INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

MARICRUZ HINOJOZA, et al.

Petitioners

v.

REPUBLIC OF FISCALANDIA

Respondent

MEMORIAL FOR THE STATE

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III. STATEMENT OF FACTS

The Republic of Fiscalandia promotes equality and transparency in a multicultural background, to preserve and enhance its efficient democracy. Fiscalandia is determined to fit international standards, having ratified most of the fundamental universal human rights treaties and accepted all optional clauses without reservation[1]. Since former President Ramiro Santa María was overthrown by a *coup d'état* in late 2005[2], the heads of public oversight bodies at the time of the entry into force of the new constitutional text remained in their positions on a transitional basis[3].

I - Regarding the situation of former judge Mariano Rex

On April 1st, 2017, the newly elected president Obregón challenged by a writ of a*mparo* the article 50 of the Constitution which bars the right to re-election[4]. The *amparo* was denied by the First Constitutional Court of Berena, presided by judge Rex[5]. The president appealed the decision and the Supreme Court granted the president's request[6].

On December 1st, 2017, the Supreme Court dismissed judge Rex on the ground of "s*erious breach of the obligation to properly state the reasoning for his decisions*" after a proper investigation and a contradictory procedure[7]. Mr. Rex did not appeal this decision[8], but filed a petition before the IACHR, alleging the violation of his right to a fair trial[9] on December 15, 2017.

[1] Hypothetical, p.1 §3.
[2] Hypothetical, p.1 §2.
[3] Hypothetical, p.3 §14.
[4] Hypothetical, p.3 §16.
[5] Hypothetical, p.9 §40.
[6] Hypothetical, p.9 §41.
[7] Hypothetical, p.9 §41.
[8] Hypothetical, *ibid.*
[9] Hypothetical p.9-10 §43.

On February14, 2019, the IACHR found the State responsible for violating the rights to a fair trial (Article 8.1) and to judicial protection (Article 25), in relation to Articles 1.1 and 2 ACHR[10].

II - Regarding the situation of former Prosecutor General Magdalena Escobar

In June 2017, journalists revealed a series of email and audio recordings supposedly exposing the existence of a huge corruption network involving numerous public officials, politicians and businessmen[11]. President Obregón was suggested the creation of an international mechanism to assist in this case[12], which Prosecutor General Escobar refused[13]. On, June 14, 2017[14], in the fight against corruption, President Obregón expressed his wish to terminate Mrs Escobar's transitional mandatory and issued an Extraordinary Presidential Decree ordering the creation of a Nominating board to elect a new Prosecutor General[15].

On June 16, 2017, Mrs Escobar filed a motion to vacate before the Tenth Administrative Court of Berena, along with an injunctive relief[16]. The motion was declared inadmissible by the Supreme Court[17] on January 2nd, 2018.

Meanwhile and before the exhaustion of domestic remedies, on August 1st, 2017, Magdalena Escobar filed a petition before the IACHR, alleging that Fiscalandia violated the ACHR.

On August 1st, 2019, the IACHR found the State internationally responsible for the violation of the rights to a fair trial (Article 8.1), equal protection (Article 24), and judicial protection (Article 25) under the ACHR, in relation to Article 1.1 of the same instrument[18].

[10] Hypothetical p.9- §44.
[11] Hypothetical, p.3-4 §18.
[12] Hypothetical, p.4 §20.
[13] Hypothetical, p.4 §21.
[14] Hypothetical, p.4 §19.
[15] Hypothetical, *ibid*.
[16] Hypothetical p.5 §23.
[17] Hypothetical p.9 §42.
[18] Hypothetical p.10 §47.

III - Regarding the situation of former candidates Sandra del Mastro and Maricruz Hinojosa

On July 15, 2017, the Nominating Board appointed to elect the new Prosecutor General published the call for candidates and the general timeline of the selection in the national newspapers twice[19]. 75 men and 8 women applied, and the Nominating Board shortlisted 44 men and 4 women candidates[20]. Those candidates were put through a proficiency test to evaluate their ability to cope with the prosecution system, except for the candidates who had already been working for the Prosecution[21], as Mrs del Mastro and Hinojosa[22]. On August 15, 2017, the Nominating Board reduced the list, after grading the candidates with a test, whose grading system was modified with notification[23].

From September 1st to September 15, 2015, those candidates were interviewed: they had five minutes to speak for themselves then, members of the Nominating Board could ask questions about their past experiences or their plans. However, Mrs Hinojosa and del Mastro were only asked about their past careers[24]. Then, three candidates were shortlisted, ranked 18th, 24th and 25th according to the scores of the test. President Obregón immediately appointed Domingo Martinez, first candidate on the shortlist[25].

Mrs Hinojosa and del Mastro filed a writ of a*mparo* before the Second Constitutional Court of Berena, against all the resolutions passed by the Nominating Board, which the Court denied. They

[19] Hypothetical p.6 §26.
[20] Hypothetical p.7 §27.
[21] Hypothetical p.7 §30.
[22] Hypothetical, *ibid.*
[23] Hypothetical p.7 §31.
[24] Hypothetical p.8 §35.
[25] Hypothetical p.8 §36.

appealed the decision, also denied on March 17, 2018[26]. Therefore, on April 1st, 2018 they filed a petition before the IACHR[27].

On August 12, 2019, the IACHR found the State internationally responsible for the violation of the rights to a fair trial (Article 8), freedom of thought and expression (Article 13), equal protection (Article 24), and judicial protection (Article 25) of the ACHR, all in relation to Article 1.1.

[26] Hypothetical p.9 §39.
[27] Hypothetical p.10 §49.

IV. LEGAL ANALYSIS

A. Preliminary exceptions

1. Consolidation of the petitions

The Commission consolidated the petitions of Magdalena Escobar[28], Mariano Rex[29], and the joined petition of Sandra del Mastro and Maricruz Hinojosa[30] naming one single joint petitioner on behalf of all alleged victims.

According to Art. 29 al 5 of the Rules of Procedure of the IACHR "*If two or more petitions address similar facts, involve the same persons, or reveal the same pattern of conduct, the Commission may join them and process them together in the same file*". Nevertheless, in this case, the Commission should not have merge the petitions. All petitioners allege different violations and if some of those alleged violations are similar, they rest on distinct facts and they are not alleged on the same grounds. Mr. Rex is challenging a disciplinary sanction rendered by the Supreme Court; Mrs Escobar is challenging a presidential decree and the appointment of the new Prosecutor General; finally, Mrs Hinojosa and del Mastro are challenging the process of the new Prosecutor General's nomination. However, Mrs Escobar states that the appointment infringed her right to irremovability from office, her right to work and the guarantees of the autonomy of the Office of the Prosecutor General; whereas Mrs del Mastro and Hinojoza argue that the appointment violated the equal access to public office and that they had been discriminated against on the basis on gender.

