

INTER-AMERICAN COURT OF HUMAN RIGHTS

Maricruz, et al. v. Republic of Fiscalandia

Petitioners

v.

The Republic of Fiscalandia

Respondent

MEMORIAL ON BEHALF OF THE STATE

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STATEMENT OF FACTS

The Respondent, the Republic of Fiscalandia ('Fiscalandia'), is a South American democratic state. It has four branches of government. These are the executive, legislative, judiciary, and public oversight branches.¹

The Supreme Court is the highest body within the judicial system of Fiscalandia and has the power to render final and unappealable decisions in civil, criminal, constitutional, and administrative law matters. Under its disciplinary functions, the Supreme Court is responsible for the suspensions and removal penalties against judges of all levels and specializations.²

The Public Oversight Branch consists of the Office of the Prosecutor General, which is headed by the Prosecutor General.³ *Article 103 of the 2007 Constitution of Fiscalandia* establishes certain criteria in order to serve as the Prosecutor General, which include, *inter alia*, the requirements that the candidate has practiced the profession for at least 10 years at the time of application and does not have any financial or partisan political ties that might affect their independence.⁴ *Article 103* also establishes that the President can directly remove the Prosecutor General on serious grounds.⁵

Magdalena Escobar joined the prosecutorial service in 1988 and was appointed to the office on September 1, 2005 for a 15-year term.⁶ She was in office when the 2007 Constitution entered into force. The *Ninth Transitional Provision* of the 2007 Constitution provides that the heads of the oversight bodies that were in office when the new constitutional text entered into force 'shall remain in their positions on a transitional basis' once they comply with the relevant

¹ Hypothetical case, para 4.

² Hypothetical case, para 7.

³ Hypothetical case, para 10.

⁴ Hypothetical case, para 12.

⁵ Hypothetical case, para 13.

⁶ Hypothetical case, para 14.

constitutional requirements.⁷ Heads of the oversight bodies were confirmed in office by a Presidential Decree.

Given that the current Prosecutor General term of office was transitional, the President of Fiscalandia, Javier Alonso Obregón, issued an *Extraordinary Presidential Decree* which ordered the creation of a ‘nominating board for the selection of the Prosecutor General of the Republic of Fiscalandia.’⁸

On June 16, 2017, Magdalena Escobar filed a motion to vacate, which is an administrative act, with the Tenth Administrative Court of Berena, challenging the call for candidates issued by the *Extraordinary Presidential Decree*.⁹ She alleged that the measures taken by President Obregón had the same effect of removal from office and therefore infringed a number of her rights.¹⁰

She additionally sought injunctive relief to temporarily suspend President Obregón’s call for candidates on the ground that the selection process could cause irreparable harm to her rights.¹¹

Although her request was initially granted, that decision was overturned on appeal by the Second Chamber of Appeals of Berena.¹² Magdalena Escobar did not appeal this decision to the Supreme Court of Fiscalandia

On August 1, 2017, Magdalena Escobar filed a petition with the Inter-American Commission on Human Rights (‘IACHR’) before any judgement on the merits of the motion to vacate had been issued.¹³ On January 2, 2018, the Supreme Court ruled that the motion to vacate was inadmissible because ‘the selection of Domingo Martinez as Prosecutor General had created a

⁷ Hypothetical case, para 14.

⁸ Hypothetical case, para 19.

⁹ Hypothetical case, para 23.

¹⁰ Hypothetical case, para 23.

¹¹ Hypothetical case, para 24.

¹² Ibid.

¹³ Hypothetical case, para 46.

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 defence.’¹⁴

The Nominating Board (‘Board’) for the selection of the Prosecutor General of the Republic of Fiscalandia met for the first time on July 15, 2017 and approved the text for the public call for candidates for the position of Prosecutor General.¹⁵ The Board received 83 applications and after a few days published a list of 48 ‘suitable candidates’ (44 men and 4 women).¹⁶ On August 10, 2017, the candidates who had not previously worked in the Office of the Prosecutor General were put through a proficiency test and each candidate’s score was published online.¹⁷ The Board went on to grade the applicants’ background.¹⁸

At the session on August 15, each Board member was given four files to review in order to determine whether the candidates had sufficient merit to serve in the position.¹⁹ At the conclusion of this stage, the list was reduced to 27 contenders (25 men and 2 women) ranked according to their scores.²⁰ Two career prosecutors, Maricruz Hinojoza and Sandra del Mastro, were ranked as candidates 1 and 2 respectively.²¹

Interviews were conducted with the 27 candidates in September. No definitive list of questions was used and the Board instead focused their questions on the candidates’ past work experiences

¹⁴ Hypothetical case, para 42.

¹⁵ Hypothetical case, para 26.

¹⁶ Hypothetical case, para 28.

¹⁷ Hypothetical case, para 29.

¹⁸ Hypothetical case, para 31.

¹⁹ Hypothetical case, para 31.

²⁰ Hypothetical case, para 32.

²¹ Ibid.

and work plans.²² In the case of Maricruz Hinojosa and Sandra del Mastro, the interviewers only asked each of them one question regarding their work history.²³

A shortlist was sent to President Obregón, which consisted of 3 candidates ranked 18th, 21st, and 25th. Domingo Maritnez was selected by President Obregón as the new Prosecutor General of the Republic. One day later, an article alleging a relationship between Domingo Martinez and President Obregón was published.²⁴

Maricruz Hinojosa and Sandra del Mastro challenged the selection process and the appointment of Domingo Martinez by filing a writ of *amparo* against all the resolutions passed by the Board.²⁵ They maintained that the process had violated their right to due process and equal access to public office.²⁶ They alleged that they were discriminated against on the basis of gender because they had not received an explanation of the reasons for their exclusion from the shortlist.²⁷

The *amparo* action was declared inadmissible by the Second Constitutional Court of Berena on the grounds that the appointment of the Prosecutor General is a sovereign power of the executive branch, and therefore was not subject to review via *amparo* proceedings.²⁸ The appeal was subsequently affirmed by the Second Appellate Chamber of Berena, and the extraordinary appeal filed by Maricruz Hinojosa and Sandra del Mastro with the Supreme Court of Justice was also

²² Hypothetical case, para 34 and 35.

