Team Number: 201

Maricruz Hinojoza et al.

Applicants

v.

Republic of Fiscalandia

Respondent

MEMORIAL FOR THE STATE

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

STATEMENT OF FACTS 1

A. Background on the Republic of Fiscalandia 1

B. Factual Background of Petitions Before the IACHR 3

C. Proceedings Before the IACHR 6

LEGAL ANALYSIS 10

I. MARIANO REX, MAGDALENA ESCOBAR, AND MARICRUZ HINOJOZA FAILED TO EXHAUST DOMESTIC REMEDIES, THUS THE MERITS OF THE CASE SHOULD NOT BE CONSIDERED. 10

A. Domestic remedies were not exhausted in relation to each of the Petitioners actions. 11

a. Rex failed to exhaust domestic remedies by not bringing any domestic legal action to challenge the administrative decision to remove him from office. 11

b. Escobar failed to exhaust domestic remedies because the judgment on the merits of the motion to vacate had not yet been issued when Escobar filed her petition. 11

c. Hinojoza and Mastro failed to exhaust domestic remedies by not filing a motion to vacate. 12

B. Petitioners claims do not fall under the exceptions of excusing a petitioner's failure to exhaust domestic remedies. 12

II. FISCALANDIA DID NOT VIOLATE ARTICLE 24 IN CONJUNCTION WITH ARTICLE 1.1 OF THE ACHR IN RELATION TO ESCOBAR, HINOJOZA, AND MASTRO BECAUSE IT FULFILLED ALL ITS LEGAL OBLIGATIONS TO

RESPECT AND GURANTEE HUMAN RIGHTS AND THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION. 13

A. Fiscalandia did not deprive Escobar of her Article 24 right to equal protection when it authorized the creation of the nominating board for the selection of a new Prosecutor General because nominating a suitable head of office to replace a senior official whose term of office had expired served a legitimate state purpose in furtherance of an aim in accordance with international law norms..... 15

B. **The selection process of the appointment of Prosecutor General did not violate Article 24 in relation to Hinojoza and Mastro because President Obregón selected the Prosecutor General after prior scrutiny by an independent entity comprised of both state and civil society members to ensure impartiality and equal access to public office**. ……16

III. FISCALANDIA PROVIDED PETITIONERS WITH JUDICIAL GURANTEES AND EFFECTIVE LEGAL RECOURSE CONSISTENT WITH ARTICLE 8 AND 25. 17

A. Fiscalandia did not violate Article 8.1 and 25 of the Convention in relation to Article 1.1 and 2 because it provided Rex with a judicial proceeding regulated in the Judiciary Act of Fiscalandia. 18

B. Fiscalandia complied with Article 8.1 and 25 of the Convention in relation to Article 1.1 because it provided Escobar with a formal hearing. 21

C. Fiscalandia complied with Article 8 and 25 of the Convention in relation to Article 1.1 because Hinojoza and Mastro had the ability to challenge any irregularity in the selection process by means of motion to vacate. 21

IV. THE STATE OF FISCALANDIA FULFILLED ALL OF ITS LEGAL OBLIGATIONS TO RESPECT AND ENSURE THE RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION PROTECTED BY ARTICLE 13 IN RELATION TO ARTICLES 1.1 AND 2 OF THE ACHR IN THE CASE OF HINOJOZA AND MASTRO. 24

A. Hinojoza and Mastro cannot assert the right to information to obtain private information that is not held by the State. 26

B. The information sought by Hinojoza and Mastro is not a matter of public interest………...27

C. Fiscalandia complied with established international law pertaining to the provision of certain limitations on the exercise of the rights and freedoms as necessary for the protection of public order, morals, and the rights and freedoms of others. 31

a. The State's refusal to hand over part of the information requested by Petitioners does not constitute a violation of the right to the freedom of thought and expression because the disclosure would frustrate the purpose of Article 13 by impeding the rights, freedoms, and expression of others. 31

b. The limitations on the access to the information of the Nominating Board, and independent entity, is established by law and supported by international norms and democratic principles...... 32

REQUEST FOR RELIEF 33

INDEX OF AUTHORITIES

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 1 ..... 14, 17, 19, 24, 34

Article 13 ..... 24, 25, 26, 28, 29, 30, 31, 33, 34

Article 2 ..... 25, 34

Article 24 ..... 14, 15, 16, 34

Article 25 ..... 18, 20, 21, 34

Article 30 ..... 31, 32

Article 46 ..... 11, 12, 13

Article 8 ..... 17, 18, 21, 34

CASES AND REPORTS

Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) 19, 20

Barbani Duarte et al. v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 234 (Oct. 13, 2011)..... 23

Case of Palamara Iribarne vs. Chile. Merit, Reparations and Costs. Judgment of November 22, 2005 24

Castro v. Colombia, decision adopted 28 October 2005 14

Chocrón Chocrón v. Venezuela, Admissibility Report, Report No. 38/06, Inter-Am. Comm'n H.R., Petition No. 549-05 (Mar. 15, 2006) 23

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Edward v. United Kingdom, Eur. Ct. H.R. (ser. A), No. 247-B (1992)..... 19

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IACHR, Admissibility Report No. 16/04, Petition 129-02, *Tracy Lee Housel* (United States), 27 February 2004..... 13

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IACHR, *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135..... 28

IACHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010*)*..... 30

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J. v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACHR. (ser. C) No. 275 (Nov. 27, 2013) 18

Kurbogaj v. Spain, Decision adopted 14 July 2006 14

Loayza Tamayo v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No 33 (Sept. 17, 1997) 11

Mémoli v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 265 (Aug. 22, 2013) 23

Report No. 04/01. Case 11.625. Merit. *María Eugenia Morales de Sierra.* Guatemala. January 19, 2001 15

Report No. 04/01. Case 11.625. Merits. *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001. 14

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Report No. 50/16. Case 12.834. Merits. *Undocumented Workers. United States of America*. November 30, 2016 74. 15

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Suárez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997) 18

Tarazona Arrieta et al. v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 286 (Oct. 15, 2014) 18

Velasquez-Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) ... 11

Vidal v. Belgium, Eur. Ct. H.R. (ser. A), No. 235-B (1992) 19

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Principle 4 of the IACHR's "Declaration of Principles" 26

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 12

The International Covenant on Civil and Political Rights 25

COMMITTEE REPORTS

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STATEMENT OF FACTS

A. Background on the Republic of Fiscalandia

The Republic of Fiscalandia ("Fiscalandia") is a unitary, democratic, and decentralized state, organized under the republican form of government.[1] Since its formation, Fiscalandia has prioritized the principles of separation of powers, judicial independence, human dignity, and respect for human rights.[2] Fiscalandia's national constitution went into force on November 25, 2007, and recognizes these principles as the highest aims of the state.[3]

Within the past century, Fiscalandia has taken steps to ensure all persons have equal access to those rights.[4] In 1970, Fisclandia ratified the American Convention on Human Rights (ACHR), a body of the OAS, and recognized the jurisdiction of the Inter-American Court.[5] Fiscalandia ratified most of the international human right instruments such as: the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the Inter-American Convention against Corruption, and the United Nations Convention against Corruption. [6]

In furtherance of these principles, Fiscalandia established the creation of nominating boards as temporary bodies for the purpose of screening candidates for appointments into senior government positions.[7] Since Fiscalandia recognizes the importance of having greater citizen