[28] Petition 110-17/ Magdalena Escobar v. State of Fiscalandia.
[29] Petition 255-17/ Mariano Rex v. State of Fiscalandia.
[30] Petition 209-18/ Maricruz Hinojosa et al. v. State of Fiscalandia.

Furthermore, the State sees no connection between Mr. Rex's petition and Mrs. Escobar's, del Mastro and Hinojoza's petitions regarding either the facts or the alleged violations.

The erroneous consolidation is undermining the respondent State's right to answer appropriately to the alleged plaintiffs. Therefore, Fiscalandia is asking the Court to rule on the case by separating them in three distinct cases, in accordance with the three petitions lodged before the IACHR.

2. The petitioners did not exhaust all domestic remedies

Article 46(1)(a) ACHR stipulates that, in order to determine the admissibility of a petition before the IACHR, in accordance with Articles 44 or 45 ACHR, it is necessary the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[31]

This rule signifies that *"such remedies should not only exist formally, but they must also be adequate and effective owing to the exceptions established in Article 46(2) of the Convention"*[32]. Domestic remedies must be adequate, *i.e.* suitable to address an infringement of the legal right alleged to be violated[33] and effective, *i.e.* capable of producing the result for which they were designed[34]. Such guarantee *"constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society according to the Convention"*[35].

[31] *Case of Velásquez Rodríguez v. Honduras*, Judgment of June 26, 1987, Series C No. 01, para. 85; *Case of Liakat Ali Alibux v. Suriname*, Judgment of January 30, 2014. Series C No. 276, para. 14; *Case of Mémoli v. Argentina*, Judgment of August 22, 2013. Series C No. 265, para. 46.
[32] *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*, Judgment of May 26, 2014, Series C No. 278, para. 83; *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988. Series C No. 4, para. 63; *Case of Liakat Ali Alibux v. Suriname*, 2014, *ibid*., para. 15.
[33] *Case of Velásquez Rodríguez v. Honduras*, 1988, *ibid.*, para. 64.
[34] *Case of Velásquez Rodríguez v. Honduras*, 1988, *ibid*., para. 66.
[35] *Case of Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000. Series C No. 70, para. 191.

Only under the three exceptional circumstances of Article 46(2) ACHR applicants are allowed not to exhaust all domestic remedies: the domestic legislation of the State does not afford due process of law, the party alleging the violation has been denied access to those remedies or there has been an unwarranted delay in rendering a final decision. The State highlights that none of those three exceptions can apply in the present case.

The Court recalls that *"The rule of prior exhaustion of domestic remedies is established in the interest of the State, as it seeks to exempt the latter from responding before an international body for acts that are attributed to it, before it has had the opportunity to remedy them by its own means"*[36]. Pursuant to its steady case law[37] and to international jurisprudence[38], *"when the State alleges the failure to exhaust domestic remedies, it must at the same time describe the remedies that should be exhausted and their effectiveness"*[39]. Fiscalandia will therefore describe what remedy was offered to each of the plaintiffs. However, the State would like to highlight the particular facts of the case, that is all plaintiffs are law practitioners. As judge and prosecutors, the plaintiffs ought to know and therefore ought to use adequate remedies offered by domestic law.

a. Mariano Rex did not exhaust all domestic remedies

On December 1, 2017, the Supreme Court decided to remove judge Rex from the bench. Fifteen days later, Mr. Rex filed a petition with the IACHR. He did not intend any legal action

[36] *Case of Liakat Ali Alibux v. Suriname*, Judgment of January 30, 2014, Series C No. 276, para. 15; *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*, 2014, para. 83, *Case of The Santo Domingo Massacre v. Colombia*, Judgment of November 30, 2012, Series C No. 259, para. 33; Case of *Hugo Armendariz v. United States*, IACHR, Report No. 57/06, 20 July 2006, para. 36.
[37] *Case of Furlan and family members v. Argentina*, Judgment of November 20, 2009, para 25; *Case of Usón Ramírez v. Venezuela*, Judgment of August 31, 2012, para 22.
[38] ECtHR, *Case of Deweer v. Belgium* (No. 6903/75), Judgment of 27 February 1980, para. 26; *Case of Foti and Others v. Italy* (No.7604/76; 7719/76; 7781/77; 7913/77), Judgment of 10 December 1982, para. 48; *Case of de Jong, Baljet and van den Brink v. The Netherlands* (No. 8805/79 8806/79 9242/81), Judgment of 22 May 1984, para. 36.
[39] *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*, 2014, *ibid*., para. 84.

under domestic law therefore he fell short to the condition of exhaustion of domestic remedies under article 46 (1) ACHR.

In the case of Mariano Rex, two possibilities were offered to him. Firstly, he could have filed a motion for reconsideration, which is the accurate remedy to challenge the penalties of suspension and removal imposed by the Supreme Court[40]. It is however not up to the State to demonstrate whether the alleged plaintiff would have any chance of success. The State recalls that *"the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective remedies"* [41]. Secondly, under Fiscalandia's *amparo* law, *amparo* can be used to challenged *"any act of omission, by any official, authority, or person, that threatens or violated human rights and fundamental freedoms recognized by the Republic of Fiscalandia"*. Therefore, under clarification answer n°23, there are no grounds of inadmissibility that would preclude a challenge to the disciplinary decisions issued by the Supreme Court through *amparo*. If Mr. Rex felt his human rights were violated, he could and should have challenged the Supreme Court's decision through a writ of *amparo*.

Thus, Fiscalandia has demonstrated that adequate and effective remedies were offered to the petitioners who deliberately decided not to employ them but rather filed a petition with the IACHR, depriving the State of addressing the alleged violation.

b. Magdalena Escobar did not exhaust all domestic remedies

On June 14, 2017, President Obregón ordered the creation of a Nominating Board. On June 16, 2017, the petitioner filed a motion to vacate declared inadmissible by the Supreme Court on

[40] Clarification answer n°51.
[41] *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988. Series C No. 04, para. 67; *Case of Saramaka People v. Suriname*, Judgment of November 28, 2007, Series C No. 172, para. 41.

January 2, 2018 on the grounds that the appointment of the new Prosecutor General *"had created a factual situation that was impossible to reverse through these proceedings, as it could affect the rights of third parties who have not had the opportunity to exercise their right of defense"*[42]. On September 16, 2017, a new Prosecutor General was appointed. As Magdalena Escobar filed a petition before the IACHR on August 1, 2017, she did not wait for this domestic remedy to be exhausted considering that the Supreme Court rendered its judgement on January 2, 2018. The State maintains that a retroactive analysis cannot be considered here, that is the inadmissibility decision cannot be appreciated as meaning that the alleged plaintiff had no chance of success. Thus, she should have waited for the exhaustion of the judicial proceeding she initiated.