²³ Hypothetical case, para 35.

²⁴ Hypothetical case, para 37.

²⁵ Hypothetical case, para 38.

²⁶ Hypothetical case, para 38.

²⁷ Ibid.

²⁸ Hypothetical case, para 39.

denied.²⁹ Maricruz Hinojosa and Sandra del Mastro subsequently filed a petition with the IACHR on April 1, 2018.

President Obregón filed an *amparo* action to challenge the constitutional ban on re-election, which was denied at first instance by the First Constitutional Court of Berena.³⁰ Judge Mariano Rex, the presiding judge, found that the right to elect and be elected was not absolute, and that the constitutional limit was reasonable and proportionate.³¹ That decision was overturned on appeal by the Supreme Court on the grounds that the prohibition was excessive and infringed on the human right to re-election. The court further ordered that Judge Mariano Rex be investigated. In disciplinary proceedings instituted against him, where Mariano Rex was granted the necessary time to exercise his right of defence, the Supreme Court ruled to remove him from the bench on grounds of a ‘serious breach of the obligation to properly state the reasoning for his decision.’³² The decision was handed down by the full Court on December 01, 2017.³³

After the Supreme Court removed him from the Bench, Judge Mariano Rex filed a petition with the IACHR claiming that his right to a fair trial was violated, and that any remedy he might have pursued would have been adjudicated at the first instance by the same Supreme Court that had sanctioned him.³⁴

²⁹ Ibid.

³⁰ Hypothetical case, para 40.

³¹ Ibid.

³² Hypothetical case, para 41.

³³ Ibid.

³⁴ Hypothetical case, para 43 and 44.

LEGAL ANALYSIS

1. Preliminary Objection

1.1. The Petitioners did not exhaust local remedies and thus their claims are not admissible before the Inter-American Court of Human Rights ('IACtHR').

Section 46(1)(a) of the American Convention on Human Rights ('ACHR') provides that a petitioner must first exhaust domestic remedies in accordance with general recognized principles of international law before filing a petition with the Inter-American Commission on Human Rights ('IACHR').³⁵ The State is entitled to raise a preliminary objection claiming that domestic remedies were not exhausted before the IACtHR so long as these were raised during the admissibility stage before the IACHR.³⁶

In the instant case, Fiscalandia raised preliminary objections of admissibility for each petitioner during the admissibility stage before the IACHR.³⁷

The State must show that the domestic remedies are available, adequate, appropriate and effective.³⁸ This principle does not apply where due process of law does not exist for protection of the right allegedly violated, where the party has been denied access to or prevented from exhausting such remedies, or where there is an unwarranted delay in the rendering of a final judgement.³⁹

³⁵ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 46 (1)(a).

³⁶ *Herrera Ulloa v. Costa Rica* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 107 (2 July 2004) para 81.

³⁷ Hypothetical Case, para 44, 46, 50.

³⁸ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn Cambridge University Press 2013) 94.

³⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 46(2).

1.1.1. Mariano Rex

Mariano Rex failed to exhaust domestic remedies in accordance with *Article 46(1) of the ACHR*, claiming that his case falls into the exceptions of *Article 46(2)*.

In Mariano Rex's case, although the Full Court's decision to remove him can be challenged by filing a motion for reconsideration,⁴⁰ he is instead alleging a violation of his constitutional rights. Such an issue can legally be brought before the Supreme Court by way of *amparo* to challenge '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.'⁴¹

Mariano Rex contends that any remedy sought for the alleged violation of his rights would be prejudiced by the composition of the Supreme Court. While it must be noted that where a State's final court has already ruled on a substantive issue, a remedy which deals with that same issue will be considered ineffective,⁴² an *amparo* is a petition for a constitutional remedy, which would not involve an appeal either on the facts or substantive law which led to the decision to remove Mariano Rex. Such a claim for a constitutional remedy would involve an enquiry into an entirely different subject matter, that is, whether the procedure itself adopted by the full court before handing down their decision to remove him contravened a right to which Mariano Rex was entitled. The *amparo* would have provided Mariano Rex with an adequate and effective domestic remedy which would have been capable of remedying the alleged violation of his rights. The responsibility of this enquiry is placed squarely upon the shoulders Supreme Court.⁴³

⁴⁰ Clarification question 51.

⁴¹ Clarification question 23.

⁴² Inter-American Commission on Human Rights (IACHR) 'Admissibility Report No. 43/10, Petition 242-05, *Mossville Environmental Action Now (United States)*' 17 March 2010, para 32.

⁴³ Hypothetical Case para 7.

Mariano Rex, having a reasonable prospect of success in such proceedings, was neither denied nor prevented from accessing this remedy but simply chose not to pursue them. His subjective beliefs as to the inefficiency of the local remedies available to him or the perceived injustice it would cause him are not enough to absolve him of the requirement to exhaust them.⁴⁴ His petition is therefore inadmissible due to his failure to exhaust domestic remedies.

1.1.2. Magdalena Escobar

Magdalena Escobar failed to exhaust domestic remedies as she filed her petition prior to the Supreme Court's judgement being delivered and thus her claim is inadmissible before the IACtHR.

Where a State files a petition with the IACHR pending a final judgement before a domestic tribunal, the IACHR cannot act on that petition until the final judgment has been rendered.⁴⁵ In the instant case, Magdalena Escobar filed a petition with the IACHR on August 1, 2017, despite the Supreme Court having not given its final ruling until January 2, 2018.⁴⁶ The IACHR acted on the petition by giving notice of the registration of the petition⁴⁷ prior to the Supreme Court's delivery of its judgement. Because the petition was acted upon before the Supreme Court could give its final ruling on the motion to vacate, that remedy could not be said to be fully exhausted.

The remedy of a motion to vacate constituted an effective and adequate remedy.

⁴⁴ *RT v France* (Admissibility), Communication No 262/1987, UN Doc CCPR/C/35/D/262/1987, (30 March 1989).

