democracy. The IACtHR found a violation of Article 13(1) ACHR[139] and referenced the UN Basic Principles on the Independence of the Judiciary, while stating that "*a situation may arise that causes a judge to feel he has a moral duty to speak out, for instance, a situation in which democracy is threatened*".[140]

Fiscalandia violated Mr. Rex's freedom of thought and expression, since a State can violate this right by creating conditions that impinge on the right to expression, which is considered to be essential to a functioning democracy as stated in *Manuel Cepada Vargas v. Colombia*.[141]

Mr. Rex was removed from the bench for, according to the Supreme Court, "*a serious breach of the obligation to properly state the reasoning for his decisions*".[142] The removal of judges based on an alleged judicial error has before resulted in violations of the Convention since the removal of judges undermines the right of judges to decide freely in accordance with the law (*cfr.* 5.1).[143] In *Baka v. Hungary* the ECtHR found that the premature termination of a court president's mandate undoubtedly had a "chilling effect" in that it must have discouraged not just

[138] J. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, CUP, 2012, p198.
[139] *López Lone et al. v. Honduras*, IACtHR, (2015), §178.
[140] *Ibid*., §173.
[141] *Manuel Cepada Vargas v. Colombia*, IACtHR, (2010), §172.
[142] Hypothetical, §41.
[143] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2006), §84.

him but also other judges from participating in public debate on legislative reforms affecting the judiciary and on issues concerning the independence of the judiciary.[144] As seen in *Uzcategui et al. v. Venezuela,* the initiation of proceedings, in the case of Mr. Rex disciplinary proceedings, can discourage an individual to express himself freely, an effect contrary to the State's obligation to foster freedom of expression.[145]

For these reasons, Mr. Rex was limited in his freedom of expression due to the initiated disciplinary proceedings and his arbitrary removal. Restrictions on the right to freedom of thought and expression can solely be compatible with the Convention if they respect four conditions. Firstly, the restriction must be based on a law, in order to remove the risk of arbitrary exercise of power by the State. Secondly, the restriction must be legitimate in that it must pursue a legitimate aim. Thirdly, the restriction must be necessary in a democratic society, meaning that it must be designed to fulfill "*an overriding public interest*"[146]. Fourthly, the restriction must be proportional.

The removal of Mr. Rex failed to respect any of the four conditions. It was demonstrated above that Mr. Rex's removal was not based in law (*cfr*. 5.1). Removing Mr. Rex from the bench was clearly aimed at silencing a dissident judge from a position in which he could defend the democratic state. Therefore, the restriction of his speech cannot be said to have had a legitimate aim as mentioned in Article 13(2) ACHR, since judicial independence is one of the cornerstones of a democratic society (*cfr.* 4.2). Additionally, this restriction was not designed to fulfill an 'overriding public interest', since the restriction was not justified on the basis of collective purposes that override the social need for the full enjoyment of the right protected by Article 13

[144] *Baka v. Hungary,* ECtHR, (2016), §167.
[145] *Uzcategui et al. v. Venezuela,* IACtHR, (2012), §189.
[146] *Herrera Ulloa v. Costa Rica,* IACtHR, (2004), §121,123.

ACHR.[147] On the contrary, the judicial independence of Mr. Rex and the correct functioning of a democratic state constitutes the social need and public interest. Therefore, the restriction suffered by Mr. Rex cannot be deemed proportionate.

For these reasons, the initiation of disciplinary proceedings and the removal from the bench of Mariano Rex, who in his capacity sought to protect the independence of the Fiscalandian judiciary as enshrined in the Constitution, is a violation of Article 13 *juncto* Article 1 ACHR.

7.1.2. The expression of Magdalena Escobar was subjected to government control

Magdalena Escobar was forced out of her function as Prosecutor General after initiating an investigation into crimes of corruption and influence peddling by confidants of President Obregón.[148] As was the case with Mr. Rex, Ms. Escobar's freedom of thought and expression was restricted since her expression or dissemination of information was subjected to government control by Fiscalandia. The creation of the nominating board in order to select a new Prosecutor General, ordered by the Extraordinary Presidential Decree issued by President Obregón following the start of the investigation, resulted in prior censorship of Ms. Escobar by Fiscalandia.