Furthermore, she could have challenged the Supreme Court's decision by a writ of *amparo* if she felt her human rights o were violated. Furthermore, she was appointed to serve as prosecutor in the district of Morena[43], appointment that she did not contest.

c. Sandra del Mastro and Maricruz Hinojosa did not exhaust all domestic remedies

Both petitioners intended an inadequate action *via* a writ of *amparo*. Indeed, the Second Constitution Court of Berena, when declaring the *amparo* inadmissible, indicated to the petitioners that the irregularity of an appointment could only be challenged by means of a motion to vacate. The petitioners appealed the decision, which was affirmed by the Second Appellate Chamber of Berena. The Supreme Court finally denied their extraordinary appeal on March 17, 2018[44]. However, both petitioners decided to file a petition with the IACHR willingly disregarding the other, adequate, domestic remedy mentioned by the first judicial authority.

[42] Hypothetical, p.9 §42.
[43] Clarification answer n°10.
[44] Hypothetical, p.9 §39.

Therefore, since none of the petitioners exhaust all domestic remedies offered by Fiscalandia, the State asks the Court to dismiss the petition on ground of inadmissibility of the application. If the Court considers this element should belong to the merits of the case, Fiscalandia will demonstrate the remedies were all effective and that it fulfilled its obligation under article 8 and 25 ACHR. In the case of the Court deciding that the current petition is admissible, Fiscalandia maintains that the State has not violated the ACHR.

B. Merits

1. The State did provide due process of law (article 8 ACHR) and judicial protection (article 25 ACHR)

Article 8 ACHR states the guarantees for due process of law: a fair hearing by a competent, independent and impartial tribunal within a reasonable time. Article 25 ACHR states that everyone has a right to judicial protection with a simple and prompt recourse by a competent tribunal.

In several of its cases law, the Court considered that Member States have an obligation *"to provide effective judicial recourses to those who allege that they are victims of human rights violations (Article 25), recourses that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all within the general obligation of these States to ensure the free and full exercise of the rights established by the Convention to all persons subject to their jurisdiction*

(Article 1(1))"[45]. As a consequence, the Court examines the scope of both articles 8 and 25 ACHR under a single chapter[46].

Following the steady case law of the Court, the State will therefore examine both articles 8 and 25 under the same title, proving that the State fulfills its international obligations under article 1 (1) in regard to articles 8 and 25 ACHR.

a. The State did not violate Mariano Rex's rights to a fair trial and to judicial protection

On December 1, 2017, the Supreme Court ruled in full court to remove Mr. Rex from the bench on the grounds of *"serious breach of the obligation to properly state the reasoning for his decision"* after he rendered his decision on the *amparo* filed by President Obregón.

The duty to state grounds is one of the guarantees to due process included in article 8 (1) ACHR. The Court once stated that: *"[t]he grounds are the exteriorization of the reasoned justification that allows a conclusion to be reached."*[47]. In its justice operators report, the IACHR mentioned two purposes for a reasoned decision: it shows the parties that they have been heard and when the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body[48]. As this Court held, in the disciplinary proceedings *"it is essential to indicate the violation precisely and to submit arguments that allow it to be concluded that the comments provide sufficiently grounds to justify removing a judge from*

[45] *Case of Yvon Neptune v Haiti*, Judgment of May 6, 2008, Series C No. 180, para. 77 cited in "Case-law of the Inter-American Court of Human Rights", *Chronicle for the Year 2008*, Marie Rota, para. 129-138.
[46] *Case of Yvon Neptune v Haiti*, 2008, *ibid*., para. 45-86; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, Series C No. 182, para. 26-185; *Case of Heliodoro Portugal v. Panama*, Judgment of August 12, 2008. Series C No. 186, para. 123-159.
[47] *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of November 21, 2007, Series C No. 170, para.107.
[48] *Case of Apitz Barbera et al. v. Venezuela.* 2008, *ibid*., para.78.

a post"[49]: the purpose is to assess and control a public official's conduct, qualifications and performance.

i. The Supreme Court was competent to rule on the case

Fiscalandia's Supreme Court enjoys disciplinary powers and is responsible for applying, in a single instance, suspension and removal penalties against judges of all levels and specializations[50].

ii. The Supreme Court granted Mariano Rex a fair hearing with due guarantees

Article 8 ACHR states that for due process of law to be guaranteed, the tribunal must be previously established by law. The disciplinary proceeding is a punitive administrative process regulated in Chapter V of the Judiciary Act of Fiscalandia[51]. Chapter V details the disciplinary proceeding. The investigation concludes with a report that (i) supports the existence of the conduct based on the evidence gathered, (ii) classifies the conduct by linking it to the administrative infraction, (iii) supports the possible penalty to be applied. The disciplinary proceedings begin when the report is approved, and the respondent is notified, giving him or her five working days to present procedural challenges to the report. Once the final deadline has expired, the Chief Justice of Internal Oversight summons the respondent to a "control hearing" at which the procedural challenges to the report are adjudicated, the evidence offered by the respondent is admitted, the necessary actions are ordered, and the respondent's defense arguments are heard. Once the evidence has been presented, the Chief Justice of Internal Oversight informs the full Supreme

[49] *Case of Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Series C No. 227, para. 120.
[50] Hypothetical, p.2 §7.
[51] Clarification answer n°18.

Court, which schedules a "final merits hearing" to hear the evidence and the judge or justice's final defense. After this hearing, the full Supreme Court issues a decision. A qualified majority of 2/3 of its members is required to impose the penalty of suspension or removal.

Therefore, the sanction imposed on Mr. Rex is established by domestic law and has been fairly trialled and applied by the Supreme Court. Such guarantees are within the due process of law of article 8 ACHR and are sufficient to guarantee an effective judicial protection under article 25 ACHR.

b. The State did not violate Magdalena Escobar's rights to a fair trial and to judicial protection

i. The Supreme Court was the competent tribunal to rule on the case

On June 16, 2017, Mrs Escobar filed a motion to vacate an administrative act with the Tenth Administrative Court of Berena to challenge the call for candidates issued by Extraordinary Presidential Decree[52]. On January 2, 2018, the Supreme Court ruled that the motion was inadmissible because the selection of the new Prosecutor General *"had created a factual situation that was impossible to reverse through these proceedings"*[53]. It can therefore be noticed that the Supreme Court assumed jurisdiction over the case, as governed by article 100 of the Constitution of Fiscalandia. This is a discretionary power of the Supreme Court that can be exercised *"when the controversy is of general interest or major social impact"*[54]. Considering the importance of the case matter, it can be seen that the Supreme Court decided to assume jurisdiction over the case as the position of Prosecutor General is at stake.