⁴⁵ *Castillo Petruzzi v Peru* (Preliminary Objections) Inter-American Court of Human Rights Series C No 41 (4 September 1998) para 54 – 55.

⁴⁶ Hypothetical Case para 42.

⁴⁷ Hypothetical Case para 45.

It was stated in *Velásquez-Rodríguez v. Honduras* that for a remedy to be adequate it must be one that is suitable to address the infringement of a legal right.⁴⁸

The Supreme Court of Justice has upheld a decision which stated that the appropriate means to challenge a sovereign power of the executive is through a motion to vacate.⁴⁹ A motion to vacate provides protection for the rights and interests of the persons under the government's jurisdiction.⁵⁰ Given that Magdalena is alleging a violation of her rights due to the sovereign acts of issuing the *Extraordinary Presidential Decree* on June 14, 2017 and removing her from office,⁵¹ a motion to vacate would be the appropriate remedy.

It was further stated in *Velásquez-Rodríguez v. Honduras* that for a remedy to be effective, it must be capable of producing the result for which it was designed.⁵² A domestic remedy is not effective if denied for a trivial reason or without examination of the merits.⁵³

The Supreme Court stated in its final judgement that a motion to vacate was inadmissible due to the irreversible factual situation that had been created.⁵⁴ This reasoning was not trivial because to rule otherwise would have resulted in the infringement of the rights of third parties. Furthermore, the irreversible situation referred to could have been avoided had the appropriate interim measures available to Magdalena been exhausted. The need for an interim measure to prevent such a factual situation from occurring was recognized by Magdalena as she sought injunctive

⁴⁸ *Velásquez-Rodríguez v. Honduras* (Merits) Inter American Court of Human Rights Series C No 4 (29 July 1998) para 64.

⁴⁹ Hypothetical Case para 39.

⁵⁰ Clarification Question 31.

⁵¹ Hypothetical Case para 13.

⁵² *Velásquez-Rodríguez v. Honduras* (Merits) Inter American Court of Human Rights Series C No 4 (29 July 1998) para 66.

⁵³ *Ibid* 68.

⁵⁴ Hypothetical Case para 42.

relief alongside the initial motion to vacate.⁵⁵ While the injunction was overturned by the Second Chamber of Appeals, it was still open to Magdalena to appeal that decision to the Supreme Court. There exists the likely possibility that the injunction would have been granted, thus preventing the irreversible situation referred to by the Supreme Court from being created. As such, the motion to vacate is an effective remedy, and the Supreme Court's reason for not granting it is both rational and partly caused by Magdalena's failure to appeal the decision of the Second Chamber of Appeals.

Therefore, Magdalena failed to exhaust local remedies by not appealing the decision not to grant the injunction by the Second Chambers of Appeal and by filing the petition with the IACHR before the delivery of the Supreme Court's final judgement.

1.1.3. Maricruz Hinojosa and Sandra del Mastro

Where multiple avenues of redress are available, the petitioner is only required to exhaust the proceeding that is suitable for remedying the alleged violations, as opposed to pursuing all remedies.⁵⁶ Maricruz Hinojosa and Sandra del Mastro have not exhausted local remedies because they did not pursue the appropriate remedy of a motion to vacate to address their alleged violations.

The IACHR has stated that, 'if the alleged victim endeavored to resolve the matter by making use of a valid, adequate, alternative [remedy] available in the domestic legal system and the State

⁵⁵ Hypothetical Case para 24.

⁵⁶ IACHR, 'Admissibility Report No. 43/10, Petition 242-05, Mossville Environmental Action Now (United States)', 17 March 2010, para 3.

had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.’⁵⁷

While Maricruz Hinojosa and Sandra del Mastro filed an *amparo*, this would not have been an adequate remedy as the appointment of Prosecutor General is a sovereign power.⁵⁸ Fiscalandia’s final court of appeal has held that sovereign powers are not subject to *amparo* proceedings.⁵⁹ Rather, they stated that the appropriate remedy in these circumstances would be to file a motion to vacate.⁶⁰ This would be binding precedent on the State of Fiscalandia. Maricruz Hinojosa and Sandra del Mastro therefore failed to exhaust domestic remedies by not filing a motion to vacate.

2. Merits

2.1. The State of Fiscalandia did not violate Mariano Rex’s rights under Articles 8 and 25 of the ACHR.

2.1.1. The State of Fiscalandia did not violate Mariano Rex’s right to a fair trial under Article 8 of the ACHR.

Mariano Rex’s claim that his right to a fair trial has been violated is not properly founded in law. Rather than applying to whether or not the decision of a tribunal or court is correct, the right to a fair trial is concerned only with procedural fairness in an attempt to safeguard the rule of law.⁶¹ The State of Fiscalandia observed and adhered to all the guarantees inherent in **Article 8 of the ACHR** in the disciplinary proceedings undertaken against Mariano Rex, as the matter was heard by a competent, independent and impartial tribunal previously established by law.

⁵⁷ IACHR, ‘Admissibility Report No. 70/04, Petition 667-01, Jesús Manuel Naranjo Cárdenas et al. – Jubilados de la Empresa Venezolana de Aviación VIASA (Venezuela)’ 15 October, 2004 para 52.

⁵⁸ Hypothetical Case para 11.

⁵⁹ Hypothetical Case para 39; Clarification Question 32 & 35.

⁶⁰ Ibid.

⁶¹ United Nations Human Rights Committee, ‘General Comment No. 32’, UN Doc. CCPR/C/GC/32 (23 August 2007), para 2.