[1] Case of Maricruz Hinojoza, et al. v. Republic of Fiscalandia [hereinafter "Hypothetical" ¶ 2.]
[2] *Id.*
[3] *Id.*
[4] Hypothetical ¶ 2-3.
[5] Hypothetical ¶ 3
[6] *Id.*
[7] *Id.*

participation in the appointments, the law provides that nominating boards are composed of twelve members: three university deans, three members of the Fiscalandia National Bar Association, three sitting judges, and three members of the public, which are selected by the President of Fiscalandia. Furthermore, the Nominating Boards Law establishes that candidates will be screened based on the principles of transparency, merit, morality, honesty, efficiency, and citizen participation.[8]

Nominating Boards operate independently and serve as intermediate entities that are not part of the government.[9] Due to the diverse composition of each nominating board, not all of the members are civil servants, and as such, nominating boards are not subject to the same accountability regime as state actors.[10] Accordingly, the Nominating Boards Law gives each board full discretion to determine the evaluation criteria and parameters used during its selection process.[11]

The Office of the Prosecutor General is one of the four institutions that exercises supervisory functions of the public oversight branch.[12] The Prosecutor General, who serves as the head of the Office of the Prosecutor General, is selected by the President of Fiscalandia from a shortlist of three candidates proposed by the respective nominating board.[13]

Article 103 of Fiscalandia's Constitution requires that all candidates meet certain criteria and qualifications for the position such as: (1) be Fiscalandian by birth, (2) be over 45 years of age, (3) have a law degree, (4) be of good moral character, (5) have practiced the profession for at least 10 years at the time of application, (6) have good physical and mental health, as well as

[8] Clarification Questions & Answers, # 37.
[9] Clarification Questions & Answers, # 35.
[10] *Id.*
[11] Clarification Questions & Answers, # 9.
[12] *Id.* at ¶10.
[13] *Id.* at ¶11.

spiritual peace, and (7) not have any financial or partisan political ties that might affect their independence.[14]

When the 2007 Constitution went into force, senior officials already in office at the time were allowed to remain in their positions on a *transitional basis* as long as they complied with their position requirements.[15] Upon their resignation or the completion of the transitional period, senior officials were replaced in accordance with the Nominating Boards Law of 1999.[16]

B. Factual Background of Petitions Before the IACHR

Magdalena Escobar ("Escobar"), the previous Prosecutor General of Fisclandia, joined the prosecutorial career service in 1998 and was appointed Prosecutor General on September 1, 2005 by the former President Santa María for a 15-year term.[17] Escobar was confirmed in office by a Presidential Decree issued on March 20, 2008.[18] This Presidential Decree did not address the duration or nature of the terms of the office nor did it expressly provide for the renewal of their terms.[19]

In February 2017, President Javier Alonso Obregón ("Obregón") was elected as president of Fiscalandia.[20] Shortly thereafter, on or around June 8, 2017, an independent digital journalism outlet published an investigation called the "META emails." The investigation revealed a series of emails and audio recordings evidencing coordination and negotiations between the presidential advisor and members of the nominating board established to elect the five judges of the Court of Auditors.[21] Civil society organizations and opinion leaders immediately sent

[14] *Id.* at ¶12.
[15] *Id.* at ¶14.
[16] Clarification Questions & Answers, # 62.
[17] Hypothetical ¶14
[18] *Id.*
[19] Clarification Questions & Answers, page 4
[20] Hypothetical ¶ 15
[21] Hypothetical ¶ 17-18

President Obregón a letter suggesting the creation of an international mechanism to assist in the fight against impunity.[22] However, Prosecutor General Escobar opposed the formation of this kind of international mechanism.[23] Escobar responded to the reports by ordering the creation of a special unit to investigate possible crimes alleged in the META emails.[24]

Given the seriousness of the report's allegations of corruption involving prosecutors at various levels of government, President Obregón sought to take necessary measures to combat corruption within the Fiscalandian government. Obregón issued an Extraordinary Presidential Decree, ordering the creation of the nominating board to nominate a new, permanent appointee as Prosecutor General.[25] On June 16, 2017, Escobar filed a motion to vacate an administrative act with the Tenth Administrative Court of Berena, challenging the call for candidates issued by Extraordinary Presidential Decree and sought injunctive relief asking the court to temporarily suspend Obregon's call for candidates.[26] The Court granted the injunction. However, the executive branch successfully appealed this decision and the injunction was overturned ten days later by the Second Chamber of Appeals of Berena.[27]

Two months later, Escobar and the prosecutors of the Special Unit held a press conference where they announced the filing of a formal complaint with the 40th Criminal Court of Fiscalandia against the individuals implicated in the META emails.[28]

After the courts allowed the President's call for a new, permanent Prosecutor General candidate, President Obregón executed the Extraordinary Presidential Decree and proceeded to

[22] Hypothetical ¶ 20
[23] Hypothetical ¶ 21
[24] Hypothetical ¶ 19
[25] *Id.*
[26] Hypothetical ¶ 23, 24
[27] Hypothetical ¶ 24
[28] Hypothetical ¶ 22; Clarification Questions & Answers, page 2

appoint the members of the nominating board.[29] The respective nominating board made an announcement inviting anyone interested to participate in the selection process for Prosecutor General. [30] The announcement resulted in applications from 83 candidates (75 men and 8 women), 48 of which were suitable for the position (44 men and 4 women).[31] After the candidates were put through a proficiency test and had their backgrounds graded, the list was reduced to 27 contenders (25 men and 2 women), ranked according to evaluations conducted by a member of the nominating board. [32]

After completing the interview process and evaluating the best candidates in totality within each of the stages, the nominating board sent a list of three candidates to President Obregón. The shortlist consisted of Martínez and two other candidates, who were ranked 18th, 21st, and 25th in order of precedence, prior to the candidate interview stage.[33] Obregón made the decision to appoint Martinez as Prosecutor General on September 15, 2017.[34]

Although the law of Fiscalandia deems the nominating board's sessions as fully confidential, several of the excluded applicants submitted requests for reconsideration to the board, as did some applicants who disagreed with the scores they received.[35] All the requests by candidates were denied.[36] Maricruz Hinojoza ("Hinojoza") and Sandra del Mastro ("Mastro"), two of the candidates, believed they had been discriminated against on the basis of gender, and thus demanded an explanation for their exclusion from the shortlist. Hinojoza and Mastro argued that since they were ranked first and second according to the file scores given by an individual

[29] Hypothetical ¶ 25
[30] Hypothetical ¶ 26
[31] Hypothetical ¶ 28
[32] Hypothetical ¶ 31-32
[33] Hypothetical ¶ 36
[34] *Id.*
[35] Hypothetical ¶ 26, 33
[36] Hypothetical ¶ 33

member of the nominating board, they should have remained the highest ranked when later evaluated by the nominating board. Thus, should have been included on the short list.[37]

On September 15, 2017, Domingo Martinez ("Martinez") took office as the Prosecutor General of the Republic, ending Escobar's appointment as Prosecutor General.[38] Thereafter, Escobar was assigned to serve as a prosecutor in the district of Morena.[39]

C. Proceedings Before the IACHR

On August 1, 2017, Escobar filed a petition with the IACHR for violating rights in the American Convention on Human Rights.[40] The IACHR declared the petition admissible, and on August 15, 2019 issued its Merits Report where it found the State of Fiscalandia was internationally responsible for the violation of the rights to a fair trial, equal protection, and judicial protection to the detriment of Escobar.[41] On January 2, 2018, the motion to vacate filed by Escobar was adjudicated in which the Supreme Court found that the motion was inadmissible because "the selection of Martínez as 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] Because Fiscalandia did not implement the recommendations issued by the IACHR, the case was submitted to the Inter-American Court of Human Rights (IACHR) on December 15, 2019.[43]

