2020 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Maricruz Hinojoza et al. v. Republic of Fiscalandia

BENCH MEMORANDUM

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I. DEFINITIONS

1. Judicial independence

Under international human rights law, judicial independence is a human right. It is recognized in Article 8.1 of the American Convention on Human Rights and in Article 14.1 of the International Covenant on Civil and Political Rights as the *right to be tried by an independent, competent, and impartial judge*.

Judicial independence is also a fundamental principle of the rule of law and democratic systems. In various rulings, the Inter-American Court of Human Rights has emphasized that one of the purposes of the separation of powers is precisely to safeguard the independence of the judiciary,[1] underscoring the obligation of States to respect and guarantee that independence.

In its 2013 report entitled *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, the IACHR systematized the existing Inter-American decisions and standards in this area, which include those issued by both the IACHR and the Inter-American Court. Further developments to these standards, subsequent to that report, can be found in the report on *Corruption and Human Rights* issued in December 2019.

In general terms, judicial independence can be defined as the *absence of interference in the exercise of the judicial function, whether from other branches of government or from non-state actors*. A distinction can be made between "external" and "internal" independence, depending on the origin of the potential interference,[2] so that "external independence" is a guarantee against undue interference or pressure from actors outside or unrelated to the judiciary, whereas "internal independence" is said to exist when judicial bodies are free from pressure and interference from within the judicial structure itself, typically from higher courts or government bodies.

Judicial independence can also be seen at different levels, one "institutional" and the other "individual or personal," depending on whether one is looking at the judiciary as a whole or at individual judges. At the institutional level, judicial independence means, for instance, prohibiting undue interference by other branches of government in the selection and appointment of judges, or requiring a sufficient budgetary allocation. At the individual level, judicial independence means demanding stability of tenure and personal security for judges, establishing a judicial career service, respecting due process guarantees in disciplinary proceedings against judges, etc.

2. Prosecutorial independence

International law recognizes that prosecutorial independence is an indispensable corollary of judicial independence. It acknowledges that the role of prosecutors in protecting the human rights of both victims and defendants can only be discharged effectively when they can make decisions independently of other

[1] I/A Court H.R., *Case of Palamara Iribarne v. Chile.* Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 15; *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 138; *Case of Reverón Trujillo v. Venezuela.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 359, among others.

[2] On the concept of judicial independence, and in particular the distinction between internal and external independence, see De Otto y Pardo, Ignacio, *Estudios sobre el Poder Judicial*, in Id., Obras completas, Oviedo, Universidad de Oviedo – CEPC, 2010, pp. 1290-1294; Díez-Picazo, Luis María, *Notas de Derecho comparado sobre la independencia judicial*, in Revista Española de Derecho Constitucional, Year 12, No. 34, Madrid, Jan.-Apr. 1992, pp. 33-35; Díez-Picazo, Luis María, *Régimen constitucional del Poder Judicial*, Madrid, Civitas, 1991, pp. 103- 104; Andrés Ibáñez, Perfecto & Claudio Movilla, *El Poder Judicial*, Madrid, Tecnos, 1986, pp. 117-124; Guarnieri, Carlo & Patrizia Pederzoli, *Los jueces y la política. Poder Judicial y democracia*, Madrid, Taurus, 1999, p. 46.

public authorities, and when the distinct role of judges and prosecutors is clearly defined, since, in a democracy based on respect for the rule of law, the basis for prosecution must be provided for in the law.[3]

Like the independence of judges, prosecutorial independence is not a prerogative or privilege conferred in their own interest, but rather in the interest of independent, impartial, and effective justice.[4] Nevertheless, there are important differences in relation to the design and content of prosecutorial autonomy as compared to the independence of judges,[5] even if they both play a fundamental role in the justice system.

Thus, while the independence of judges and their absolute separation from the executive branch is a fundamental principle of the rule of law to which there can be no exceptions, there are systems in which prosecutors' offices are attached to that branch of government, without this necessarily entailing undue interference in the exercise of their functions. In addition, while the independence of judges has both institutional and individual facets that protect them from undue influence—including from their superiors or other judges—in the case of prosecutors, the principle of unity of action requires a certain degree of top-down control of their decisions and actions by the Attorney General.[6]

There are different models for prosecutors' offices throughout the world and in the region. In some countries they are independent from other public authorities, while in others they are attached to the executive branch or even the judiciary. There are also some cases in which prosecutors' offices, together with other oversight institutions, are part of the so-called Public Prosecutor's Office [*Ministerio Público*], whereas in other countries the Public Prosecutor's Office is synonymous with the Attorney General's Office. Despite this diversity of models, international law recognizes that prosecutors must enjoy autonomy and independence, and that this must be guaranteed by the domestic legal framework at the highest possible level.

This autonomy should be understood to mean that prosecutors are "free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind,"[7] so that no public authority should seek to influence prosecutors' decisions in individual cases as to how the investigation and criminal prosecution should be conducted. In this regard, the United Nations Guidelines on the Role of Prosecutors state that it is the duty of States to ensure "that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."[8]

3. Internal and external independence

Regarding the extent of autonomy, international law distinguishes between the autonomy of the prosecutor's office as a whole (external independence), and the individual autonomy of each prosecutor (internal independence).