[52] Hypothetical, p.5 §23.
[53] Hypothetical, p.9 §42.
[54] Clarification answer n°41

While assessing the interests at stake in the case, the Supreme Court balanced those different interests as it concluded that the new situation *"had created a factual situation"*. Such situation was "*impossible to reverse through these proceedings"* because *"it could affect the rights of third parties who have not had the opportunity to exercise their right of defense"*[55]. The Supreme Court, desirous to fit into international standard and exercising a conventionality control, found that reversing the situation would affect the right to fair trial and to judicial protection as protected by articles 8 and 25 ACHR. Such violations balance out former Mrs Esbobar's interests.

ii. The Supreme Court's decision was rendered within a reasonable time

The Court held that the notion of *"reasonable time"*[56] is not easy to define. Thus, the Court refers to the ECtHR posing an equivalence between article 8 ACHR and article 6 ECHR. According to the ECtHR[57], three criteria must be taken into account: the complexity of the matter, the judicial activity of the interested party and the behavior of the judicial authorities[58]. However, the IACtHR developed its own jurisprudence and since 2009, the Court now upholds four criteria, that last one being the impairment to the legal situation of the person involved in the proceedings[59].

On the first element, the State considers that considering that the position of Prosecutor General is one of great importance, it is a delicate matter the Supreme Court has to rule on hence the period of six months.

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[55] Hypothetical, p.9 §42.
[56] *Case of Genie-Lacayo v. Nicaragua,* Judgment of January 29, 1997. Series C No. 30, para. 77
[57] ECrHR, *Case of Motta v Italy*. Judgment of February 19, 1991. Series A No. 195-A, para. 30; ECrHR, *Case of Ruiz-Mateos v. Spain*. Judgment of June 23, 1993, Series A No. 262, para. 30 cited in *The Inter-American Yearbook on Human Rights, Vol. 2, 1997*.
[58] Case of Genie-Lacayo v. Nicaragua, 1997, *ibid*., para. 77; *Case of Suárez Rosero,* Judgment of November 12, 1997, Series C No. 35, para. 72; *Case of Bayarri v. Argentina,* Judgment of October 30, 2008, Series C No. 187, para. 107.
[59] *Case of Kawas Fernandez v. Honduras,* Judgment of April 30, 2009, Series C No. 196, para. 112; *Case of Fornerón and daughter v. Argentina,* Judgment of April 27, 2012, Series C No. 242, para. 66.

On the second element, Mrs Escobar filed a motion to vacate with the Tenth Administrative Court of Berena[60] and sought an injunctive relief at the same time. The latter was granted but the attorney for the executive branch appealed the decision which was overturned ten days later by the Second Chamber of Appeals of Berena[61].

On the third element, the celerity with which the courts rendered their judgments show how dedicated they are to ensure an efficient legal system. Yet, with the reasonable time period of six months to render its final decision, the Supreme Court, on the contrary, took the necessary amount of time to assess properly the situation. As stated earlier, the profession of Prosecutor General is one of great importance which explains while the Supreme Court did not rush its decision. The State also recalls that the Supreme Court decided to assume jurisdiction over the case which means that all documents in the Tenth Administrative Court of Berena's hands had to be transferred to the Supreme Court.

On the fourth element, even though Magdalena Escobar does not hold the position of Prosecutor General anymore, she was appointed to serve as prosecutor in the district of Morena, known for its high rates of gang violence and two hours away from Berena. This new appointment is quite close to the one she earlier held as a specialized organized crime prosecutor and to which her request to be reinstated to has been denied[62].

[60] Hypothetical, p.5 §23.
[61] Hypothetical, p.5 §24.
[62] Clarification answer n°10.

c. The State did not violate Mrs del Mastro and Hinojoza's rights to a fair trial and to judicial protection

i. The Supreme Court's decision was rendered within a reasonable time

After the appointment of the new Prosecutor General Domingo Martínez on September 15, 2017[63], candidates to the position Maricruz Hinojoza and Sandra del Mastro decided to challenge the selection process and the appointment of the new Prosecutor General[64]. They filed a writ of *amparo* before the Second Constitutional Court of Berena which declared the *amparo* inadmissible on the grounds that the appointment of the Prosecutor General is a sovereign power of the executive branch. The Court indicated the petitioners that any irregularity could be challenge by means of a motion to vacate. The plaintiffs appealed the decision, which was affirmed by the Second Appellate Chamber of Berena. The Supreme Court finally denied the decision on March 17, 2018[65]. The State applies the same reasoning it applied for former Prosecutor General Magdalena Escobar with the four criteria to assess a *"reasonable time"*: the complexity of the matter, the judicial activity of the interested party, the behavior of the judicial authorities and the impairment to the legal situation of the person involved in the proceedings.

As for the first and the third elements, the State considers the same reasoning for former Prosecutor General Escobar applies here as the same position is discussed.

Regarding the second element, the Second Constitutional Court of Berena which declared the *amparo* inadmissible indicated the plaintiffs the adequate means to challenge the appointment. However, both plaintiffs willingly disregard the indication and decided instead to pursue a remedy they knew was not the effective one.

[63] Hypothetical, p.8 §36.
[64] Hypothetical p.8 §38.
[65] Hypothetical p.9 §39.

Regarding the fourth element, the State considers the impairment of the situation on the plaintiffs is void as they both were career prosecutors earlier and the fact that they were not appointed Prosecutor General had not impact on their positions.

The State recalls that the fact that the *amparo "did not have a favorable outcome does not in and of itself denote either lack of domestic remedies"*[66]. Therefore, the State did provide due process of law, but the plaintiffs willingly disregard the domestic Court's indication to pursue a none-adequate remedy and lodge a petition before the IACHR. Such practice undermined the State's right to address the issue properly within its domestic legal system, legal system that offers effective and adequate and consequently, guarantees of due process of law.

d. The State guarantees independent and impartial tribunals

i. The State provides independent tribunals

The justice operators report mentions that "*For a disciplinary authority to have institutional independence, other branches or organs of government cannot interfere in the disciplinary proceedings, so that the disciplinary authority is able to act independently"*[67].

Former Prosecutor General Escobar might have filed a formal complaint for corruption but that is only addressed against some specific people in the governmental branch and never had it been mentioned that the judicial branch was involved.

[66] *Case of Saramaka People v. Suriname*, Judgment of November 28, 2007, Series C No. 172, para. 4.
[67] *« Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas »*, OEA/Ser.L/V/II. Doc. 44, December 5, 2013, para. 197.