Hinojoza and Mastro decided to challenge the selection process and the appointment of Martínez, filing a writ of *amparo* on September 15, 2017.[44] The *amparo* action, brought before

[37] Hypothetical ¶ 38
[38] Hypothetical ¶37; Clarification Questions & Answers, page 3
[39] *Id.*
[40] Hypothetical ¶46
[41] *Id.*
[42] Hypothetical ¶42
[43] Hypothetical □48
[44] Hypothetical ¶38

the Second Constitutional Court of Berena, was declared inadmissible on the grounds that the appointment of the Prosecutor General is a sovereign power of the executive branch, and therefore is not subject to review via *amparo* proceedings.[45] According to the Court, Petitioners could have challenged any irregularity by means of a motion to vacate. However, the Petitioners instead appealed the decision, which was subsequently affirmed by the Second Appellate Chamber of Berena.[46] Petitioners then filed an extraordinary appeal with the Supreme Court of Justice contending that the inadmissibility of the *amparo* left them with no remedy for violations of the law and that the judgement failed to adequately state the reasoning on which they were based.[47] The extraordinary appeal was denied in a decision dated March 17, 2018.[48]

On April 1, 2018, Hinojoza and Mastro filed a petition with the IACHR.[49] On December 30, 2018, the IACHR declared the petition admissible and issued its Merits Report finding Fiscalandia responsible for the violation of the rights to a fair trial, freedom of thought and expression, equal protection, and judicial protection to the detriment of Hinojoza and Mastro.[50] Because Fiscalandia did not implement the recommendations issued by the IACHR, the case was submitted to the Inter-American Court of Human Rights on December 15, 2019.[51]

On April 1, 2017, the newly elected President Obregón filed a writ of *amparo* challenging Article 50 of the Constitution, which barred presidential re-election.[52] Judge Mariano Rex ("Rex"), a judge for the First Constitutional Court of Berena, denied Obregón's *amparo* action at the first instance.[53] After applying a "balancing" technique, Rex found that the

[45] Hypothetical ¶ 39
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Hypothetical □ 49
[50] Hypothetical □51
[51] Hypothetical □52
[52] Hypothetical ¶16
[53] Hypothetical ¶40

right to elect and be elected was not absolute and that the constitutional limitation was reasonable and proportionate.[54] Obregón appealed that decision, and the case was taken up by the Supreme Court.[55] On October 10, 2017, the Supreme Court held that an absolute prohibition was excessive and infringed on the human right to reelection.[56] The Court found that Rex had incorrectly applied the balancing technique in the specific case as he had failed to consider the effect of a law barring the reelection of a president only 35 years of age and with immense popularity among the people of Fiscalandia.[57] As such, the Supreme Court ordered Rex be investigated for having committed a serious breach of his duty to state the reasoning for his decision.[58]

Rex has an extensive history involving multiple disciplinary complaints.[59] Notably, in 2015, Rex was reprimanded for a delay in adjudicating an *amparo* case.[60] In 2017, Rex had a total of 65 complaints, most of which were in connection with *amparo* proceedings.[61] Among the general obligations of judges regulated in the Judiciary Act of Fiscalandia, Article 15 of the Judiciary Act of Fiscalandia states that the general duties of judges and justices include "properly stating the reasoning for their judgements and decisions, in accordance with the law in force."[62] Additionally, Article 55 states that the failure to state reasoning for judgements and judicial decisions is a serious administrative infraction.[63] Under Article 62, serious administrative infractions are punishable by removal.[64]

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[54] Hypothetical ¶40; Clarification Questions & Answers, page 1
[55] Hypothetical ¶41
[56] *Id.*
[57] Hypothetical ¶41; Clarification Questions & Answers, page 1
[58] *Id.*
[59] Clarification Questions & Answers, page 7
[60] Clarification Questions & Answers, page 7
[61] *Id.*
[62] Clarification Questions & Answers, page 6
[63] *Id.*
[64] Clarification Questions & Answers, page 6

The disciplinary proceeding is a punitive administrative process regulated in Chapter V of the Judiciary Act of Fiscalandia.[65] The Chief Justice of Internal Oversight (CJIO), who is elected by other judges of the Supreme Court by agreement of the full Court, serves independently, full time, and is barred from serving on any division of the Court or on the full Court to adjudicate specific cases.[66] The technical body supporting the CJIO gathers information and evidence relating to the alleged administrative infraction and creates a report which is then presented to the CJIO for approval. Once the report is approved, the respondent has 5 working days to present procedural challenges and 10 workings days to exercise a defense and submit evidence. In this case, Rex effectively exercised his right to a defense and was given the opportunity to present his case before the Supreme Court for 20 minutes at the final hearing of the merits.[67] After this hearing, on December 01, 2017, the Supreme Court ruled to remove Rex from the bench which required a qualified majority.[68]

On December 15, 2017, Rex filed a petition with the IACHR, alleging the violation of his right to a fair trial.[69] On August 8, 2018, the IACHR declared the petition admissible.[70] On February 14, 2019, the IACHR issued its Merits Report, finding the State responsible for violating the rights to a fair trial and judicial protection, both in relation to Articles 1.1 and 2 of the ACHR.[71] The Court recommended, among other things, the reinstatement of Rex to his position.[72] Because Fiscalandia did not implement the recommendations issued by the IACHR

[65] Clarification Questions & Answers, page 5
[66] *Id.*
[67] Clarification Questions & Answers, page 6
[68] Hypothetical ¶41; Clarification Questions & Answers, page 6
[69] Hypothetical ¶43
[70] *Id.*
[71] *Id.*
[72] *Id.*

during the requisite time period, the case was submitted to the Inter-American Court of Human Rights.[73]

LEGAL ANALYSIS

I. MARIANO REX, MAGDALENA ESCOBAR, AND MARICRUZ HINOJOZA FAILED TO EXHAUST DOMESTIC REMEDIES, THUS THE MERITS OF THE CASE SHOULD NOT BE CONSIDERED.

Under Article 46 (1), a Petitioner must exhaust domestic remedies, when possible, before filing a petition with the Commission.[74] Generally, the exhaustion requirement involves appealing to the highest domestic court with jurisdiction over the petitioner's claim. When a State objects that domestic remedies have not been exhausted, the State has the burden of proving which domestic remedies remain.[75] Both the Human Rights Committee and the Inter-American Commission on Human Rights apply the standard of a "reasonable prospect of success" in evaluating effectiveness.[76] In *Ragan Salgado v. U.K.*, the State Party argued that "the "test for an effective remedy cannot be whether a complaint would have been successful or not but rather whether there is a procedure available in the domestic system capable of considering and, if persuaded of the merits, providing a remedy…."[77] Here, the Court should adopt and implement this test in defining the scope of a "reasonable prospect of success."

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[73] *Id.*
[74] See American Convention Article 46(1)(a).
[75] See *Velasquez-Rodriguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988); *See Loayza Tamayo v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No 33, ¶ 57 (Sept. 17, 1997)
[76] See, e.g., Human Rights Committee, Communication No. 437/1990, Committee, Communication No. 511/1992, *Lansman et al. v. Finland,* Views adopted 14 October 1993, para. 6.3; Human Rights Committee, Communication No. 1095/2002, *Gomaritz v. Spain*, Views adopted 26 August 2005, para. 6.4
[77] *Constance Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland,* CEDAW Communication No. 11/2006, U.N. Doc. CEDAW/C/37/D/11/2006 (2007).

