

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

SAN JOSE, COSTA RICA

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**MARICRUZ HINOJOZA, et al.**

Petitioners

**v.**

**REPUBLIC OF FISCALANDIA**

**Respondent**

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**MEMORIAL FOR THE STATE**

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## II. INDEX OF AUTHORITIES

### A. Legal books and Articles

#### Legal books

The Inter-American Yearbook on Human Rights, International-American

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Case of Herrera-Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations and Costs). Judgment of July 2, 2004. Series C No.117 (p. 39, 40, 42)

Case of Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs). Judgment of July 8, 2004. Series C No. 110 (p. 30)

Case of Ricardo Canese v. Paraguay (Merits, Reparations and Costs). Judgment of August 31, 2004. Series C No.111 (p. 39)

Case of Tupac

Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador (Preliminary objections, Merits, Reparations and Costs). Judgment of November 21, 2007, Series A/C.H.R./C.11/07/010020/TJ -0.002 Tc 0.002 T

Case of Indigenous Community Xákmok Kasek v. Paraguay (Merits, Reparations and Costs). Judgment of August 24, 2010. Series C No. 214 (**p. 34, 35**)

Case of Chocrón Chocrón v. Venezuela (Preliminary objections, Merits, Reparations and Costs)



## 2. European Court on Human Rights

Case of The Sunday Times

M50(5) by 15(1)(h) - 1(6), 18

## **Inter-American Commission of Human Rights cases Reports**

Case of Hugo Armendariz v. United States (Admissibility), Report No. 57/06, 20 July 2006  
(p. 19)

Case of Maria Eugenia Morales de Sierra (Guatemala) (Merits), Case N° 11.625, Report  
No. 4/01 (19 January 2001) (p. 32)

## **Documents from regional and international institutions**

### **1. Inter-American Commission on Human Rights**

Declaration of Principles on Freedom of Expression, Principle 2, (October 2000) (p. 41)

#### **Theme reports from the IACHR**

Guarantees for the independence of justice operators. Towards strengthening access to  
justice and the rule of law in the Americas, OEA/Ser.L/V/II. Doc. 44, December 5, 2013 (p. 29,  
35-37)

Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression  
Chapter IV, OEA/Ser.L/V/II. Doc. 51, (December 30, 2009) (p. 41)

The Inter-American Legal Framework Regarding the Right to Access to Information, Office  
of the Special Rapporteur for Freedom of Expression of the IACHR, Second Edition.  
OEA/Ser.L/V/II. CIDH/RELE/INF (March 7, 2011) (p. 41)

SILENCED ZONES: Highly dangerous areas for the exercise of freedom of expression  
Office of the Special Rapporteur for Freedom of Expression of the IACHR, OEA/Ser.L/V/II  
CIDH/RELE/INF.16/17 March 15, 2017 (p. 40)

Specialized supervisory bodies for the right to access to public information, Special  
rapporteur for freedom of expression of the IACHR, OAS/Ser.L/V/II. CIDH/RELE/INF.14/16 (p.  
42, 43)

Compendium on Equality and Non-Discrimination. Inter-American Standards  
OEA/Ser.L/V/II.171 Doc. 31(12 February 2019) (p. 32)

### Country reports

Democratic Institutions, the Rule of Law and Human Rights in Venezuela OEA/Ser.L/V/II.  
Doc. 209, December 31, 2017 (p. 40)

## 2. Inter-American Juridical Committee

Principles on the right to access to information, Resolution 147 of the 73<sup>rd</sup> Ordinary Period  
of Sessions, Principle 10, Inter-American Juridical Committee, (August 7, 2008) (p. 41)

### 3. United Nations

Principle 17 of the United Nations Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (p. 30)

Report of the independent expert to update the set of principles to combat impunity, United Nations, Economic and Social Committee, E/CN.4/2005/102/Add.1, Principle 30 (February 18, 2005) (p. 38)

#### International texts

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, “Convention Belém do Pará”, 1994 (p. 33)

### III. STATEMENT OF FACTS

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

#### **I - Regarding the situation of former judge Mariano Rex**

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

On December 1<sup>st</sup>, 2017, the Supreme Court dismissed judge Rex on the ground of "serious breach of the obligation to properly state the reasoning for his decisions" after a proper investigation and a contradictory procedure<sup>7</sup>. Mr. Rex did not appeal this decision<sup>8</sup>, but

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On February 14, 2019, the IACHR found the State responsible for violating the rights to a fair trial (Article 8.1) and to judicial protection (Article 25), in relation to Articles 1.1 and 2 ACHR<sup>10</sup>.

## **II - Regarding the situation of former Prosecutor General Magdalena Escobar**

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

On June 16, 2017, Mrs Escobar filed a motion to vacate before the Tenth Administrative Court of Berena, along with an injunctive relief<sup>16</sup>. The

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

#### **Hinojosa**

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

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

Mrs Hinojosa and del Mastro filed a writ of amparo

periences

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appealed the decision, also denied on March 17, 2018<sup>26</sup>. Therefore, on April 1<sup>st</sup>, 2018 they filed a petition before the IACHR<sup>27</sup>.