The Court holds a steady view in its case law that an international instrument must be interpreted in a wider scope than the instrument itself[68]. It must take into account the system in which it is part. In its advisory opinion of October 1, 1999[69], the Court cited the International Court of Justice: *"[…] the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law […] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. […] In this domain, […] the corpus iuris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore"*[70]. That is why the State finds accurate and helpful to use the United Nations Basic Principles on the Independence of the Judiciary as a source of soft law to help setting up guidelines for the independence of tribunals. These principles establish that *"A charge or complaint against a judge in his/her judicial or professional capacity shall be processed expeditiously and fairly, in accordance with the national law. The judge shall have the right to a fair hearing. The examination of the matter at its initial stages shall be kept confidential, unless otherwise requested by the judge"*[71].

In the case of Mariano Rex, as demonstrated earlier with Fiscalandia fulfilling its obligation of fair trial under article 8 ACHR: the disciplinary proceeding is a punitive administrative process

[68] *Case of "Street Children" (Villagran-Morales et al.) v. Guatemala,* Judgment of November 19, 1999, Series C No. 63, para. 192-193; *Case of Gómez-Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004, Series C No. 110, para. 164; *Case of Tibi v. Ecuador,* Judgment of September 7, 2004, Series C No. 114, para. 144.
[69] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113.
[70] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971; p. 16 ad 31.
[71] Principle 17 of the *United Nations Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

regulated in Chapter V of the Judiciary Act of Fiscalandia[72]. Such guarantees of independent tribunals are therefore provided by Fiscalandia's law.

ii. The State provides impartial tribunals

The guarantee of the disciplinary authority's impartiality requires that said authority approaches the facts of the case objectively, without any preconceived notions or bias, and that it offer sufficient objective guarantees to dispel any doubt that the accused or the community might harbor with respect to the absence of impartiality[73]. In the Peruvian case, the Court found that the guarantee of impartiality was affected in a case involving the dismissal of judges because the disciplinary system did not allow judges to be challenged; judges could only disqualify themselves.

In the case of Mariano Rex, the full Supreme Court ruled on his removal, which is the competent body[74], and the ruling could have been challenged by a motion for reconsideration with the same full court[75]. Such guarantees of impartiality are provided by law and were properly implemented by the State.

[72] Clarification answer n°18.
[73] *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008. Series C No. 182, para. 56; *Case of the Constitutional Court v. Peru*, Judgment of January 31, 2001. Series C No. 71, para. 66-85.
[74] Clarification answer n°18.
[75] Clarification answer n°51.

2. The State did not violate the principles of equality before the law and access to public offices regarding Mrs Escobar, del Mastro and Hinojosa

a. The State did enforce its positive obligations regarding articles 23 and 24 of the ACHR

« The notion of equality (..) is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority »[76].

Discrimination is defined as « *any distinction, exclusion, or restriction based on certain motives, such as race, color, gender, language, religion, a political or any other opinion, the national or social origin, property, birth or any other social condition* »[77] which has the effect to reduce human rights exercice. Gender based discrimination is therefore prohibited[78]. The principle of equality is valued along with non-discrimination, that is an obligation of the State which must not produce regulations that have discriminatory effects on people's right[79].

To examine discrimination, the Court can take into account a demonstration of a structural discrimination by indicators as statistics[80]. The IACtHR imposes to States to take affirmative

[76] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/94 of January, 19, 1984, Series A No 4, para 55; *Case of Atala Riffo and Daughters v Chile*, Judgment of February 24, 2012, Series C No.239, para 79.
[77] *Case of Atala Riffo and Daughters v Chile*, Judgment of February 24, 2012, Series C No.239, para 81.
[78] *Case of Maria Eugenia Morales de Sierra* (Guatemala), Case Nº 11.625, Report on the Merits No. 4/01 (19 January 2001)
[79] *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005, Series C No. 130; *Case of D.H. et al v. Czech Republic*, ECrHR, GC, No. 57325/00, (13 November 2007).
[80] *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, Series C No. 182, para 16; *Vélasquez-Rodriguez v Honduras*, Judgment of July 29, 1998, Series C No. 4, para. 140; *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*, Judgment of July 10, 2007, Series C No. 167, para. 41; « *Compendium on Equality and Non-Discrimination. Inter-American Standards* », IACHR, OEA/Ser.L/V/II.171 Doc. 31(12 February 2019)

mesures to change discriminating situations that may be pending, this ends in a special obligation to protect[81] by providing the means and legal conditions for people to exercise their rights[82]. It can result in a special regulation, as quotas, to remedy a historic discrimination[83]. About political rights specifically, States must « *generate the optimum conditions and mechanisms* » through, for example, « *widely publicised announcements that are clear and transparents as regards the eligibility requirements* »[84]. Those positive obligations are proactive measures to redress discrimination. Those measures only have to be reasonable, objective and proportionate to the goal to put an end to discriminatory behaviours.

The Convention of Belém do Pará states that discrimination against women "*is a manifestation of the historically unequal power relations between women and men*"[85], therefore, States must fight gender stereotypes that can lead to discrimination and violence.[86]

Fiscalandia is home to the Anti-Patriarchal Party in force in the legislative assembly, which submitted a Gender Parity Law, in order to promote and write down in the legislation the enforcement of equality between genders. This constitutes an aim to put on quotas to adapt its legislation with international standards as it was already appreciated by the IACtHR[87]. More precisely, the two publications of the call for candidates for the position of Prosecutor General in the newspapers constitues a proactive way to ensure equal access to public offices[88]. Aside from

[81] *Case of Atala Riffo and Daughters v Chile*, 2012. *ibid*., para.80.
[82] *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, Series C No. 146.
[83] *Case of Stec and Others v. the United Kingdom*, nos. 65731/01 and 65900/01, 12 april 2006; *Case of Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, 10 May 2007, para. 40-41.
[84] Supra, para. 73.
[85] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
[86] *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Judgment of November 28, 2012, Series C No. 257 para.295.
[87] *Case of González et al v. Mexico*, Judgment of November 16, 2009, Series C No. 214, para 494.
[88] Hypothetical p.6 §26.

proactive efforts, Fiscalandia provides an atmosphere of equality. The past Prosecutor General and members from this service were women, the State appointed two women as replacement of members of the Judicial council[89], and there is not a single indicator of discrimination. Therefore, Fiscalandia did not fail to fulfill its obligations regarding the principle of equality. Those are indicators testifying of Fiscalandia's goodwill towards gender equality.[90]

b. The State did not violate articles 24 and 23 of the ACHR towards Maricruz Hinojosa and Sandra del Mastro

Equality before the law is a fundamental element in international law[91], with value of j*us cogens*[92] and protected by article 24 ACHR. It requires that laws are applied equally to all people. Nevertheless, distinction between groups of people does not violate article 24 if it is objective and reasonable, and pursuing a legitimate aim enforced by international law[93]. In other words, no discriminatory treatment should be established by the law. To be reasonable and objective, a distinction must be based on a factual difference between people, resulting in a proportionate different regime.