A. Domestic remedies were not exhausted in relation to each of the Petitioners actions.

a. Rex failed to exhaust domestic remedies by not bringing any domestic legal action to challenge the administrative decision to remove him from office.

Rex failed to exhaust his domestic remedies as he did not bring any domestic legal action to challenge the administrative decision to remove him from office as required before filing a petition with the Commission.[78] Rex could have challenged the penalties of suspension and removal imposed by the Supreme Court of the State of Fiscalandia by filing a motion for reconsideration.[79] This remedial method is effective as it provides Rex with a procedure where he is able to make his case, and if the Supreme Court is persuaded on the merits, provide reinstatement, an effective remedy. Thus, Rex did not exhaust the domestic remedies available to him.

b. Escobar failed to exhaust domestic remedies because the judgment on the merits of the motion to vacate had not yet been issued when Escobar filed her petition.

Before filing with a commission, a petitioner must exhaust domestic remedies.[80] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee has held that the question of whether domestic remedies have been exhausted is to be determined at the time of its consideration of a communication, rather than at the time the victim submits the communication.[81] Thus, the petition must be lodged within six months from when domestic remedies are exhausted, which begins when the petitioner is first notified of the final judgment.[82] Here, Escobar filed with the commission before receiving a judgement on her

[78] Hypothetical □44; See American Convention Article 46(1)(a).
[79] Clarification Questions & Answers, page 14
[80] See American Convention Article 46(1)(a).
[81] Communication No. 6/2005, Yildirim, Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, B. Akbak et al. v. Austria.
[82] IACHR, Admissibility Report No. 35/09, Petition 466-99, *Ramon Nicolas Guarino* (Argentina), 19 March 2009, para. 33.

motion to vacate. Thus, the domestic remedies had not been exhausted at the time Escobar had filed with the commission.

c. Hinojoza and Mastro failed to exhaust domestic remedies by not filing a motion to vacate.

Hinojoza and Mastro failed to exhaust domestic remedies by not filing a motion to vacate as that would have been the appropriate remedy for challenging the decisions of the President and of the nominating board.[83] A judicial remedy is effective and adequate when it is capable of obtaining the result for which it was designed and when pursuing it may protect the right allegedly violated.[84] Here, the motion to vacate in challenging the decisions of the President and Nominating Board was an effective and adequate judicial remedy as it would have had a similar effect in challenging the selection process and the appointment of Martinez. Thus, Hinojoza and Mastro did not exhaust their domestic remedies, and the case should be dismissed.

B. Petitioners claims do not fall under the exceptions of excusing a petitioner's failure to exhaust domestic remedies.

Petitioners have the burden of showing that exceptions to the requirement of exhausting domestic remedies are met. There are three exceptions in which a petitioner in the Inter-American System will be excused from exhausting domestic remedies: (1) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated, (2) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or (3) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.[85]

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[83] Hypothetical □50

[84] IACHR, Admissibility Report No. 16/04, Petition 129-02, *Tracy Lee Housel* (United States), 27 February 2004, para. 31, *available* at http://cidh.org/annualrep/2004eng/USA.129.02 htm.

[85] IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, art. 31(2); *see* also American Convention on Human Rights, art. 46(2).

In this case, Rex could have filed a motion for reconsideration to challenge the penalties of suspension and removal.[86] Rex argues that any remedy he might have pursued would have been adjudicated at the first instance by the same Supreme Court that had sanctioned him, and therefore should be regarded as an exception to that admissibility requirement.[87] However, a complainant's mere doubts as to the effectiveness of a remedy do not excuse the complainant from complying with the exhaustion requirement.[88]

Additionally, Fisclandia provided Escobar, Hinojoza, and Mastro with the ability to seek different avenues to exercise their rights and there was no unwarranted delay in adjudicating each of their claims. These admissibility-exceptions to the exhaustion of domestic remedies do not apply in the cases of Rex, Escobar, and Hinojoza. Thus, the cases should be dismissed.

II. FISCALANDIA DID NOT VIOLATE ARTICLE 24 IN CONJUNCTION WITH ARTICLE 1.1 OF THE ACHR IN RELATION TO ESCOBAR, HINOJOZA, AND MASTRO BECAUSE IT FULFILLED ALL ITS LEGAL OBLIGATIONS TO RESPECT AND GURANTEE HUMAN RIGHTS AND THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION.

Fiscalandia fully complied with Article 24 in conjunction with Article 1.1 in its proceeding to nominate a new permanent appointee as Prosecutor General. Article 1.1 of the American Convention accords States the obligation to respect and guarantee the rights and freedoms recognized by the ACHR without any discrimination.[89] Under Article 24, "all persons are entitled, without discrimination, to equal protection of the law."[90] Thus, the right to equal

[86] Clarification Questions & Answers, page 14
[87] Hypothetical □44
[88] See, e.g., Committee on the Elimination of Racial Discrimination Communication No. 34/2004, *Gelle v. Denmark*, para. 6.6 (published in UN Doc. A/61/18 (2006); *Kurbogaj v. Spain*, Decision adopted 14 July 2006, para. 6.3; *Castro v. Colombia*, decision adopted 28 October 2005, para. 6.3
[89] American Convention on Human Rights OAS, 18 July 1978, 1144 U.N.T.S. 123, Art. 1.1. [hereinafter "ACHR" or "American Convention"].
[90] ACHR, Art. 24.

protection of the law requires national legislation to accord its protections without discrimination.[91]

However, the IACHR has firmly established that the American Convention does not forbid all distinctions of treatment.[92] The Court has explained the difference between "distinction" and "discrimination". Distinctions are based on "reasonable and objective criteria" compatible with the American Convention while discriminations are arbitrary differences that are detrimental to human rights.[93] A distinction can serve a legitimate state interest in conformity with the terms of Article 24 so long as such distinctions pursue a legitimate aim and employ means which are proportional to the end sought.[94] Case law has also established that distinctions may be required in some circumstances to achieve justice or in order to protect persons who require the application of special measures.[95]

As a result, a distinction between groups of people does not violate Article 24 if it is objective and reasonable and in furtherance of an aim that does not lead to an unnecessary or disproportionate infringement of a fundamental right.[96] In fact, "there would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review."[97]

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[91] IACHR. Report No. 04/01. Case 11.625. Merits. *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001. ¶ 31.
[92] IACHR, 2019 Compendium on Equality and Non-discrimination OEA/Ser.L/V/II.171
[93] Report No. 50/16. Case 12.834. Merits*. Undocumented Workers. United States of America*. November 30, 2016 74.
[94] Report No. 04/01. Case 11.625. Merit. *María Eugenia Morales de Sierra.* Guatemala. January 19, 2001.
[95] *Id.*
[96] IACHR. Report No. 48/16. Case 12.799. Merit. *Miguel Ángel Millar Silva et al (Radio Estrella del Mar de Melinka)*. Chile. November 29, 2016; IACHR. The Road to Substantive Democracy: Women's Political Participation in the Americas. OEA/Ser.L/V/II. Doc. 79. April 18, 2011, para. 43; IACHR. Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application. Updates from 2011 to 2014. Update approved on January 26, 2015, para. 151.
[97] IACHR. Report No. 73/00. Case 11.784. Merit. *Marcelino Hanríquez et al.* Argentina. October 3, 2000.

A. Fiscalandia did not deprive Escobar of her Article 24 right to equal protection when it authorized the creation of the nominating board for the selection of a new Prosecutor General because nominating a suitable head of office to replace a senior official whose term of office had expired served a legitimate state purpose in furtherance of an aim in accordance with international law norms.