Prosecutors play a key role in protecting society from a culture of impunity, function as gatekeepers to the judiciary[149] and should be protected against outside pressure, especially against undue political influence by the executive.[150] As specified by the Venice Commission, the Prosecutor General should enjoy the guarantee of non-interference, which means that the

[147] *Claude Reyes et al. v. Chile*, IACtHR, (2006), §91.
[148] Hypothetical, §19.
[149] *Report of the Special Rapporteur on the independence of judges and lawyers*, UNHCR, (2012), §35.
[150] *Report on the Independence of the Prosecution*, Venice Commission, (2010), p16.

prosecutor's activities in procedures should be free of external pressures as well as from undue or illegal internal pressures from within the prosecution system.[151]

President Obregón initiated the selection procedure for a new Prosecutor General immediately after Ms. Escobar initiated an investigation into corruption offences. This resulted in undue political influence by the executive and a violation of Ms. Escobar's freedom of thought and expression.

Article 13(3) ACHR establishes that "*the right of expression may not be restricted by indirect methods or means*", according to the IACtHR.[152] This provision targets restrictions by the State, including abusive controls over media "*and any other means tending to impede the communication and circulation of ideas and opinions*".[153] During the corruption investigation the Office of the Prosecutor General already was the subject of harassment initiated by the head of the internal oversight body of the Office of the Prosecutor General, Domingo Martínez. This targeted harassment, aimed at hampering the investigation, can be considered a form of abusive control. The removal from office of Ms. Escobar led her to not being involved anymore in the corruption proceedings. The transfer of Ms. Escobar to a district away from Berena was an indirect method of restricting her freedom of expression. As specified by the IACHR, the act of separating a justice operator from the case he or she is hearing can be in retaliation for his or her decisions.[154] The transfer of justice operators must be done according to public, objective criteria, following a clear, pre-established procedure.[155] Consequently, if the transfer of Ms. Escobar does not adhere to objective criteria, it must be deemed arbitrary. Since the Extraordinary Presidential Decree that

[151] *Ibid*., p7.
[152] *Advisory opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism*, IACtHR, (1985), §47.
[153] *Ibid.*
[154] *Guarantees for the independence of justice operators*, IACHR, (2013), p49.
[155] *Guarantees for the independence of justice operators*, IACHR, (2013), p50.

ended her previous function as Prosecutor General and led to her transfer does not have a formal legal basis (*cfr*. 4.2), her transfer is arbitrary.

As emphasized by the IACtHR in *López Lone et. al. v. Honduras*, the effective discontinuation of a justice operator in his or her function, supporting the preservation of democracy, can result in a violation of Article 13 ACHR.[156] The undue political influence by President Obregón in the corruption proceedings initiated by Ms. Escobar, resulted in an effective removal of the Prosecutor General. Her transfer and newly assigned function constitute indirect methods of restricting the freedom of thought and expression of Escobar and results in a violation of Article 13 *juncto* Article 1 ACHR.

7.2. The right to access state-held information

The selection process for the appointment of a new Prosecutor General included several opaque criteria, such as the notion “suitable candidate” or the way in which the applicant’s backgrounds were graded.[157] Several of the excluded applicants submitted requests for reconsideration to the nominating board after the publication of their scores, since the criteria used to assess the merits of the applicants were unknown. However, all these requests were denied on the grounds that the nominating board could grade candidates “at its own discretion”.[158] According to the IACtHR in *Claude Reyes v. Chile*, Article 13 ACHR includes the right of all persons to access State-held information within the normal limitations foreseen in Article 13(2) ACHR. State authorities are governed by the “principle of maximum disclosure”, which establishes the presumption that all

[156] *López Lone et al. v. Honduras,* IACtHR, (2015), §166.
[157] Hypothetical, §28.
[158] *Ibid*., §33.

information is accessible.[159] Additionally, the right to access of information must be considered the rule and secrecy the exception.[160]

The exceptions mentioned in Article 13(2) ACHR are measures necessary to ensure national security, public order or public health or morals and cannot be invoked by Fiscalandia as they do not apply in this case. Additionally, the Venice Commission underlines that the "*method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession*".[161]

According to Ms. Knaul, former UN Special Rapporteur on the independence of judges and lawyers, "*a public competitive selection process is an objective way to ensure the appointment of qualified candidates to the profession of Prosecutor. Both selection and promotion should be transparent in order to avoid undue influence, favouritism and nepotism"*.[162] As specified by the IACHR, the rule of law requires the State to implement objective, predictable and transparent mechanisms in the selection and appointment processes for justice operators,[163] in accordance with Article 11 UNCAC. The method of selection applied by Fiscalandia could never gain the confidence of the public, due to its lack of transparency. This lack of transparency gave leeway for the executive to exercise undue influence and favouritism, which resulted in the appointment of Mr. Martínez.