The requirement of a competent authority concerns only a defendant's right to be heard by regular courts, following procedures previously established, in order to prevent persons from being judged by special or ad hoc tribunals set up for the case.⁶² Furthermore, the guarantees of independence and impartiality speak to the autonomous exercise of judicial power on the one hand, and on the other, a demand that judges approach the facts of the case subjectively free of all prejudices.⁶³

Not only does Fiscalandia's National Constitution recognize the principle of the separation of powers and judicial independence,⁶⁴ but its Supreme Court is the highest existing body in the judicial system and has the jurisdiction to duly impose penalties of suspension and removal of judges.⁶⁵ The Court assumed jurisdiction over the case, initiated disciplinary proceedings, allowed Mariano Rex to exercise his right to defence and then voted to remove him, all in accordance with the law.⁶⁶ In the absence of any evidence to the contrary, personal and subjective impartiality of the Court is to be presumed.⁶⁷

With respect to due process and the applicable minimum guarantees inherent in *Article 8(1)*, Mariano Rex was given the opportunity to present procedural challenges, submit evidence and exercise his right to defence, all in accordance with the procedures established in the *Judiciary Act of Fiscalandia*.⁶⁸

⁶² *Case of Castillo Petruzzi et al. v Peru* (Merits, Reparations, and Costs) Inter American Court of Human Rights Series C No. 52 (30 May 1999), para. 129.

⁶³ *Case of the Constitutional Court v. Peru*, Judgement, Inter American Court of Human Rights Series C No. 71 (31 January 2001), para 73.

⁶⁴ Hypothetical Case, para 2.

⁶⁵ Hypothetical Case, para 7; and Clarification question 23.

⁶⁶ Clarification Question 19.

⁶⁷ *Pullar v. the United Kingdom*, Reports of Judgments and Decisions 1996-III, European Court of Human Rights (10 June 1996), para 30.

⁶⁸ Clarification question 18.

2.1.2. *The State of Fiscalandia did not violate Mariano Rex's right to judicial protection under Article 25 of the ACHR.*

Article 25 of the ACHR provides that States must offer a simple, prompt and effective judicial recourse against actions that violate their basic rights. The IACtHR has stated that ‘for such a remedy to exist, it is not sufficient that it be provided for by the constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.’⁶⁹ A remedy which therefore proves illusory cannot be considered effective.⁷⁰

A motion for reconsideration provides Mariano Rex with an effective avenue for challenging the disciplinary proceedings and the sanction applied. In its *Report on Admissibility*,⁷¹ the IACHR found that a motion for reconsideration could not legally address the facts alleged by a petitioner if the provision authorizing challenges by way of that motion were intended for different circumstances than those for which the petitioner sought recourse. Here, however, Fiscalandia’s motion for reconsideration can be used to challenge the suspension or removal penalties imposed by the Supreme Court,⁷² and so must be distinguished from both an appeal and an opportunity for a party to re-litigate the same matter. A motion for reconsideration is instead a request that the court or judge reconsider its or her previous decision. On international jurisprudence, it is an inherent discretionary power which the court has where there has been a clear error of reasoning or where particular circumstances exist which justify reconsideration in order to prevent

⁶⁹ *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 of the American Convention on Human Rights)* Advisory Opinion OC-9/87, Inter American Court of Human Rights Series A No 9 (6 October 1987), para 24.

⁷⁰ *ibid.*

⁷¹ *Report No. 39/16, Petition 196-01 Report on Admissibility Admissibility José Alberto Picciotto Argentina* OEA/Ser.L/V/II 44 (August 31, 2016) para 28.

⁷² Clarification question 51.

injustice.⁷³ Questions of bias due to the composition of the court cannot arise in such proceedings since such a motion is an application for that court to alter or amend its judgement in light of specific matters which it overlooked or erred.

Going even further, according to *Fiscalandia's Amparo Law*, the *amparo* can be used to challenge any act or omission that threatens or violates human rights and fundamental freedoms.⁷⁴ The IACtHR has interpreted the right to judicial protection to primarily refer to an *amparo*, which it notes is a simple and prompt remedy designed for the protection of rights of individuals.⁷⁵ Therefore, not only was the prompt remedy of *amparo* available to Mariano Rex to obtain a constitutional remedy for any rights that may have been infringed in the process of the disciplinary proceedings, but that remedy would have been effective in doing so since it would have involved entirely different considerations upon which the judges of the Supreme Court would have had no preconceptions about.

Under the guise of the contravention of his rights, a judge that has been the subject of an exorbitant number of disciplinary complaints in *amparo* cases is attempting to have the finding of a competent court overturned by avoiding the necessity of applying in the normal way for judicial remedy. Two effective remedies were available to Mariano Rex to pursue and he chose not to do so. Consequently, his application amounts to no more than an abuse of the process of the Court.

⁷³ *Prosecutor v Rasim Delic*, ICTY-04-83-T (13 February 2008) para 9.

⁷⁴ Clarification question 23.

⁷⁵ *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* Advisory Opinion OC-9/87, Inter American Court of Human Right Series A No 8 (20 January 1987) para 32.

2.2. *The State of Fiscalandia did not violate any of Magdalena Escobar's rights under the ACHR.*

2.2.1. *The State of Fiscalandia did not violate Magdalena Escobar's right to a fair trial under Article 8 of the ACHR.*

Article 8 (1) of the ACHR requires the provision of a fair hearing for everyone against whom a criminal accusation is made or for the determination of their rights and obligations of a civil, labor, fiscal or any other nature.⁷⁶

In the instant case, there was no criminal accusation being made against Magdalena. Therefore, the right to a fair trial can only apply if there was a determination of her rights or obligations.

In interpreting a similar provision found in **Article 6(1) of the European Convention on Human Rights ('ECHR')**,⁷⁷ the use of the phrase 'determination of rights and obligations' has been held to require that there be a genuine dispute of a right recognized by domestic law for the right to a fair trial to apply.⁷⁸ This dispute can be related to the right's existence, scope and manner of exercise. The key distinction between the **Article 6(1) of the ECHR** and **Article 8(1) of the ACHR** is that the latter guarantees the right to a fair trial for the determination of rights and obligations of any nature as opposed to the former which is limited to civil rights.

It is recognized that the right to work is enshrined in **Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)**⁷⁹ and has been interpreted by the Committee on Economic, Social and Cultural Rights as not being an absolute and unconditional right to

⁷⁶ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8(1).

⁷⁷ European Convention for the Protection of Human Rights art 6(1).