The State of Fiscalandia did not violate Article 24 in conjunction with Article 1.1 of the ACHR in relation to Escobar because none of the rights protected under the American Convention were violated as a result of alleged arbitrary differences in treatment. Although Escobar remained in office on a transitional basis under the Ninth Transitional Provision of the 2007 Constitution, she did not meet the requirements to remain in office as she had not practiced in the prosecutorial profession for at least ten years.[98] Thus, she cannot assert a right to remain in office on a transitional basis.

Escobar contends that she has the right to irremovability from office because the 2003 Supreme Court decision affords her the right to a lifetime appointment.[99] However, that decision was made prior to the Ninth Transitional Provision of the 2007 Constitution, which established her position as being on a transitional basis.[100] Additionally, the decision in which Escobar relies is an outdated decision preceding Fiscalandia's fight against uninterrupted government and the establishment of Fiscalandia's new national constitution. The 2007 Constitution undoubtedly recognized that principles of separation of powers, judicial independence, human dignity, and respect for human rights supersedes any public official's purported right to irremovability from office.

[98] Hypothetical ¶14
[99] Hypothetical ¶13
[100] Hypothetical ¶14

B. The selection process of the appointment of Prosecutor General did not violate Article 24 in relation to Hinojoza and Mastro because President Obregón selected the Prosecutor General after prior scrutiny by an independent entity comprised of both state and civil society members to ensure impartiality and equal access to public office.

Fiscalandia's selection process for Prosecutor General was fully compatible with the American Convention Article 24 and did not subject Hinojoza and Mastro to any arbitrary differences in treatment or unnecessarily infringe on a fundamental right. Here, Hinojoza and Mastro are asking the Court to afford them extraordinary treatment contrary to the norms and prevailing principles in democratic societies. The Petitioners maintain that the subject of the present case is an alleged difference in treatment based on discriminatory practices on the basis of gender because they had not received an explanation for their exclusion from the shortlist.[101] However, Petitioners are unable to establish that Fiscalandia granted disparate treatment to similarly situated people. Indeed, all requests by candidates for reconsideration were denied categorically.

Fiscalandia cannot be held internationally responsible for the failure to provide the Petitioners with extraordinary treatment that was denied to all similarly situated people when the alleged harm caused does not amount to a violation of human rights. Thus, the State is asking the Court to acknowledge the existence of a number of State policies whose purpose is to provide equal protection of the law.

[101] Hypothetical ¶38

III. FISCALANDIA PROVIDED PETITIONERS WITH JUDICIAL GURANTEES AND EFFECTIVE LEGAL RECOURSE CONSISTENT WITH ARTICLE 8 AND 25.

Article 8 of the American Convention is the right and obligation, within Article 1(1), to protect a person's right to a fair trial and due process of law.[102] Specifically, Article 8(1) states that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law."[103] Essentially, "due guarantee" requires there be explicit reasoning for "the decisions adopted by the domestic organs of the States that may have an impact on human rights."[104] The "reasonable time" standard considers the total duration of the proceedings, until a "final and firm judgment is delivered and the jurisdiction thereby ceases."[105] Under Article 8(4), "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."[106]

Similarly, Article 25 guarantees the right of all persons to prompt and effective recourse to a competent court for fundamental right violations.[107]

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[102] American Convention, supra note 55, Art. 1(1), 8; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights) Advisory Opinion OC-9/87, October 6, 1987, Inter-Am Ct. H.R. Series A No. 9, ¶ 28.
[103] American Convention, supra note 55, Art. 8(1).
[104] E.g., *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACHR. (ser. C) No. 275, para. 224 (Nov. 27, 2013); *YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, para. 125 (June 23, 2005).
[105] E.g., *Tarazona Arrieta et al. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 286, para. 98 (Oct. 15, 2014); *Suárez Rosero v. Ecuador*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 35, para. 71 (Nov. 12, 1997).
[106] American Convention, supra note 55, Art. 8(4).
[107] American Convention, ¶ Art. 25 (1); Draft Inter-American Convention on Protection of Human Rights, Doc. 5 (English), art. 23 Sept. 22, 1969; Inter-American Commission on Human Rights, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the InterAmerican System of Human Rights, OEA/Ser.L/V/II.129, Doc. 4, 7 Sept. 2007, para. 244.

A. Fiscalandia did not violate Article 8.1 and 25 of the Convention in relation to Article 1.1 and 2 because it provided Rex with a judicial proceeding regulated in the Judiciary Act of Fiscalandia.

Petitioner asserts that his Article 8 rights were violated.[108] However, Rex was given a right to a hearing within a reasonable time and was given explicit reasoning for the Court's decision to remove him. Rex maintains that the disciplinary authority had not provided any rationale for the "serious" and "inexcusable" nature of his alleged failure to comply with the law.[109] However, Article 15 Judiciary Act of Fiscalandia states that the general duties include "property stating the reasoning for their judgements and decisions, in accordance with the law in force."[110] Article 55 Judiciary Act of Fiscalandia then states that failing to properly state the reasoning for judgements and judicial decisions are serious and inexcusable failures.[111] Thus, when Rex failed to state the reasoning of his decision in Obregón's *amparo* action that rightfully warranted an investigation.[112]

In order to determine if Article 8 has been violated, the court will examine a state's domestic judicial proceedings.[113] Here, the domestic judicial proceedings when judges are under investigation is a punitive administrative process regulated in the Judiciary Act of Fiscalandia.[114] Pursuant to this Judiciary Act, Rex effectively exercised his right to a defense and was given a full opportunity to present his case.[115] In *Apitz Barbera et al. v. Venezuela ("Apitz")*, the Court found Article 8(1) in relation to Article 1(1) was not violated as no domestic rule existed

[108] Hypothetical ¶43
[109]Clarification Questions & Answers, page 6
[110] *Id.*
[111] *Id.*
[112] Hypothetical ¶41; Clarification Questions & Answers, page 1
[113] *Villan-Morales v. Guatemala*, supra note 69 ¶ 224; see also *Edward v. United Kingdom*, Eur. Ct. H.R. (ser. A), No. 247-B, ¶ 34-35 (1992); *Vidal v. Belgium*, Eur. Ct. H.R. (ser. A), No. 235-B, ¶ 32-33 (1992).
[114] Clarification Questions & Answers, page 5
[115] Clarification Questions & Answers, page 6

granting a body other than the CORJS the power to hear this case.[116] Therefore the CORJS was considered a competent tribunal to hear disciplinary hearings against the Petitioners.[117] Similarly, in this case, there was no domestic rule granting a body other than the CJIO and the full Supreme Court to hear this case. Therefore, under the reasoning in *Apitz,* the CJIO and Supreme Court are considered a competent tribunal to hear disciplinary hearings against the Petitioners. Additionally, in compliance with the Judiciary Act of Fiscalandia, Rex was given the opportunity to present his case before the full Supreme Court.[118]

In *Apitz,* the Court noted that based on previous decisions, "an adequate appointment process and a fixed term of office" would evidence judicial independence and "neither regular nor temporary judges can be subject to discretionary removal."[119] Here, the Chief Justice of Internal Oversight (CJIO) is elected by other judges of the Supreme Court by agreement of the full court, and is barred from serving on any division of the Court or on the full Court to adjudicate specific cases.[120] Thus, there is a showing of judicial independence as there is an adequate appointment process and a fixed term of office.