Article 24 enforces the principle of non-discrimination, also provided for by Article 1. The latter refers to the State's obligation to apply the Convention without discrimination, when article

[89] Clarification question n°62.
[90] *Case of González et al. v Mexico,* Judgment of November 16, 2009, Series C No. 205. Para. 494.
[91] *Case* of *Yatama v Nicaragua,* Judgment of June 23, 2005, Series. C No. 127, para. 185.
[92] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* OC-4/94 (19 January 1984) Series A No 4; *Case of Atala Riffo and Daughters v Chile*, Judgment of February 24 2012, Series C No. 239, para 79; *Case of Indigenous Community Xákmok Kasek v. Paraguay,* Judgment of August 24, 2010, Series C No. 214, para.269.
[93] *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89; *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, para. 56; *Case of Willis v. The United Kingdom*, ECHR, No36042/97 (11 June 2002) para. 39.

24 regards unequal protection provided by domestic laws[94], as in the case of *Artavia Murillo*, where Costa Rica was condemned because the regulation discriminated women in the fact, based on a gender stereotype[95]. Therefore, States must not carry out any action that directly or indirectly create situations of discrimination: « *de jure* or *de facto* discrimination »[96]

In this case, Mrs Hinojosa and del Mastro may argue they were discriminated before the law because the selection rules decree exempted them from the proficiency test[97]. Such exemption is based on the fact that they, along with some other men candidates, had work a long time for the prosecution services and had a proficient knowledge of the system. In this case, such exemption had no discriminatory effect on them. It did not prejudice them as they directly went to the next step of the selection process[98].

Article 23 al.1.c ACHR states that people must have access, « *under general conditions of equality* », to public offices. States must ensure it through their policies and the selection making process[99]. Competitions based on merit are a satisfying way to appoint justice operators because, if they consider objectives criteria, they are the best way to avoid discretionary appointments[100]. A State enforcing competition to obtain a position cannot be accused of interference or prejudice to

[94] *Case of Indigenous Community Xákmok Kasek v. Paraguay*, 2010, *ibid*., para.272; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/94 (19 January 1984) Series A No. 4, paras. 53 and 54, ; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of August 5, 2008, Series C No. 182, para. 209.
[95] *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Judgment of November 28, 2012, Series C No. 257.
[96] *Case of Atala Riffo and Daughters v Chile*, Judgment of February 24, 2012, Series C No.239; *Juridical Condition and Rights of Undocumented Migrants*, OC-18/03 of September, 17, 2003, Requested by the United Mexican States, IACtHR, Series A., No.18, para 271; *Case of Indigenous Community Xákmok Kasek v. Paraguay*, 2010, *ibid*., para. 299.
[97] Hypothetical p.7 §30.
[98] Hypothetical p.8 §35.
[99] *Case* of *Yatama v Nicaragua*, Judgment of June 23, 2005, Series C, No. 127, para. 195.
[100] *« Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas »*, IACHR OEA/Ser.L/V/II. Doc. 44, December 5, 2013. p3.2.

equal access of public offices, as long as there is no restrictive condition based on a discriminatory factor to apply[101]. As example, the Congress of Peru appointment process was *prima facie* driven by political considerations, as « credentials of each » and « individual assessments » were not led[102]. The selection process should also be opened to public scrutiny in order to reduce the ability of the Nominating Board to exercise a discretionary selection[103]. The OAS is very sensitive to discrimination against women, particularly in the context where it leads to violent consequences for them as feminicide, rape and physical violence. Therefore, the IACtHR condemns lenient States towards gender equality[104]. In the facts, States must not prevent women to exercise public offices on stereotypical grounds, in reference to a woman's traditional position[105].

Both plaintiffs are women, and argued a gender based discrimination in access to public offices[106] but never reported any kind of violence or harassments on the basis of their gender. Reviewing « *Public Announcement for the Selection of the Prosecutor General of Fiscalandia"*, it is impossible to establish such a discriminatory effect, as the criteria are based on the candidates abilities, work experiences and criminal records, and other specificities without discriminatory effect on the plaintiffs.

The Nominating Board received 75 applications from men and 8 from women, and there were no restrictive conditions for women to apply[107]. Through every step of the selection process, the rate of applications from women and men decreased in a proportional way. The interviews were determining, and Domingo Martinez was the most successful candidate then. The plaintiff were

[101] *Case of Sidabras et Džiautas c. Lituanie*, ECHR, Nos 55480/00 and 59330/00, (27 July 2004).
[102] Human Rights Watch, *Peru: Ensure Fair Selection of Judges, Ombudsman*, July 23, 2013; « Guarantees for the independence of justice operators. Towards strengthe.ning access to justice and the rule of law in the Americas », IACHR OEA/Ser.L/V/II. Doc. 44, December 5, 2013. p32.
[103] *Ibid*.
[104] *Case of Artavia Murillo et al. v. Costa Rica*, Judgment of November 28, 2012, Series C No. 257 para. 295.
[105] *Case of Emel Boyraz v. Turkey*, ECHR, No. 61960/08 (2 December 2014).
[106] Hypothetical p.8 §38.
[107] Hypothetical p.7 §28.

already brilliant public officer, and the past occupant of the position was a woman. During the lustration policy, women were given jobs. While it is true that candidates were asked about their past work experiences or work plans, the petitioners were not asked on the latter, that does not constitute a gender based discrimination as defined by this Court. Moreover, every candidate was given five minutes to speak freely. Interviews were subject to public scrutiny medias providing a guarantee of transparency against the arbitrary[108]. Moreover, members of the Nominating Board were appointed in accordance with the law[109], ensuring their independence. This diversity of board members associated with the rest of the procedure shows guarantees established by the OAS in its report on justice operators upon competitions. The plaintiff failed to prove a gender based discrimination in the law or in the access to public office. Therefore, Fiscalandia did not violate article 24 and 23 towards Mrs Hinojosa and del Mastro.

c. The State did not violate article 24 of the ACHR by dismissing Magdalena Escobar

The IACtHR states that "*the criteria and processes for appointment, promotion, suspension, and dismissal must be objective and reasonable,*" and that "*persons must not suffer from discrimination*"[110]. Article 103 of Fiscalandia's Constitution states the requirements to be appointed Prosecutor General and precise that he can be "*removed directly by the President on serious grounds and for good cause*"[111]. This presidential removal can be overruled by the

[108] Hypothetical p.7 §34; *« Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas »*, IACHR OEA/Ser.L/V/II. Doc. 44, December 5, 2013.
[109] Hypothetical p.1, Footnote n°1 about Law 266 of 1999.
[110] *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela,* Judgment of August 5, 2008, Series C No. 182, para. 206.
[111] Hypothetical p.3 §13.

legislative assembly. According to international laws, public employees who were "*unlawfully appointed*" may be dismissed on no other grounds[112].