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[3] Council of Europe. Consultative Council of European Prosecutors (CCPE) and Consultative Council of European Judges (CCJE). *The Bordeaux Declaration on Judges and Prosecutors in a Democratic Society,* adopted in Strasbourg on 8 December 2009, principle 3, and Explanatory Note, para. 10.

[4] *Ibid.*, Explanatory Note, para. 27.

[5] European Commission for Democracy through Law (Venice Commission), *Report on European standards as regards the independence of the judicial system. Part II – The prosecution service*, adopted by the Venice Commission at its 85th Plenary Meeting (Venice, 17-18 December 2010), para. 28.

[6] *Ibid.*, *loc. cit.*

[7] Council of Europe. Consultative Council of European Prosecutors. Opinion No. 13 (2018) "Independence, accountability and ethics of prosecutors." CCPE(2018)2, adopted in Strasbourg, 23 November 2018, para. 15.

[8] United Nations, *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc.A/CONF.144/28/Rev. 1 p. 189 (1990), principle 4.

External independence guarantees the independence of the actions of the prosecutor's office from undue interference from other public authorities, especially from the executive branch. The standards reinforce the idea that the executive branch should not give instructions to the Prosecutor General or to prosecutors in relation to individual cases, although instructions of a general nature, established as a component of a crime policy, may be permitted when they have been adopted by the legislature or the executive branch itself following the appropriate procedures.[9] These instructions may concern, for example, setting priorities in criminal prosecution under a comprehensive policy, and must be given transparently and in writing.[10] In addition, external independence protects the prosecutor's office from interference by non-state actors such as political parties[11] and even organized crime.

In its recent report on *Corruption and Human Rights*, the Inter-American Commission recognized that public prosecutors' offices play a central role in the fight against corruption. The Commission stressed the need for their external independence, which "requires institutional designs that prevent political interference or affiliation with the government" and which should include, as a fundamental consideration, an appropriate system for the appointment of its authorities consistent with international standards.[12]

For their part, and by virtue of their **internal independence**, individual prosecutors—distinctly from the Attorney General—enjoy decision-making freedom in the exercise of their duties, with no limitations other than those deriving from the hierarchical relations to which they are subject.[13] These relationships may vary from one system to another, but in general, the scope of prosecutors' autonomy should respect the organization's directives, guidelines, and instructions.

This is a fundamental aspect that differentiates the internal independence of prosecutors from the independence of judges. Prosecutors are part of a hierarchical organization, the purpose of which is to ensure the coherence, consistency, uniformity, and unity of criminal prosecution for the proper administration of justice, as well as for the protection of the human rights of victims and defendants—especially the principle of equality before the law. This hierarchy is expressed in directives, guidelines, and general instructions, which, while limiting the prosecutors' decision-making capacity to some extent, are necessary to maintain unity of action, especially in those systems where prosecutors enjoy a certain latitude in applying the "discretionary principle."[14]

This does not mean that prosecutors are not protected from undue interference with their autonomy by their superiors. They enjoy certain guarantees, such as the following:

- Directives, guidelines, or general instructions should be clear and in writing.
- Relationships of authority and the respective responsibilities should be clear and public, in order to promote public trust.
- There should be clear mechanisms for prosecutors to challenge before their superiors any directives or instructions that they believe to be illegal or contrary to their ethical obligations.

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[9] European Commission for Democracy through Law (Venice Commission), *Report on European standards as regards the independence of the judicial system. Part II – The prosecution service*, adopted by the Venice Commission at its 85th Plenary Meeting (Venice, 17-18 December 2010), para. 30.

[10] Council of Europe. Consultative Council of European Prosecutors. Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors." CCPE(2018)2, adopted in Strasbourg, 23 November 2018, para. 34-37.

[11] Council of Europe, *European guidelines on ethics and conduct of public prosecutors. "The Budapest guidelines,"* principle 31.a

[12] IACHR, *Corrupción y Derechos Humanos* [Corruption and Human Rights], OEA/Ser.L/V/II. Doc. 236, December 6, 2019, para. 298.

[13] Council of Europe, *European Guidelines on ethics and conduct of public prosecutors,* principle 31.b

[14] Council of Europe. Consultative Council of European Prosecutors. *Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors."* CCPE(2018)2, adopted in Strasbourg, 23 November 2018, para. 31-40

- Objective criteria for promotion, transfer, performance evaluation, and case allocation, as well as codes of conduct and rules of professional responsibility, should be established so that the parameters of prosecutors' activity are clearly defined.