⁷⁸ *Neves e Silva v. Portugal* App no 11213/84 (ECtHR 27 April 1989) 37; *Case of Vilho Eskelinen and others v Finland* App no 63235/00 (ECtHR 19 April 2007).

⁷⁹ International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 6.

obtain employment.⁸⁰ Although it encompasses the right not to be arbitrarily deprived of employment,⁸¹ one must first validly obtain employment for this to apply.

In the instant case, the *Ninth Transitional Provision* of the Constitution of Fiscalandia required that the heads of oversight bodies would only remain in office on a transitional basis if they complied with the constitutional requirements.⁸² *Article 103 of the Constitution* requires that for a person to be appointed as a Prosecutor General, they must have 10 years' experience of being a lawyer.⁸³ At the time of the 2007 Constitution, Magdalena Escobar, who is career prosecutor, had only been in the prosecutorial service for nine years.⁸⁴ As such, the Presidential Decree issued in March 20, 2008 confirming Magdalena Escobar into office is void and in breach of the Constitution of Fiscalandia as she was never validly on transitional basis. The correct procedure to appoint a Prosecutor General in these circumstances would have been to create a nominating board to appoint a new Prosecutor General. Given that Magdalena was never lawfully confirmed into office, due to her never being validly in office on a transitional basis, she is not protected by the right to work with respect to job of Prosecutor General. As no right or obligation of Magdalena is being affected by the *Extraordinary Presidential Decree* of June 14, 2017, there can be no breach of the right to a fair trial by the State of Fiscalandia as it does not apply.

⁸⁰ UN Committee on Economic, Social and Cultural Rights, 'General Comments No 18' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (24 November 2005) UN Doc HRI/GEN/1/Rev.1 para 6.

⁸¹ *Ibid.*

⁸² Hypothetical Case para 14.

⁸³ Hypothetical Case para 13; Clarification Question 24.

⁸⁴ Clarification Question 10.

2.2.2. *Magdalena Escobar's right to equal protection of the law was not breached as there was no discrimination established by law.*

Article 24 of the ACHR provides that all persons are 'entitled, without discrimination, to equal protection of the law.'⁸⁵ In order for this right to be breached, there must be some form of discrimination, that is, treatment based on arbitrary differences that is neither reasonable nor objective but rather results in harm to human rights.⁸⁶ Secondly, this discrimination must be effected by the application or interpretation of some domestic law.⁸⁷ The law relating to Magdalena Escobar is **Article 103 of the 2007 Constitution** and the **Extraordinary Presidential Decree**. **Article 103** is not in its effect or application discriminatory because it does not result in unequal treatment based any protected characteristic. All the criteria set out in **Article 103** can be described encompassing objective criteria and as such, will not amount to discrimination.⁸⁸ The **Extraordinary Presidential Decree**, while it affects Magdalena Escobar specifically, is not based on any arbitrary differences. Therefore, the State of Fiscalandia did not violate Magdalena Escobar's right to equal protection.

⁸⁵ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 24.

⁸⁶ *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 59.

⁸⁷ *Case of Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica* Inter-American Court of Human Rights Series C No 257 (28 November 2012) para 285.

⁸⁸ Nihal Jayawichrama, *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence* (2nd edn Cambridge University Press 2017) 1009.

2.2.3. *Magdalena Escobar's right to judicial protection before the law was not breached because she had effective recourse available to her.*

The right to judicial protection as encompassed in **Article 25 of the ACHR** imposes an obligation to provide a simple, prompt and effective remedy for the violation of a fundamental right recognized either by the ACHR or by national law.⁸⁹

Simplicity has been interpreted to refer to a procedure that is streamlined and lacks the dilatory procedural formalities of ordinary judicial means.⁹⁰ In *Aguado Alfaro et al v. Peru*, the court found a violation where the victims had no certainty as to which recourse to adopt.⁹¹ The remedy must therefore be understandable to potential litigants.

A motion to vacate allows for the effective protection of the rights and interests of persons under the government's jurisdiction.⁹² This remedy fulfills the criteria of being simple, as it is clear in who it applies to.

The remedy must also be effective, which means that it is capable of providing redress for the human rights violation in question.

While no case in the Inter-American system has dealt with interim relief in the context of the right to judicial protection, both the **Rules of Procedure of the Inter-American Court** and the **Rules of Procedure of the IACHR** recognize the need for interim measures to prevent

⁸⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 25; Thomas M. Antkowiak and Alejandra Gonza *The American Convention on Human Rights; Essential Rights* (1st edn Oxford University Press 2017) 218.

⁹⁰ Ibid 219; Allan Brewer-Carias *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (1st edn Cambridge University Press 2009) 170.

⁹¹ *Aguado-Alfaro et al v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 158 (24 November 2006) para 129.

⁹² Clarification Question 32.

irreparable harm from occurring.⁹³ This is done to ensure that remedies given by both the IACtHR and the IACHR are not rendered ineffective while the case is proceeding.

Therefore, in determining whether a remedy is effective for the purposes of providing judicial protection, this may be dependent on whether interim measures are available.

Magdalena filed for an injunction alongside the motion to vacate. While this injunction was discharged on appeal to the Second Chamber of Appeals of Berena, it was open to Magdalena to appeal that decision to the Supreme Court of Fiscalandia. There exists the possibility that the injunction could have been granted which would have prevented the motion to vacate from being rendered inadmissible due to the presence of irreversible facts.

Therefore, due the existence of the appropriate interim measure of an injunction which was available to Magdalena, the motion to vacate constitutes an effective remedy for the purposes of affording judicial protection under *Article 25 of the ACHR*.

2.3. The State of Fiscalandia did not violate Maricruz Hinojosa and Sandra del Mastro's rights under Article 8, 13, 24 and 25 of the ACHR.

2.3.1. Maricruz Hinojosa and Sandra del Mastro's right to a fair trial was not violated by virtue of the court proceedings.