The ECtHR pronounced itself multiple times about public officers' removal at the time of eastern lustration policies. In the case *Ivanivski v. The former socialist Republic of Macedonia,* M. Ivanisky was dismissed because he did not fit the requirements to keep his position after the lustration law[113]. The ECtHR concluded to a violation of the plaintiff's rights because he was prevented from occupying any public office, which was considered disproportionate. In the case *Matyjek v. Poland*, the ECtHR condemned the State for a violation of equality before the law, as the plaintiff was unable to obtain a fair trial after his dismissal, which ended in a breach of equality[114], but did not condemned the lustration law itself. Moreover, Fiscalandia was asked to establish clear rules about the terms of office and to put an end on transitional status[115]. This policy about transitional status is shared by the IACtHR which stated that a provisional status had to be the exception and not the rule, given the lack of protection that offers such a status. It expressed multiple times the fact that *« provisional appointments must not extend indefinitely in time, and must be subject to a condition subsequent »*, but never mentioned a breach of equality before the law due to a needed period of transition[116].

In this case, Magdalena Escobar was under a transitional mandate, valuable only if she fitted the requirements provided by article 103 of the new Constitution. Article 103 is mute about

[112]« *Report of the independant expert to update the set of principles to combat impunity* », United nations, Economic and Social Committee, E/CN.4/2005/102/Add.1, principle 30.
[113] *Case of Ivanoski v. The former Yugoslav republic of Macedonia*, ECHR, No 29908/11, 1st Section (21 January 2016).
[114] *Case of Matyjek v. Poland*, ECHR, no 38184/03, 4th section (24 April 2007).
[115] Clarification question n°30.3.
[116] *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela,* Judgment of August 5, 2008, Series C No. 182, para. 43; *Case of Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Series C No. 227, para. 107; *Case of Reverón Trujillo v. Venezuela,* Judgment of June 30, 2009, Series C No. 197, para. 118.

the candidates' gender, but states that they should have practiced the profession for at least ten years[117] at the time of application.

Magdalena Escobar joined the prosecutorial career service in 1998 and was appointed in 2005 for fifteen years[118]. She did not fit the ten years condition, so her mandate was void according to the Constitution. President Obregón, who was aware of the corruption cases pending, decided to clean the institutional background and enforce the transitional terms to end it. This suppression of transitional mandate was later requested by the IAHR[119]. It was adequate with the OAS standards urging member States to put an end on provisional status. Fiscalandia also enforced the removal of transitional members of the Judicial Council, that was not challenged[120].

Moreover, Magdalena Escobar's removal could have been denied by the legislative assembly, democratically elected[121], which provides an efficient counter-power to the executive branch. Magdalena Escobar's removal provided security and guarantees. She was able to pursue her prosecuting carrer, so her removal had nothing disproportionate. Therefore, Fiscalandia did not violated article 24 regarding Magdalena Escobar.

3. The Nominating board did not violate freedom of expression

Article 13 ACHR protects freedom of expression. The IACtHR establishes that this right is not absolute and may be restricted, but only if the restriction is necessary in a democratic society and proportionate to the purpose[122] in order to avoid censorship. This prohibition priorly concerns

[117] Hypothetical p.2 §12.
[118] Hypothetical p.3 §14.
[119] Clarification answer n°30.3.
[120] Clarification answer n°62.
[121] Hypothetical p.3 §13.
[122] *Case of Ricardo Canese v. Paraguay*, Judgment of August, 31, 2004, Series C.No.111, para 95; *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July, 2, 2004, Series C No.117, para121; *Case of The Sunday Times v. the United Kingdom*, ECHR No 6538/74, plenary session, (26 April 1979).

the medias, through a monopoly, arbitrary detentions, threats, or acts of harassment[123]. The presence of medias is highly recommended, as watchdogs for transparency and democracy[124], to avoid violation of the freedom of expression and access to information. Regarding public officials or candidates, democracy implies a particular protection of freedom of expression, given the publicity of their status they have to be able to freely answer questions or give explanations[125]. In the case of an alleged violation of freedom of expression, the Court should examine *« the facts of the case as a whole »*[126] along with the context and circumstances.

In this case, the interviewers only asked one question to each of the petitioners, every interviewed candidate had five minutes to present himself. During those five minutes, Mrs Hinojosa and del Mastro had the occasion to explain their work plans for the future and were free to say everything they found relevant for their application. The jurisprudence of this court forbids disproportional restrictions to freedom of expression, and does not cover interviews where less questions were asked, as this does not constitute a restriction. Moreover, the medias allowed during the interviews never reported an important gap that could have breach equality between interviews.

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[123] « *SILENCED ZONES : Highly dangerous areas for the exercise of freedom of expression* », Office of the Special Rapporteur for Freedom of Expression of the IACHR, OEA/Ser.L/V/II CIDH/RELE/INF.16/17 March 15, 2017, p.11; « *The Inter-American Legal Framework regarding the Right to Freedom of Expression* », Office of the Special Rapporteur for Freedom of Expression of the IACHR, OEA/Ser.L/V/II CIDH/RELE/INF, (December, 30, 2009), para. 70; *« Democratic Institutions, the Rule of Law and Human Rights in Venezuela »*, IACHR, OEA/Ser.L/V/II. Doc. 209, December 31, 2017, p.154.

[124] *Case of Baruch Ivcher Bronstein v. Peru*, Judgment of February, 6, 2001, Series C No.74, para.149; *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July, 2, 2004, SeriesC. No.117, para.117; Case of *Satakunnan v. Finland*, ECHR No 931/13, GC, (27 June 2017), para. 117.

[125] *Case of Tristán Donoso v. Panama*, Judgment of January 27, 2009, Series C No. 193. para. 122.

[126] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, OC-5/85, IACtHR, Series A No. 5. (November 13, 1985), para. 42; *Case of Müller and Others v Switzeland*, ECHR, no. 10737/84, (May, 24 1988), para. 32; *Case of Sürek and Özdemir v. Turkey*, ECHR, nos. 23927/94 and 24277/94 (July, 8, 1999), para. 57.