Although the court in *Apitz* found Venezuela had violated Article 8(1) to the detriment of the Petitioners, the analysis in this portion of the Court's decision is distinguishable. In *Apitz,* the State's legislatures prevented the victim from requesting review of the CORJS's impartiality.[121] However, in *Apitz,* the Court looked to international law for valid grounds by which a judge may be removed which did not include the situation for which the Petitioners were removed. In our

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[116] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) ¶ 53
[117] *Id.*
[118] Clarification Questions & Answers, page 6
[119] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) ¶ 138
[120] Clarification Questions & Answers, page 5
[121] *Apitz Barbera et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs □66

case, Article 15 of the Judiciary Act of Fiscalandia states that the general duties of judges and justices include "properly stating the reasoning for their judgements and decisions, in accordance with the law in force."[122] Additionally, Article 55 states that the failure to state reasoning for judgements and judicial decisions is a serious administrative infraction.[123]

Petitioner contends that his Article 25 rights have been violated because any legal action against the decision to remove Rex from office would not be effective because there is no guarantee as to the impartiality of the judges.[124] It is true that penalties of suspension and removal imposed by the full Supreme Court can only be challenged by filing a motion for reconsideration with the same Full Court.[125] However, Fiscalandia does provide a prompt, simple and effective recourse to alleged victims in order to guarantee their rights since not every member must assent to suspension or removal, only a qualified majority.[126] In *Apitz,* the Court found that Article 25(1) was not violated when the Petitioner was denied judicial protection as a result of her removal from the First Court as the Petitioner failed to file any judicial appeal against the order for removal from office.[127] Similarly, here, Rex failed to file any judicial appeal against his order from removal of office. Rex was never a party to another judicial or administrative proceeding based on the same facts.[128] Thus, there is no violation of the right to judicial protection.

[122] Clarification Questions & Answers, page 6
[123] Clarification Questions & Answers, page 6
[124] Hypothetical ¶43
[125] Clarification Questions & Answers, page 14
[126]Clarification Questions & Answers, page 6
[127] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela,* Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) ¶ 182-183, 185
[128] Clarification Questions & Answers, page 4

B. Fiscalandia complied with Article 8.1 and 25 of the Convention in relation to Article 1.1 because it provided Escobar with a formal hearing.

Escobar sought injunctive relief asking the court to temporarily suspend the President's call for candidates which was originally granted, but evidently reversed.[129] However, it is within the President's authority to create a nominating board to replace a senior official whose term of office had expired and was not politically motivated, given that the President selected the Prosecutor General after prior scrutiny by an independent entity, the nominating board. Thus the injunctive relief was rightfully overturned.

Although the motion to vacate was held inadmissible with the Tenth Administrative Court of Berena, this does not warrant Magdalena's claim that Fiscalandia failed to comply with Article 8 and 25. The motion was held inadmissible because "the selection of Domingo Martínez as 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." [130] Fiscalandia was placed in an impossible situation where if the motion was admissible, it would compromise the rights of third parties whom had applied for the Prosecutor General position and are not able to exercise their right to a defense. Additionally, Article 8(1) of the Convention does not necessarily guarantee the right to an oral hearing.[131]

C. Fiscalandia complied with Article 8 and 25 of the Convention in relation to Article 1.1 because Hinojoza and Mastro had the ability to challenge any irregularity in the selection process by means of motion to vacate.

Hinojoza and Mastro brought an *amparo* action before the Second Constitutional Court of Berena which was found to be inadmissible.[132] The *amparo* action's inadmissibility does not

[129] Hypothetical ¶23, 24
[130] Hypothetical □42
[131] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) ¶ 75.\
[132] Hypothetical □39

warrant Hinojoza and Mastro's claim that Fiscalandia failed to comply with Article 8 and 25. Hinojoza and Mastro, in filing an extraordinary appeal with Supreme Court of Justice, contend that the inadmissibility of the *amparo* proceeding (1) denied them there due process rights as it had left them with no remedy for violations of the law and (2) that the judgement failed to adequately state the reasoning on which they were based.[133] As to the first issue, as described below, Hinojoza and Mastro could have challenged any irregularity by means of a motion to vacate which would have been an effective remedy. Second of all, the Second Constitutional of Berena clearly stated their reasoning - that appointment of the Prosecutor General is a sovereign power of the executive branch which is not subject to review via *amparo* proceedings.[134] The Court has clarified that an unfavorable ruling for petitioners "does not necessarily signify the ineffectiveness of the remedy filed, or that [they] did not have access to an effective remedy."[135]

The State's remedies must make an effective contribution to ending harmful situations and ensure full exercise of the protected rights under the Convention.[136] Although the Supreme Court stated that the Nominating Boards were "intermediate entities" that were not part of the government, thus their actions could not be challenged on a motion to vacate, a motion to vacate would have been first filed before the administrative trial courts.[137] Additionally, the Second Constitutional Court of Berena noted that Hinojoza and Mastro could have challenged any irregularity in the appointment of the Prosecutor General by means of a motion to vacate.[138]

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[133] *Id.*
[134] Clarification Questions & Answers, page 11
[135] E.g., *Mémoli v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 265, para. 195 (Aug. 22, 2013); *Fermín Ramírez v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126, para. 83 (June 20, 2005).
[136] *Chocrón Chocrón v. Venezuela*, Admissibility Report, Report No. 38/06, Inter-Am. Comm'n H.R., Petition No. 549-05, ¶ 128 (Mar. 15, 2006)
[137] Clarification Questions & Answers, page 11
[138] Hypothetical ¶39

In *Barbani Duarte et al. v. Uruguay*, the court indicated that the right to a hearing includes two elements: a "formal" or "procedural" element that "ensures access to the competent body to determine the right that is claimed," and a "material aspect" whereby the State must ensure that the eventual decision is implemented.[139] In this case, a motion to vacate would have been an effective remedy. A motion to vacate is a judicial proceeding in an administrative court that seeks judicial review of governmental acts or omissions subject to administrative law, as well as the effective protection of rights and interests of the persons under the government's jurisdiction.[140] The action is brought before the administrative trial courts and can be appealed to the appeals chamber. Even more so, an extraordinary appeal can be filed with the Supreme Court when the appeals chamber's judgement has violated due process guarantees.[141] A motion to vacate could result in: (1) declaring the government's action null and void or ineffective, in whole or in part, (2) acknowledging and/or restoring the legally protected right or interest and ordering the government to take the necessary measures to end, or (3) ordering the government to take a certain action or measure established by law.[142] Thus, Fiscalandia met its obligation in providing Hinojoza and Mastro with a simple and effective recourse through a competent court and should not be held responsible since Petitioners had chosen not to exercise that right.

[139] *Barbani Duarte et al. v. Uruguay*, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 234, para. 122 (Oct. 13, 2011),
[140] Clarification Questions & Answers, page 10
[141] *Id.*
[142] Clarification Questions & Answers, page 10 - 11

IV. THE STATE OF FISCALANDIA FULFILLED ALL OF ITS LEGAL OBLIGATIONS TO RESPECT AND ENSURE THE RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION PROTECTED BY ARTICLE 13 IN RELATION TO ARTICLES 1.1 AND 2 OF THE ACHR IN THE CASE OF HINOJOZA AND MASTRO.