Article 8 of the ACHR protects the right to a fair trial, under which every person is entitled to due guarantees 'within a reasonable time, by a competent, independent and impartial tribunal,

⁹³ IACtHR, *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009, Art 25; IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Approved by the Commission at its 109^o special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions, held from October 7 to 25, 2002, Art 25.

previously established by law'.⁹⁴ In *Chocrón-Chocrón v Venezuela*, it was stated that *Article 8* outlines the guidelines for due process that must be adhered to in order to ensure the individual can defend his or her rights.⁹⁵ Likewise, in *Duque v Colombia*, it was held that due process requires the observance of due guarantees in correlation with the procedure in question.⁹⁶

All due process guarantees were complied with by the Second Constitutional Court of Berena, the Second Appellate Chamber of Berena and the Supreme Court of Justice with respect to Maricruz Hinojosa and Sandra del Mastro. All three courts were competent, independent and impartial tribunals previously established by law that issued judgments on Maricruz Hinojosa's and Sandra del Mastro's rights according to Fiscalandia's law. In all three instances, the reasons for denying the *amparo* were adequately stated, and an alternative remedy of a motion to vacate was offered.⁹⁷ The State of Fiscalandia therefore did not violate Maricruz Hinojosa's or Sandra del Mastro's right to a fair trial with respect to their court proceedings.

2.2.2 Maricruz Hinojosa and Sandra del Mastro's right to a fair trial was not violated by virtue of the selection process.

Under *Article 8(1)*, there is a duty to comply with the judicial guarantees applicable to the procedure in question.⁹⁸ Decisions must be duly substantiated and not be arbitrary.⁹⁹ Domestic bodies, including certain administrative bodies, are required to give reasons when issuing

⁹⁴ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8.

⁹⁵ *Chocrón Chocrón v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 227 (1 July 2011) para 115.

⁹⁶ *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 84.

⁹⁷ Hypothetical, para 39; Clarification Question 35.

⁹⁸ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8(1).

⁹⁹ *Chocrón Chocrón v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 227 (1 July 2011) para 118.

decisions.¹⁰⁰ In *Claude Reyes v Chile*, the refusal by the State to give reasons for refusing to grant the applicants' request for information was held to violate the right to a fair trial because the State failed to adopt a duly justified written decision.¹⁰¹ Furthermore, the State was held to have an obligation to guarantee simple, prompt and effective recourse in cases where the State has refused to release State-held information.¹⁰²

Fiscalandia did not violate the right to a fair trial because neither Maricruz Hinojosa nor Sandra del Mastro sought to request an explanation of the reasons for their exclusion from the shortlist issued by the nominating board.¹⁰³ This is distinct from *Claude Reyes* where a request for information was made but then refused with no grounds being given. The State of Fiscalandia was not given the opportunity to adopt a duly justified written decision. Moreover, the cases where administrative bodies have been required to give reasons for their decisions in order to comply with the judicial guarantees of *Article 8(1) of the ACHR* have been limited to cases involving the arbitrary removal of persons from previously-held positions.¹⁰⁴ Neither Maricruz Hinojosa nor Sandra del Mastro previously held the position of Prosecutor General, nor were they entitled to the position of Prosecutor General after applying. The nominating board did not have an obligation in the present circumstances to provide an explanation of the reasons for the exclusion of Maricruz Hinojosa and Sandra del Mastro from the shortlist absent a request for

¹⁰⁰ *Maldonado-Ordonez v Guatemala* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 311 (3 May 2016).

¹⁰¹ *Claude-Reyes et al v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 151 (19 September 2006) para 122.

¹⁰² *Ibid* para 137.

¹⁰³ Hypothetical, para 38.

¹⁰⁴ *Maldonado-Ordonez v Guatemala* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 311 (3 May 2016).

; *Chocrón Chocrón v Venezuela* (Preliminary Objection, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 227 (1 July 2011).

reasons. The State of Fiscalandia therefore did not violate Maricruz Hinojosa or Sandra del Mastro's right to a fair trial with respect to the selection process.

2.2.3 Maricruz Hinojosa's and Sandra del Mastro's right to judicial protection was not violated because effective recourse was available.

Article 25 of the ACHR guarantees the right to judicial protection by imposing an obligation on the State to provide effective recourse to a competent court in order to ensure the protection of the individual's fundamental rights and freedoms.¹⁰⁵ The right to judicial protection imposes on the State an obligation to provide all persons in their jurisdiction with an effective judicial remedy to any violation of their fundamental rights and freedoms protected under the ACHR.¹⁰⁶ In the case of *Yatama v Nicaragua*, it was held that it is not sufficient if the recourses only formally exist; rather, they must be effective and available remedies.¹⁰⁷

Fiscalandia did not violate Maricruz Hinojosa's or Sandra del Mastro's right to judicial protection because an effective judicial remedy in the form of a motion to vacate was available to address the alleged violation of their fundamental rights. While the Supreme Court held their writ of *amparo* to be inadmissible due to its inapplicability to sovereign powers, an alternative and more effective means of redress was recommended.¹⁰⁸ This is distinguished from a situation where there was no effective recourse to challenge the exercise of state power as they could have filed a motion to vacate to challenge any irregularities in the selection process. Although the

¹⁰⁵ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 25.

¹⁰⁶ *Yatama v Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 127 (23 June 2005) para 167; *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 85.

¹⁰⁷ *Yatama v Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 127 (23 June 2005) para 169.

¹⁰⁸ Hypothetical Case, para 39.

nominating board's actions cannot be challenged by virtue of a motion to vacate,¹⁰⁹ this does not pre-empt challenging the President's appointment of Prosecutor General from a shortlist of three by virtue of a motion to vacate. The motion to vacate would be applicable in these circumstances as it allows for the effective protection of the rights and interests of the persons under the government's jurisdiction.¹¹⁰ Both Maricruz Hinojosa and Sandra del Mastro are under the government's jurisdiction.

An effective judicial remedy was therefore available to Maricruz Hinojosa and Sandra del Mastro.

2.2.4 Maricruz Hinojosa's and Sandra del Mastro's right to freedom of thought and expression was not violated by the selection process.