On August 12, 2019, the IACHR found the State internationally responsible for the violation of the rights

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## IV. LEGAL ANALYSIS

### A. Preliminary exceptions

#### 1. Consolidation of the petitions

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

According to Art. 29 al 5 of the Rules of Procedure of the IACHR “If two or more petitions address similar facts, involve the same persons, or reveal the same pattern of conduct, the Commission may join them and process them together in the same file”. Nevertheless, in this case, the Commission should not have merge the petitions. All petitioners allege different violations and if some of those alleged violations are similar, they rest on distinct facts and they are not alleged on the same grounds. Mr. Rex is challenging a disciplinary sanction rendered by the Supreme Court; Mrs Escobar is challenging a presidential decree and the appointment of the new Prosecutor General; finally, Mrs Hinojosa and del Mastro are challenging the process of the new Prosecutor General’s nomination. However, Mrs Escobar states that the appointment infringed her right to irremovability from office, her right to work and the guarantees of the autonomy of the Office of the Prosecutor General; whereas Mrs del Mastro and Hinojoza argue that the appointment violated the equal access to public office and that they had been discrimina0.001 5tees

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

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

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

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

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

Furthermore, she could have challenged the Supreme Court’s decision by a writ of amparo if she felt her human rights were violated. Furthermore, she was appointed to serve as prosecutor in the district of Morena<sup>43</sup>, appointment that she did not contest.

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

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

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(Article 1(1))”<sup>45</sup>. As a consequence, the Court examines the scope of both articles 8 and 25 ACHR under a single chapter<sup>46</sup>.

Following the steady case law of the Court, the State will therefore examine y0th(8 )20(a) ed [/Top ]/BB

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

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

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

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

On June 16, 2017, Mrs Escobar filed a motion to vacate an administrative act with the Tenth Administrative Court of Berena to challenge the call for candidates issued by Extraordinary

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

On the third element, the celerity with which the courts rendered their judgments show how dedicated they are to ~~since~~ ~~201p20.0024[(a.50r796 Tm (B1 Tw 4.)1(er)-1(ed ))TJ -0en)]Tj 0 Tc 0 Tw4(ffirt517~~

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Regarding

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regulated in Chapter V of the Judiciary Act of Fiscalandia<sup>72</sup>. Such guarantees of independent tribunals are therefore provided by Fiscalandia's law.

ii. The State provides impartial tribunals

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

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

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<sup>72</sup> Clarification answer n°18.

<sup>73</sup> Case of Apitz Barbera et al. ("First Court of Administrative Disputes"). Venezuela Judgment of August 5, 2008. Series C No. 182, para. 56; Case of the Constitutional Court v. Peru, Judgment of January 31, 2001. Series C No. 71, para. 66-85.

<sup>74</sup> Clarification answer n°18.

<sup>75</sup> Clarification answer n°51.

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

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

« The notion of equality is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group

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

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equal access of public offices, as long as there is no restrictive condition based on a discriminatory factor to apply<sup>101</sup>. As example, the Congress of Peru appointment process was *prima facie* driven

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legislative assembly. According to international laws, public employees who were “unlawfully appointed” may be dismissed

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the candidates' gender, but states that they should have practiced the profession for at least ten years<sup>117</sup> at the time of application.

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

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

### **3. The Nominating board did not violate freedom of expression**

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

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<sup>117</sup> Hypothetical p.2 §12.

<sup>118</sup> Hypothetical p.3 §14.

<sup>119</sup> Clarification answer n°30.3.

<sup>120</sup> Clarification answer n°62.

<sup>121</sup> Hypothetical p.3 §13.

<sup>122</sup> Case of Ricardo Canese v. Paraguay Judgment of August, 31, 2004, Series C.No.111, para 95; Case of Herrera-Ulloa v. Costa Rica Judgment of July, 2, 2004, Series C No.117, para 121; Case of The Sunday Times v. the United Kingdom

the medias, through a monopoly,

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

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

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<sup>136</sup> Case of *Claude Reyes v. Chile*, 2006, *ibid.*, para. 90; Case of *López Álvarez v. Honduras* Judgment of February, 1, 2006, Series C. No.141, para. 165; Case of *Palamar Ribarne*, Judgment of November, 22, 2005, Series C. No.135, para. 85.

<sup>137</sup> « Specialized supervisory bodies for the right to access to public information », Special rapporteur for freedom of expression of the IACHR, OAS/Ser.L/V/II. CIDH/RELE/INF.14/16.

Case of *Herrera-Ulloa v. Costa Rica* Judgment of July 2, 2004. Series C No.117.

interviews, the press and civil organisations were present<sup>139</sup> to guarantee the process' transparency and the respect of human rights as -2880( )-p465(1)463(1)51335TT060052200( )(case.001 Tw 1.D 3 >>BDC 0.0

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## V. REQUEST FOR RELIEF

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

- 1) The request of the petitioners is declared inadmissible for not exhausting domestic remedies.
- 2) The State has not violated its international obligations under Articles 8, 13, 24 and 25 in conjunction with Article 1(1) and 2 of the ACHR.