Used as a guarantee, they did not reveal any information that could have violated their right to reputation.

Therefore, Mrs Hinojosa and del Mastro never suffered from a restriction of their freedom of expression, and Fiscalandia did not violate article 13 ACHR.

4. The Nominating board did not violate the right to information

The Inter-American system is the first one to protect the right to information as a fundamental human right[127] and freedom of expression with equal importance[128]. Access to information enforces the principle of maximum disclosure and good faith, except to ensure respect for the rights and reputation of others, which is a positive obligation of the States[129]. This right is a guarantee to democracy[130]: it means every person shall have equal opportunities to seek and receive information without discrimination[131].

To guarantee the right to information, States have a proactive obligation[132], *i.e*, they must make sure to provide the information needed for people to exercise their rights[133]. In addition, States must also creates a culture of transparency[134]. The right to information must also be protected by an access to an effective judicial system[135].

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[127] *Case of Claude-Reyes v. Chile*, Judgment of September, 19, 2006, Series C. No.151.
[128] *Case of The Last Temptation of Christ,* Judgment of February 5, 2001, Series C No.73, para. 67; *Case of Baruch Ivcher Bronstein v. Peru*, Judgment of February, 6, 2001, Series C No.74, para.149
[129] *Case of Claude-Reyes v. Chile*, 2006, *ibid*., para.58
[130] *Case of Claude-Reyes v. Chile*, 2006, *ibid*., para 43
[131] Declaration of Principles on Freedom of Expression, Principe 2, IACHR (October 2000).
[132] « *The Inter-American Legal Framework Regarding the Right to Access to Information* », Office of the Special Rapporteur for Freedom of Expression of the IACHR, Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF (March 7, 2011), para. 261; « *Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression* », Chapter IV, OEA/Ser.L/V/II. Doc. 51, (December 30, 2009). para. 30-32.
[133] « *The Inter-American Legal Framework regarding the Right to Freedom of Expression* », Office of the Special Rapporteur for Freedom of Expression of the IACHR, OEA/Ser.L/V/II CIDH/RELE/INF, (December, 30, 2009).
[134] « *Principles on the right to access to information* », Resolution 147 of the 73rd Ordinary Period of Sessions, Principle 10, Inter-American Juridical Committee, (August 7, 2008).
[135] *Case of Claude-Reyes v. Chile*, Judgment of September, 19, 2006, Series C. No.151, para. 137.

To measure the adequacy of transparency, the IACHR submitted a three-part test. Firstly, any restriction to the principe of maximum disclosure must pursue an aim protected by the ACHR, for example the "*respect for the rights or reputation of others*" or "*protection of national security, public order or public health or morals*''[136]. Secondly, States must demonstrate the disclosure threatens this aim. Thirdly, States must demonstrate the violation of this aim is beyond the interest of having the information. For instance, the IACtHR condemned a lack of transparency when the government pressured medias to keep some information secret. In its reports on legal standards regarding the right to information, the IACtHR congratulated Nicaragua that established the duty for public entities to publish documents about its functioning and the recruiting process. It also congratulated Honduras for putting on public hearings for interviews[137]. Those public hearings are necessary, as public official must be exposed to public scrutiny for the benefit of democracy, and the only restriction to transparency is if the public official honour is at stake, which is also protected by article 13. This Court already condemned a restriction put on a journalist for broadcasting illegal activities of a public officers[138].

In this case, the call for candidates with the general timeline and the requirements for the position was published twice in national newspapers as a consideration for citizens struggling having access to internet. The list of suitable candidates and the rectification notice for the proficiency test were published. The candidates shortlisted were interviewed and during those

[136] *Case of Claude-Reyes v. Chile*, 2006, *ibid*., para. 90; *Case of López-Álvarez v. Honduras*, Judgment of February, 1, 2006, Series C. No.141, para. 165; *Case of Palamara Iribarne*, Judgment of November, 22, 2005, Series C. No.135, para. 85.
[137] « Specialized supervisory bodies for the right to access to public information », Special rapporteur for freedom of expression of the IACHR, OAS/Ser.L/V/II. CIDH/RELE/INF.14/16.
[138] *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004. Series C No.117.

interviews, the press and civil organisations were present[139] to guarantee the process' transparency and the respect of human rights as encouraged by international standards and the IACHR in this case[140]. Moreover, Fiscalandia's medias are known to publish every suspicion of scandal in the country[141], therefore they were an important guarantee and they did no wrong to the petitioners, so the latter were unable to argue a violation of their right to reputation.

The petitioners may argue a breach of the right to access to information because they claim an absence of access to the reasons of their rejection and the lack of information regarding the selection process. Firstly, the selection process was transparent, and the requirements to apply were widely published. Members of the Nominating Board received paper guidelines they chose not to disclose as it constituted an internal working paper for them to precise the requirements. Mexico established a distinction between documents directly impacting the people, and documents having a supporting role and whose dissemination does not affect the decision made[142]. Those guidelines were only used as a supporting document used in the deliberation process to precise the requirements previously published and contained the questions of the proficiency test. Therefore, publishing them would have made the selection process meaningless, and that kind of dissemination was considered proportionate by the IACHR in the cited report.

Secondly, the reasoning behind the rejection of each candidates was not published in order to enforce the respect of their dignity and reputation, enforced by article 11 ACHR. In order to respect the right to information, the State had to put on effective remedies and a possibility to require those information. Nevertheless, Mrs Hinojosa, del Mastro and other rejected candidates

[139] Hypothetical p.7 §34.
[140] Clarification answer n°30.
[141] Hypothetical p.3 §18.
[142] « Specialized supervisory bodies for the right to access to public information », Special rapporteur for freedom of expression of the IACHR, OAS/Ser.L/V/II. CIDH/RELE/INF.14/16, para 55.

did not asked for the reasons of their rejection but simply required from the Nominating Board to review their application when the newly selected prosecutor was just appointed. Mrs Hinojosa and del Mastro, filed a motion for reconsideration which proves the existence of a judicial remedy the State considers to be effective.

The rejected candidates did not asked for further information, but for a review of their grades. Therefore, Fisclandia did not refuse to grant information in violation of the Inter American Convention.

In conclusion, Fiscalandia did not violate the right of information protected by article 13 ACHR.

V. REQUEST FOR RELIEF

Based on the foregoing submissions, the respondent State of Fiscalandia respectfully requests this Honorable Court to declare and adjudge in favour of the State that:

1) The request of the petitioners is declared inadmissible for not exhausting domestic remedies.

2) The State has not violated its international obligations under Articles 8, 13, 24 and 25 in conjunction with Article 1(1) and 2 of the ACHR.