Article 13(1) of the ACHR protects the freedom of thought and expression, including the 'freedom to seek, receive and impart information and ideas of all kinds'.¹¹¹ This has been interpreted to impose on the State a positive obligation to grant citizens access to information under its control.¹¹² In guaranteeing the right of access to information, the State must adhere to the principles of maximum disclosure and good faith to ensure a transparent public

¹⁰⁹ Clarification Questions, no. 31 & 35.

¹¹⁰ Clarification Question 32.

¹¹¹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13.

¹¹² *Claude-Reyes et al v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 151 (19 September 2006) para 77; Inter-American Commission on Human Rights (IACHR) 'Annual Report of the Inter-American Commission on Human Rights 2009 Report of the Special Rapporteur for Freedom of Expression' (30 December 2009) OEA/Ser.L/V/II.Doc. 51; IACHR 'Declaration of Principles on Freedom of Expression', Principle 4; Inter-American Juridical Committee, 'Principles on the Right of Access to Information' Resolution CJI/RES 147 (LXXIII-O/08), 7 August 2008.

administration system and legal regime subject to due diligence.¹¹³ If the State denies provision of information, the burden is on the State to justify the reasons for refusal.¹¹⁴

The right of access to information is not absolute and can be subject to the limitations provided for under *Article 13(2) of the ACHR*. *Article 13(2)* stipulates that any restriction of the right to freedom of thought and expression must be ‘expressly established by law to the extent necessary’ to protect the rights or reputations of others, national security, public order, public health or morals.¹¹⁵ This was held to apply to the right of access to information in the case of *Claude-Reyes v Chile*. That case stated that the right of access to information may be subject to restriction, provided said restriction is established by law, based on an objective and legitimate aim and is necessary and proportionate to achieving that aim.¹¹⁶

The State of Fiscalandia did not violate Maricruz Hinojosa’s or Sandra del Mastro’s right of access to information because all information pertaining to the selection procedure and criteria of the nominating board was published and therefore available, save for the information relating to board sessions which was fully confidential in accordance with the domestic law of Fiscalandia.¹¹⁷ This restriction is therefore established by law.

¹¹³ Inter-American Commission on Human Rights (IACHR) ‘Annual Report of the Inter-American Commission on Human Rights 2009 Report of the Special Rapporteur for Freedom of Expression’ (30 December 2009) OEA/Ser.L/V/II.Doc. 51; *Claude-Reyes et al v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 151 (19 September 2006) para 86.

¹¹⁴ Inter-American Commission on Human Rights (IACHR) ‘Annual Report of the Inter-American Commission on Human Rights 2009 Report of the Special Rapporteur for Freedom of Expression’ (30 December 2009) OEA/Ser.L/V/II.Doc. 51.

¹¹⁵ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13(2).

¹¹⁶ *Claude-Reyes et al v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 151 (19 September 2006) para 88, 89, 90, 91.

¹¹⁷ Hypothetical, para 26.

Furthermore, the information dealt with in the board's sessions pertained to the personal information and documentation of the candidates.¹¹⁸ This restriction reflects the exception outlined under *Article 13(2)(a) of the ACHR*, namely, the need to respect the rights and reputations of others, which is further protected under *Article 11 of the ACHR*, which provides that everyone has the right to privacy. The restriction therefore pursues an objective and legitimate aim.

Finally, the restriction was arguably proportionate to the need to protect the candidates' right to privacy because only the nominating board's sessions were deemed fully confidential, whereas all other information related to the selection process was made available.

Moreover, neither Maricruz Hinojosa nor Sandra del Mastro requested an explanation of the reasons for their exclusion from the shortlist from the nominating board.¹¹⁹ The European Court of Human Rights, in *Guerra v Italy*, stated that the freedom of information protected under the *ECHR* cannot be interpreted as imposing a positive obligation on the State to collect or provide information of its own volition.¹²⁰ The freedom of information right under *ECHR* is analogous to the right of access to information protected under the *ACHR*. While the right of access to information contains obligations of active transparency and maximum disclosure, Fiscalandia complied with these obligations by ensuring all information pertaining to the selection process was available.¹²¹ There was no positive obligation for Fiscalandia to provide, of its own volition, the reasons for excluding Maricruz Hinojosa or Sandra del Mastro from the shortlist. Therefore,

¹¹⁸ Hypothetical, para 26.

¹¹⁹ Hypothetical, para 38.

¹²⁰ Nihal Jayawichrama, *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*, (2nd edn Cambridge University Press 2017) 771.

¹²¹ Hypothetical, para 26, 28, 29, 30, 31 & 34; Clarification Questions 36, 37, 38, 58 & 64.

a failure to provide an explanation absent a request for an explanation was not a violation of Maricruz Hinojosa's or Sandra del Mastro's right of access to information.

2.2.5 Maricruz Hinojosa's and Sandra del Mastro's right to equal protection was not violated because the Nominating Boards Law was not discriminatory in its application or interpretation.

Article 24 of the ACHR provides that all persons are 'entitled, without discrimination, to equal protection of the law.'¹²² This provision has been interpreted as referring only to discrimination resulting from the interpretation or application of a specific domestic law, as distinct from the general non-discrimination provision in **Article 1 (1)** which imposes an obligation on the State to respect the right to equality according to each substantive right provided for in the ACHR.¹²³

The principle of equality and non-discrimination is considered *jus cogens* and is therefore binding on all States.¹²⁴ It encompasses the prohibition of arbitrarily different treatment and the duty of ensuring conditions of equality for marginalized groups.¹²⁵ States have an obligation not to act in a manner that is either directly or indirectly aimed at creating a *de facto* or *de jure* situation of discrimination.¹²⁶ With regard specifically to discrimination on the basis of sex,

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against

¹²² American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 24.

¹²³ *Case of Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica* Inter-American Court of Human Rights Series C No 257 (28 November 2012) para 285; *Case of Apitz Barbera et al ('First Court of Administrative Disputes') v Venezuela* Inter-American Court of Human Rights Series C No 182 (5 August 2008) para 209; *Case of the Xákmok Kásek Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C No 214 (24 August 2010) para 272; *Case of Atala Riffo and Daughters v Chile* Inter-American Court of Human Rights Series C No 12 1502 (24 February 2012) para 82.