The right to access to public information, including the principle of transparency, is recognized as one of the main tools in the fight against corruption.[164] According to the IACHR,

[159] *Claude Reyes et al. v. Chile*, IACtHR, (2006), §92.
[160] *The Inter-American legal framework regarding the right to access to information*, IACHR, (2009), p4.
[161] *Report on the Independence of the Prosecution*, Venice Commission, (2010), p8.
[162] *Report of the Special Rapporteur on the independence of judges and lawyers*, UNHCR, (2012), §62.
[163] *Corrupción y derechos humanos*, IACHR, (2019), §198-300.
[164] *Resolution 1/18 Corruption and Human Rights*, IACHR, (2018), p4.

States should establish active transparency obligations on information necessary for effective accountability and the fight against corruption, notably with regard to systems for public sector vacancy announcements.[165]

The non-disclosure of the methods of grading and the broader lack of complete confidentiality of the selection process amount to a lack of transparency. The refusal of Fiscalandia to provide insight in several aspects of the selection procedure for a new Prosecutor General, which is State-held information, constitutes a violation of Article 13 *juncto* Articles 1 and 2 ACHR, since no limitations were applicable in this case.

8. The right to participate in government - Article 23 ACHR

Article 23 ACHR provides that every citizen has the right to participate in government and the effective enjoyment of political rights. The IACtHR has frequently ruled that the arbitrary dismissal of judges constitutes a violation of Article 23 ACHR. In *Reverón Trujillo v. Venezuela*, the arbitrary and unequal treatment of a judge amounted to a violation of Article 23(1)(c) ACHR.[166] In *Quintana Coello et al. v. Ecuador*, the IACtHR found the rights of judges under Article 23(1)(c) ACHR violated when they were dismissed for political reasons.[167] In *Camba Campos et al. v. Ecuador* the IACtHR found that the arbitrary termination of a judge's term through his or her dismissal can lead to great harm due to the impact on judicial independence and the guarantees of impartiality.[168] The arbitrary removal of judges affects the principle of judicial independence because it eliminates the judges' guarantee to stability in their positions.[169] In these

[165] *Ibid.*, p5.
[166] *Reverón Trujillo v. Venezuela,* IACtHR, (2009), §141.
[167] *Quintana Coello et al. v. Ecuador,* IACtHR, (2013), §160-167.
[168] *Camba Campos et al. v. Ecuador,* IACtHR, (2013), §3; *López Lone et al. v. Honduras,* IACtHR, (2015), §194.
[169] *Ibid*., §198-200; *Ibid*., §161.

cases the IACtHR established a subjective right of judges to permanence in public office which cannot be affected arbitrarily. According to the IACHR, the arbitrary dismissal of a judge constitutes a denial of access to permanence of the public service and an infringement with judicial independence and guarantees of impartiality, violating Articles 23(1)(c) and 8(1) ACHR. The IACHR has argued that the IACtHR interprets Article 23(1)(c) such that the arbitrary impairment of the tenure of judges violates the rights enshrined in Articles 8(1) and 23(1)(c) ACHR.[170]

At first instance, former judge Rex denied the *amparo* action filed by President Obregón challenging the constitutional ban on re-election, lodged before the First Constitutional Court of Berena. After disciplinary proceedings, the Supreme Court ruled to remove Mr. Rex from the bench, in December 2017. According to *Camba Campos et al. v. Ecuador*, judges may only be removed for serious disciplinary offences or incompetence.[171] As established before (*cfr.* 5.1.), the dismissal of former judge Rex was an arbitrary measure in the sense that it was not based in law. Moreover, Mr. Rex had extensively stated his reasons for denying the *amparo* remedy which the President had sought. The Supreme Court disagreed with the judicial analysis of Mr. Rex and argued that he supposedly failed to give sufficient weight to the "human right to be re-elected" of the President.[172] Consequently, the grounds on which the Supreme Court decided to remove Mr. Rex make the decision arbitrary.

For all these reasons, the removal of Mr. Rex by Fiscalandia violates his rights under Articles 8(1) and 23(1)(c) *juncto* Articles 1 and 2 ACHR.

[170] *Eduardo Rico v. Argentina*, IACHR, (2017), §124.
[171] *Camba Campos et al. v. Ecuador*, IACtHR, (2013), §200.
[172] CQ, §1.