Article 13 of the American Convention on Human Rights establishes the right to freedom of thought and expression including the freedom to seek, receive, and impart information held by the state, subject to certain limitations.[143] However, the rights prescribed in Article 13 are not absolute.[144] The right to exercise freedom of thought, expression, and dissemination of ideas is limited by the rights of others,[145] and may be restricted when in the interest of public welfare and overall common good. [146]

Regarding the obligation to respect rights, Article 1.1 provides that all persons are ensured "the free and full exercise of [ACHR] rights and freedoms, without any discrimination for reasons of… political or other opinion, national or social origin, economic status, birth, or any other social condition."[147] Article 2 states "[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention… measures as may be necessary to give effect to those rights or freedoms."[148]

[143] American Convention on Human Rights OAS, 18 July 1978, 1144 U.N.T.S. 123, Art. 13. [hereinafter "ACHR" or "American Convention"].
[144] IACHR. *Herrera Ulloa vs. Costa Rica*. Preliminary Objections Merit, Repairs and Costs. Judgment of July 2, 2004 ¶. 54; *Ricardo Canese vs. No. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. ¶ 95; *Case of Palamara Iribarne vs. Chile*. Merit, Reparations and Costs. Judgment of November 22, 2005. ¶ 79.
[145] American Declaration of the Rights and Duties of Man, Article XXVII.
[146] ACHR, Art. 32.2
[147] ACHR, Art. 1.1.
[148] ACHR, Art. 2.

Article 13 read in conjunction with Articles 1.1 and 2 of the ACHR provides that everyone has the right to freedom of expression, ideas, and information, and states have the obligation to adopt measures to ensure the exercise of such rights.[149]

When the OAS adopted the International Covenant on Civil and Political Rights, this convention served as a guideline for how states should make efforts to ensure the right to freedom of expression, thought, information and ideas in accordance to the rights of all persons.[150] The exercise of the right to freedom of expression requires certain responsibilities and restrictions "[f]or respect of the rights or reputations of others, " and "[f]or the protection of national security or of public order, or of public health or morals."[151]

Additionally, while Article 13 of the ACHR prohibits prior censorship and protects the free dissemination of information, it also provides liability for an abusive exercise of the right.[152]

Accordingly, a state is justified in providing limitations to those rights and freedoms where such restrictions are "necessary in a democratic society to satisfy a compelling public interest."[153] Furthermore, "the denial of information in the genuine interests of protecting national security and public order is not inconsistent with the protection of human rights."[154]

As a result, "every action to restrict access to information should be resolved on a case-by-case basis."[155] Within the decisions of the court, Article 13(2) provides well-delineated exceptions to the rights and freedoms protected under Article 13 where the limitation on the right

[149] Report No. 103/13 Case 12,816 Merits. *Adán Guillermo López Lone et al. v. Honduras*, November 5, 2013
[150] International Covenant on Civil and Political Rights, Art. 19.
[151] *Id.*
[152] *Herrera-Ulloa v. Costa Rica*, July 2, 2004, Inter-Am. Ct. H.R. Series C No. 107, ¶ 169.
[153] IACHR. Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. OEA/Ser.L/V/II. Doc. 51. December 30, 2009.
[154] IACHR, Annual Report 2001, Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression,, Chapter III, *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*, OEA/Ser.L/V/II.114 Doc. 5, rev. 1, April 16, 2002.
[155] Principle 4 of the IACHR's Declaration of Principles

is: (1) established by state law; (2) in conformity with the goals of the American Convention, and (3) necessary in a democratic society for the protection a legitimate public interest.[156]

A. Hinojoza and Mastro cannot assert the right to information to obtain private information that is not held by the State.

Article 13 protects the right of people to seek and receive access to state-held information.[157] Since the Nominating Board is an intermediate entity which functions independently,[158] Petitioners do not have a right to receive information from the Nominating Board because they are private individuals. Thus, there cannot have been any deprivation of a right to state-held information because the information sought is not held by the State.

While the Petitioners may argue that certain members of the Nominating Board are public officials, that does not discount that the Nominating Board acted as a temporary independent body who cannot be subjected to the general liability regime of the State.[159] Members of the Nominating Board included three deans of the oldest universities in the country and three members chosen at random by the National Bar Association of Fiscalandia.[160] Furthermore, three of the remaining six members of the Nominating Board consisted of three members of the National Associated Judges and Justices of Fiscalandia, who were elected by the direct vote of association members, not President Obregon. As such, the only members that Petitioners can argue were selected by the State via Obregon were the Minister of Justice, the Ombudsman of Fiscalandia, and an independent member of the National Assembly – all of

[156] IACHR, Annual Report 2009, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II. Doc. 51
[157] IACHR. *Case of Claude-Reyes et al. v. Chile,* Judgment of September 19, 2006, (Merits, Reparations and Costs) ¶ 77.
[158] Clarification Questions & Answers, page 10
[159] *Id.*
[160] Hypothetical ¶ 25

whom serve in positions which cannot reasonably be considered politically motivated in favor of President Obregon. [161]

In accordance with the law of Fiscalandia, the board's sessions are deemed fully confidential in order to preserve the sanctity of the board's ability to operate independently and exercise their right to hold opinions without interference.[162] Requiring the board to provide access to every aspect of their deliberations would surely interfere with their ability to act objectively without concern for intimidation, harassment, and persecution for whatever opinions they may hold. Moreover, since members of the Nominating Board are not civil servants and are not subject to the general accountability and liability regime of the State, they are not required to provide the State with information on their proceedings.[163] As such, Petitioners have no right to access information that is not in the possession of the State.[164]

B. The information sought by Hinojoza and Mastro is not a matter of public interest.

Even if the information sought by Petitioners were in the possession of the State, which it is not, the information sought is not the type of information protected under Article 13. The international principles recognized in jurisprudence of both the IACHR and the European Court of Human Rights ("ECHR"), have established the right to access to information applies to information that is a matter of public interest.[165] Unlike cases involving serious human right violations, such as censorship of the media and interference with journalistic activities, the

[161] *Id.*
[162] Hypothetical ¶ 26.
[163] Clarification Questions & Answers, page 10
[164] *See* IACHR. Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV (The Right of Access to Information). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. ¶ 21; IACHR. Annual Report 2011. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (The Right to Access to Public Information in the Americas). OEA/Ser.L/V/II. Doc. 69. December 30, 2011. ¶ 149
[165] European Convention on Human Rights and Fundamental Freedoms (ECHR), "[European] Convention for the Protection of Human Rights and Fundamental Freedoms." Article 10, (Freedom of Expression).

information sought by Petitioners are not a matter of public interest and essentially only serve the Petitioners personal interests.

Through jurisprudence of the IACHR, the fundamental aims and scope of Article 13 is taken expressly to incorporate the standards for the protection of international human rights law.[166] For example, in *Palamara Iribarne v. Chile*, the Court found a violation of Article 13 where the Petitioner was convicted of a criminal offense due to speaking out against officers of a military court who were prosecuting him.[167] With respect to those same principles, the Court found a violation in the case of *Herrera Ulloa v. Costa Rica* where a local newspaper published allegations regarding the commission of serious criminal offenses by diplomatic representatives of Costa Rica.[168]

Unlike the aforementioned cases and other established jurisprudence of the IACHR, this case does not involve any allegations of the State restricting the Petitioners free circulation of ideas and opinions. Instead, Petitioners rely on Article 13 only to allege violations of the right to access information because they had not received an explanation of the reasons they were not selected as Prosecutor General.[169]

With respect to the principles of freedom to access information, the only jurisprudence in which the IACHR, ECHR, and the African Court of Justice and Human Rights ("ACJHR") involve cases that establish the fundamental purpose of the right is to enable the public to receive

[166] IACHR, Report of the Office of the Special Rapporteur for Freedom of Expression, December 30, 2009. "Inter-American Legal Framework Regarding the Right to Freedom Of Expression." OEA/Ser.L/V/II. CIDH/RELE/INF. 2/09. 0

[167] IACHR, *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 83

[168] IACHR, Case *of Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107.