¹²⁴ *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 60; *Case of Atala Riffo and Daughters v Chile* Inter-American Court of Human Rights Series C No 12 1502 (24 February 2012) para 79; *Juridical Conditions and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 65.

¹²⁵ *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 59.

¹²⁶ *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 61; *Juridical Conditions and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 103.

Women (“CEDAW”) defines discrimination against women as ‘any distinction, exclusion or restriction’ on the basis of sex with the effect of impairing the ‘recognition, enjoyment or exercise’ by women of their rights and freedoms in any field.¹²⁷

Not all distinction or differentiation in treatment is considered discrimination and thus prohibited.¹²⁸ Distinction in treatment that is objective, reasonable and proportionate is not discrimination.¹²⁹ Likewise, difference in treatment that pursues a legitimate purpose and is not counter to justice, reason or the nature of things is not discrimination.¹³⁰

Fiscalandia’s *Nominating Boards Law* was not discriminatory because neither the interpretation nor the application of the law resulted in unequal protection or unequal treatment in relation to Maricruz Hinojosa or Sandra del Mastro. The *Nominating Boards Law* stipulates the composition of the nominating board for the selection of the Prosecutor General of Fiscalandia, which determines the criteria to be applied in assessing the appropriate Prosecutor General. The creation of, and selection procedure applied by, the nominating board complied with the standard in international law that governs the principles applicable to the selection of justice system authorities. States must guarantee the selection of justice system authorities adheres to ‘principles of efficiency, transparency and objective criteria such as merit, equity and aptitude’¹³¹

¹²⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 1.

¹²⁸ *Case of Artavia Murillo et al* (‘*In Vitro Fertilization*’) v *Costa Rica* Inter-American Court of Human Rights Series C No 257 (28 November 2012) para 285; *Duque v Colombia* Inter-American Court of Human Rights Series C No 12 841 (2 April 2014) para 62; *Juridical Conditions and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 84.

¹²⁹ *Juridical Conditions and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 84.

United Nations Human Rights Committee ‘General Comments No 18’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (19 May 1989) UN Doc HRI/GEN/1/Rev.1.

¹³⁰ *Juridical Conditions and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 90, 91.

¹³¹ United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 art 7.

and guard against partiality, prejudice and discrimination.¹³² In the *Case of Apitz Barbera*, the IACtHR held that the criteria and processes for appointing persons in public service must be objective and reasonable.¹³³ Likewise, the case of *Yatama v Nicaragua* stated that the State must guarantee access to public services under conditions of equality.¹³⁴

The nominating board was created according to Fiscalindia's law. Its members were appointed according to the criteria stipulated under the *Nominating Boards Law*.¹³⁵ Regarding the criteria of 'three members of the public', *Black's Law Dictionary* has defined 'public' as 'of, relating to, or involving an entire community, state or country... the people of a country or community as whole'.¹³⁶ The Minister of Justice, Ombudsman of Fiscalandia and an independent member of the National Assembly all fall under the scope of 'members of the public'. Therefore, the creation of, and selection process adopted by, the nominating board complied with the international standard.

Moreover, the application of the *Nominating Boards Law* in the appointment of senior government officials was not discriminatory, because the selection process itself did not make any distinction in treatment with regard to Maricruz Hinojosa and Sandra del Mastro. They were assessed with the other candidates by the nominating board, irrespective of gender. They were subject to the same criteria as the other candidates in a transparent selection process under which all relevant information was published and made available, excluding the board's sessions.¹³⁷ All

¹³² UN Guidelines on the Role of Prosecutors, Inter-American Commission on Human Rights 'Guarantees For The Independence Of Justice Operators. Towards Strengthening Access to Justice And The Rule Of Law In The Americas' (5 December 2013) OEA/Ser.L/V/II Doc. 44.

¹³³ *Case of Apitz Barbera et al ('First Court of Administrative Disputes') v Venezuela* Inter-American Court of Human Rights Series C No 182 (5 August 2008) para 206.

¹³⁴ *Yatama v Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) Inter American Court of Human Rights Series C No 127 (23 June 2005) para 194.

¹³⁵ Hypothetical, para 25 & footnote 1.

¹³⁶ Henry Campbell Black, *Black's Law Dictionary* (10th edn, West Publishing Company 2014) 1422.

¹³⁷ Hypothetical, para 26, 29, 30, 31, 34; Clarification Questions 38, 54, 58, 64.

candidates were asked to provide the same documentation,¹³⁸ set to the same proficiency test,¹³⁹ and interviewed.¹⁴⁰ With respect to the interviews, despite Maricruz Hinojosa and Sandra del Mastro only being formally asked one question, in substance, they were asked about their work history, whereas the other candidates were asked about their work experience and work plans.¹⁴¹ All candidates submitted their work plans to the nominating board when submitting their documentation.¹⁴² The nominating board already had relevant information pertaining to Maricruz Hinojosa and Sandra del Mastro, and therefore despite only being asked one question each, the board had all relevant information to make an informed and objective decision. Like the other candidates, Maricruz Hinojosa and Sandra del Mastro were interviewed for 30 minutes on the same subject matter.¹⁴³ There was no differential treatment and therefore no discrimination.

¹³⁸ Hypothetical, para 26.

¹³⁹ Hypothetical, para 30.

¹⁴⁰ Hypothetical, para 34, 35.

¹⁴¹ Hypothetical, para 35.

¹⁴² Hypothetical, para 26.

¹⁴³ Hypothetical, para 34, 35.

REQUEST FOR RELIEF

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

1. the Applicants' petitions are inadmissible;
2. the State of Fiscalandia did not violate Articles 8 or 25 of the ACHR with respect to Mariano Rex.
3. the State of Fiscalandia did not violate Article 8, 24 or 25 of the ACHR with respect to Magdalena Escobar.
4. the State of Fiscalandia did not violate Articles 8, 13, 24 or 25 with respect to Maricruz Hinojosa and Sandra del Mastro.