9. The right to equal protection - Article 24 ACHR

Article 24 ACHR grants the right to equal protection. This right entails the prohibition against discrimination and two autonomous rights, namely the right to equality before the law and the right to equal protection of the law.[173] These rights, and the principle of non-discrimination belong to *jus cogens*.[174] The IACtHR applies the definition of discrimination "*as differential treatment lacking a 'reasonable and objective justification'*".[175] The IACtHR links Article 1(1) ACHR to Article 24 ACHR.[176] This entails that the same parameters of Article 1(1) ACHR apply here, among which are reasons of sex and political opinion.[177] States "*must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of de jure or de facto discrimination*".[178] In *Girls Yean and Bosico v. Dominican Republic* the IACtHR reiterated that States are obligated to combat discriminatory practices and to adopt affirmative measures needed to ensure the effective right to equal protection for all people under the law.[179]

In order to respect the principle of equality and non-discrimination, it is fundamental that the State generates the optimum conditions and mechanisms to ensure that these aforementioned political rights can be exercised effectively.[180]

---

[173] C. MEDINA, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice*, Intersentia, 2016, p20.
[174] *Norín Catriman v. Chile*, IACtHR, (2014), §197.
[175] *Vélez Loor v. Panama*, IACtHR, (2010), §218 and §248.
[176] *Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, (2003), §85.
[177] *Ibid.*
[178] *Norín Catriman v. Chile*, IACtHR, (2014), §201.
[179] *Girls Yean and Bosico v. Dominican Republic*, IACtHR, (2005), §141.
[180] *Yatama v. Nicaragua*, IACtHR, (2005), §207.

9.1. Discrimination based on sex

Fiscalandia has ratified the Convention on the Elimination of All Forms of Discrimination against Women (herinafter: CEDAW).[181] Article 2 CEDAW reaffirms Fiscalandia's obligation not to discriminate on the basis of sex. Under Article 3 and 7(b) CEDAW, Fiscalandia is obliged to take positive measures to ensure women's equal access to political and public life.[182] The IACtHR has found that the obligations of States not to discriminate, formalized in Article 24 ACHR, must take account of the definitions in CEDAW.[183]

While initially there was already a remarkably low number of female candidates for the mandate of Prosecutor General, solely Ms. Hinojoza and Ms. del Mastro were withheld after the first two tests.[184] For the first test, the proficiency assessment, both women received a score of 100. They likewise received top scores for the subsequent background assessment.[185] Consequently, they were ranked first and second before the interviews started. These interviews were expected to last 30 minutes per candidate.[186] However, Ms. Hinojoza and Ms. del Mastro, contrary to the other male candidates, were only asked one question.[187] The shortlist of 3 candidates that was sent to President Obregón afterwards, contained three male candidates that had received much lower scores in the rounds prior to the interviews and the President nominated Mr. Martínez out of these three.[188] The blatant way in which Ms. Hinojoza and Ms. del Mastro were discriminated against can be made explicit on the basis of the known scores of the candidates

[181] Hypothetical, §3.
[182] *General Recommendation No. 23 on political and public life*, CEDAW, (1997), §17.
[183] *Norín Catrimán et al. v. Chile*, IACtHR, (2014), §198,201.
[184] Hypothetical, §32.
[185] CQ, §64.
[186] Hypothetical, §32.
[187] *Ibid.*, §35.
[188] *Ibid., §*36.

during the selection process. Taking account of the relative weight of the proficiency assessment, the background assessment and the interview, and given the respective scores of Ms. Hinojoza and Mr. Martínez after the first two assessments, Mr. Martínez would have to be graded 48 points higher than Ms. Hinojoza during the interviews in order for him to precede her on the candidate list.[189]

The fact that so little women were considered suitable candidates for the position of Prosecutor General and that Ms. Hinojoza and Ms. del Mastro were the only two female candidates left before the interviews is inconsistent with Fiscalandia's positive obligations under Articles 3 and 7(b) CEDAW. The discriminatory treatment of the only female candidates during the interviews is inconsistent with Fiscalandia's negative obligations under Article 2 CEDAW. Fiscalandia has discriminated against Ms. Hinojoza and Ms. del Mastro on the basis of sex and has therefore violated the rights enshrined in Articles 1, 2, 23 and 24 ACHR.