[169] Hypothetical ¶ 38

information regarding government decisions or actions that may affect them, or to detect violations of human rights.

In the case of *Claude-Reyes et al. v. Chile,* the Court found that Chile violated Article 13 when it refused to provide the Petitioners with requested information regarding a deforestation project and failed to offer a valid justification for the denial. In its decision, the Court reiterated that the right to access public information in State custody is not an absolute right, but found that the information sought was a matter of public interest because it related to a project that caused considerable public debate due the its possible environmental impact and threat to the sustainable development of Chile.[170] However, the Court clarified that it did not apply the established Chilean laws to its analysis of whether the restrictions to access information was justified because the laws were not enacted until after the facts that gave rise to the petition.[171]

Another example of the established principles of Article 13 is the case of *Gomes Lund et. al. v. Brazil,* where the Court found Brazil violated the right to access information of public interest regarding forced disappearances and extrajudicial execution.[172] There, the State failed to provide family members of missing individuals with information regarding their whereabouts.

Here, the Petitioners cannot allege any such violations as established by jurisprudence. Unlike in *Claude-Reyes et al. v. Chile,* the laws of Fiscalandia establish the confidentiality of the Nominating Boards was promulgated more than a decade prior to the facts that gave rise to this petition.[173] Further, Fiscalandia went beyond its legal obligations and provided almost all information regarding the selection process by publishing: the call for candidates for the

[170] IACHR, *Case of Claude-Reyes et al. v. Chile* Judgment of September 19, 2006 (Merits, Reparations and Costs)
[171] *Id.* ¶ 58.
[172] IACHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010*).*
[173] Hypothetical ¶ 26

Selection of the Prosecutor General, the timeline of the selection process *twice* in the official newspaper of national circulation, the list of suitable candidates, and the board resolutions, biographies, photographs, and scores of candidates on a publicly accessible website.[174] Additionally, the interview sessions were open and attended by the press and civil society organizations.[175]

To that end, the only violations of Article 13 alleged by Petitioners came after the Petitioners were not given explanations for the reasons why they were not selected as the top candidates for the position.[176] In fact, when the Board denied all requests for the evaluation criteria used to assess candidates on the grounds that the Board could evaluate candidates "at its own discretion,[177]" the Petitioners did not have any objections or allege any violations of their rights until they were not selected after the final stage. Since the only assessment scores not made public were the candidate interviews, it cannot be reasonably assumed that evaluation criteria for an interview even exists rather than it being the personal assessments and opinions of the interviewers.

As such, the Petitioners cannot reasonably argue that every person who interviews for a position and is not selected is entitled to an explanation. The minimal, if any, public interest in seeing the interview evaluations does not outweigh the generalities of its content. Such information is of no interest other than to the candidates who disagreed with their rejection.

[174] Hypothetical ¶ 26 - 31
[175] Hypothetical ¶ 34
[176] Hypothetical ¶ 38
[177] *Id.* 33.

C. Fiscalandia complied with established international law pertaining to the provision of certain limitations on the exercise of the rights and freedoms as necessary for the protection of public order, morals, and the rights and freedoms of others.

a. The State's refusal to hand over part of the information requested by Petitioners does not constitute a violation of the right to the freedom of thought and expression because the disclosure would frustrate the purpose of Article 13 by impeding the rights, freedoms, and expression of others.

Even if the information sought is within the Protections of Article 13, Fiscalandia justifiably limited the exercise of the right as necessary to ensure the protection of public order.

The international principles recognized in jurisprudence of both the IACHR and other international systems have recognized that the rights enumerated often have proper limitations. Article 30 of the ACHR provides that certain restrictions on the rights and freedoms recognized by the Convention are possible by laws enacted for reasons of "general interest," meaning the public order or protection of public morals.[178] Even if textually absent, it is implicit in privacy.

The IACHR has established that the right to freedom of thought and expression includes two dimensions., the "individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."[179] Moreover, the IACHR draws a crucial distinction between private and public persons and has been emphatic by stating that "any private citizen. . . can assert their right to privacy when facing opinions, criticisms or information harmful to that right."[180]

As such, the rights of members of the Nominating Board to freedom of thought and expression must be guaranteed simultaneously by the State.

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[178] American Convention, art. 30; Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev, 797, 806 (2008).
[179] IACHR. *Case of López Álvarez*, supra note 72, para. 163; *Case of Ricardo Canese,* supra note 72, para. 80; and C*ase of Herrera Ulloa*, supra note 72, paras. 108-11.
[180] IACHR, Report of the Office of the Special Rapporteur for Freedom of Expression, December 30, 2009. "Inter-American Legal Framework Regarding the Right to Freedom of Expression." OEA/Ser.L/V/II. CIDH/RELE/INF. 2/09. ¶ 110.

Furthermore, Article 30 of the ACHR provides that certain restrictions on the rights and freedoms recognized by the Convention are possible by laws enacted for reasons of "general interest," meaning the public order or protection of public morals.[181] Even if textually absent, it is implicit in privacy rights that States do not have an obligation to guarantee access to information when it undermines basic democratic values, representing a threat to political stability and economic growth.

Here, the confidentiality of the Nominating Boards' candidate evaluations is absolutely necessary to achieve a democratic process and guaranteeing the right to hold opinions without interference. Undoubtedly, there is a compelling public interest in interfering as little as possible with the effective exercise of the right.

b. The limitations on the access to the information of the Nominating Board, and independent entity, is established by law and supported by international norms and democratic principles.

The Nominating Board is an independent entity given full discretion to determine the evaluation criteria and parameters as established by Fiscalandian law. Article 103 of the 2007 Constitution of Fiscalandia; Arts. 15-20 of Law 266 of 1999, the Nominating Boards Law; Art. 5 of the Organic Law of the Office of the Prosecutor General of the Republic all establish this criterion in accordance with the laws of the ACHR.

In fact, Fiscalandia's selection process for Prosecutor General implemented criteria, democratic in nature, which promotes diversity and provides equal opportunity of access to all persons, in full compliance with State law Article 13(3) of the American Convention.

Moreover, Fiscalandia took the necessary steps to ensure public access to information as permitted by established law. Not only were the interview sessions open to the public, but

[181] American Convention, art. 30; Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev, 797, 806 (2008).

Fiscalandia published all scores online that did not violate the rights and privacy of others. [182] Fiscalandia even made regular publications on a website created to make the information more easily accessible to the public.

Furthermore, the State's obligation to take appropriate steps to safeguard the right of everyone to have opportunities to work compels collateral limitations on the rights of others for the purpose of promoting the general welfare in a democratic society. The paradox of finding such collateral limitations as human rights violations is opposition to the established principles of both international law and the Inter-American System.

For all the foregoing reasons, the State maintains that none of the rights protected under the American Convention has been violated to the detriment of Hinojoza and Mastro; to the contrary, in full observance of the international instruments and of constitutional guarantees, the latter were protected by the State's extensive efforts to ensure the Nominating Board consist of members who are objective and reasonable to ensure absolute fairness and equal opportunity for all candidates.

REQUEST FOR RELIEF

Based on the foregoing submissions, the Republic of Fiscalandia respectfully requests the Court find that the exhaustion of domestic remedies requirement was not satisfied, and hence the Court does not have jurisdiction over Rex, Escobar, and Hinojoza et al. Alternatively, Fiscalandia maintains that Articles 8, 13, 24, and 25 in connection with Article 1(1) and 2 of the American Convention were not violated.

[182] Hypothetical ¶34, Clarification Questions & Answers, page 12