9.2. Discrimination based on political views

A second illegitimate reason for the differential treatment consists of the contrasting political views and ties of the candidates. Article 24 ACHR has been considered before in the case of perceived political opponents by the IACtHR in *Apitz Barbera et al. v. Venezuela*.[190] Ms. Hinojoza and Ms. del Mastro are both career prosecutors who investigated serious human rights violations committed by the State security forces in the 1980s.[191] Mr. Martínez is known to have donated to the party of President Obregón,[192] to have worked for the brother of the President,[193]

[189] CQ, §64.
[190] *Apitz Barbera et al. v. Venezuela*, IACtHR, (2008).
[191] Hypothetical, §32.
[192] *Ibid.*, §37.
[193] *Ibid*.

was called out by Ms. Escobar for harassing the Special Unit conducting an investigation in the alleged corruption of the President's brother[194] and acquired a luxury car the week before his selection as Prosecutor General.[195] Mr. Martínez's career is intertwined with his party loyalty and service. Additionally, the appointment as Prosecutor General of Mr. Martínez is unconstitutional. Article 103 of the Constitution of Fiscalandia, that poses the requirements for the position as Prosecutor General, establishes that a Prosecutor General is prohibited from having financial or partisan political ties that might affect his or her independence.[196] These two instances of discriminatory treatment during the selection procedure of Ms. Hinojoza and Ms. del Mastro constitute a violation of Article 24 *juncto* Article 1 ACHR.

9.3. Terminating the transitional appointment of Ms. Escobar amounts to discrimination

Ms. Escobar's tenure to the position of Prosecutor General ended because the President claimed the transitional period for which she was appointed had come to an end. Under the discussion of Article 9 ACHR, it was shown that the adoption of the Extraordinary Presidential Decree which had these effects was an unlawful and arbitrary measure. The Ninth Transitional Provision of the 2007 Constitution did not specify the duration of the transitional periods for which heads of public oversight bodies were appointed.[197]

The members of the judicial council were replaced after the expiration of their original terms of office. The duration of these terms were calculated according to pre-constitutional

[194] *Ibid*., §22.
[195] *Ibid*.,
[196] *Ibid*., §12.
[197] Hypothetical, §14.

rules.[198] The Ombudsperson of Fiscalandia, continued to serve after the expiration of the original 3-year term for which she was appointed as her tenure was renewed for an additional 3 years. Consequently, if Fiscalandia had respected the right of equality before the law, Ms. Escobar would only be replaced after her original term had ended, *i.e.* in 2020.

Since Fiscalandia treated Ms. Escobar discriminatory against all other heads of oversight bodies with regard to her replacement, it must be concluded that she was discriminated against in violation of Article 24 ACHR *juncto* Article 1 ACHR.

[198] CQ, §62.

III. Request for relief

The petitioners respectfully request this Honorable Court to declare the present case admissible and to rule that Fiscalandia has violated Articles 2, 8, 9, 11, 13, 23, 24 and 25 *juncto* 1(1) ACHR. Additionally, the petitioners respectfully request the IACtHR to order Fiscalandia to:

a. immediately reinstate Mariano Rex to his former position in the First Constitutional Court of Berena;
b. provide pecuniary reparations for the loss of income Mariano Rex has suffered;
c. adopt legislation to the effect that the Supreme Court can no longer both initiate disciplinary proceedings and rule on its final effects;
d. immediately reinstate Magdalena Escobar to the position of Prosecutor General;
e. in the case that Magdalena Escobar does not wish or is obstructed for other reasons to be reinstated to the position of Prosecutor General, to recommence the selection procedure for Prosecutor General;
f. provide pecuniary reparations for the difference in income Ms. Escobar has suffered;
g. provide pecuniary reparations to Maricruz Hinojoza and Sandra del Mastro for any financial loss they have suffered by participating in the selection process;
h. provide domestic legislation to ensure equal access to public office for men and women;
i. ensure that there are detailed rules defining the nature and exact duration of the terms of office of all senior government authorities;
j. adapt domestic legislation on the selection of justice authorities in accordance with the applicable international human rights standards;

k. build in sufficient security in the selection procedure of nominating boards to ensure the principle of separation of powers, including an obligation to disclose the guidelines applicable to the evaluation of candidates;

l. commence an independent investigation into influence peddling into the appointment procedure for the positions in the Court of Auditors and the Supreme Court;

m. create the International Commission against Impunity in Fiscalandia no later than 31 december 2020;

n. publicize the judgement of the IACtHR in the State Gazette, mainstream media and within the different branches of government by email;

o. carry out a capacitation program for public servants on adherence to the rule of law, anti-corruption policy and Inter-American case law.