At the Inter-American level, the IACHR has underscored how important it is that "investigations and, on a broader level, any activities associated with the prosecution of crime, be independent and impartial so that crime victims are assured access to justice,"[15] and it has sought to establish some criteria to guarantee external independence, especially with respect to the executive branch, stressing that the lack of independence can undermine the confidence and credibility of the authority entrusted with effectively investigating crimes. These criteria include: that the scope and powers of the executive branch in relation to the prosecutor's offices are clearly established by law and exercised transparently; that general instructions are clear, written, and public; and that instructions relating to specific cases or operational decisions are generally prohibited, especially those seeking to prevent the investigation of specific cases, among others.

The Commission has also referred to the independence of prosecutors' offices from parliaments, which should not attempt to influence their actions by, for instance, setting conditions on budget allocations, or using institutional accountability mechanisms to demand information on individual cases. With regard to the judiciary, the Commission has stressed the need to reinforce a clear separation between the functions of prosecutors and judges to ensure confidence that any unlawful act by the prosecutors' office will be subject to review by an impartial judge. For this reason, the IACHR has said that prosecutors' offices "should not be part of any other branch of government."[16]

4. Power of the States to establish different mechanisms for the selection and appointment of justice authorities

There is no international standard that requires States to implement a particular type of mechanism for selecting and appointing their justice authorities. In fact, the IACHR has recognized that a variety of mechanisms exist in the region, and that they are legitimate as long as they meet certain minimum criteria (see section III.2). It has also stated that public competitions are "are the best method to avoid discretionary appointments and to ensure that all citizens who meet the requirements set out in law are able to participate in the selection process, under general conditions of equality, and apply for the position they aspire to hold;"[17] nevertheless, it has recognized that the most senior justice system authorities are usually political appointees.[18]

Recently, in its report on *Corruption and Human Rights,* the IACHR pointed out that appointments should not depend on political actors, because "they are more exposed to different forms of outside control." It stated that mechanisms with a majority of members from the judiciary, that operate based on objective criteria and transparent procedures, should be favored[19] in order to prevent the risk of senior judicial bodies controlling and self-regulating the entire judicial system.

5. Intervention by political bodies

The IACHR has noted that, in several countries, political authorities are in charge of the processes for selecting and appointing senior justice system authorities, which "puts the independence of justice operators

[15] IACHR, *Guarantees for the Independence of Justice Operators,* para. 36.
[16] *Ibid.*, para. 44.
[17] *Ibid.*, para. 100.
[18] *Ibid.*, para. 101.
[19] IACHR, *Corrupción y Derechos Humanos* [Corruption and Human Rights], para. 306.

at risk, given the nature of the authorities who select them,"[20] thus "politicizing" the process.[21] The IACHR has referred expressly to this risk in connection with the selection of the Attorney General, when he or she "is selected or appointed by a political body, whose appointments may be entirely discretionary."[22]

For this reason, the IACHR has viewed positively the existence of "reinforced safeguards" that seek to "make it clear to the public that the candidates selected are the best candidates based on merit and professional qualifications," such as: maximum transparency, the requirement for qualified majorities, and the drawing up of "lists" or "shortlists" by bodies such as the Council of the Judiciary or by the Supreme Courts themselves, which are handed over to the political branches for the final selection.[23]

However, the IACHR considers that what matters most is that, "substantively speaking, the States ensure that these [appointments] must not and cannot be perceived by the public as being decided on the basis of politics, which would undermine a defendant's belief that justice operators perform their functions independently."[24] To this end, it considers measures such as the following to be essential: (i) advance publication of the announcements of the selection process, deadlines and procedures; (ii) guarantees of equal and inclusive access for candidates; (iii) civil society involvement; (iv) eligibility based on merit and professional qualifications, (v) objective selection criteria that will ensure that the justice operators will be persons of integrity and will have the appropriate legal training and qualifications befitting the singular and specific role they will be called upon to perform; (vi) holding properly prepared public hearings or interviews where the public, nongovernmental organizations, and other interested parties have an opportunity to apprise themselves of the selection criteria, learn who the candidates are, and express their concerns about a given candidate, among others.[25]

6. Security of tenure

The guarantee of judges' irremovability from office gives them the right to remain in their positions "until the dissolving condition that puts a legal end to their term of office occurs"[26] and entails a number of "reinforced guarantees" of stability, which protect their independence from undue pressures. According to the *United Nations Basic Principles on the Independence of the Judiciary*, "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[27]

"Reinforced guarantees" under the principle of the security of tenure of judges in the Inter-American system include:

(i) Judges may only be removed under two different types of circumstances: i) circumstances that are commensurate with the guarantee of irremovability and are dictated by the term of office, period of

[20] IACHR, *Guarantees for the Independence of Justice Operators*, para. 103.
[21] *Ibid.*, para. 101.
[22] *Ibid.*, loc. cit.
[23] IACHR, *Guarantees for the Independence of Justice Operators*, para. 104 -105.
[24] *Ibid.*, para. 106.
[25] *Ibid.*, para. 107.
[26] I/A Court H.R., *Case of Reverón Trujillo v. Venezuela.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 116.
[27] 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 at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; principle 12.

appointment, or mandatory retirement age; and ii) circumstances related to the judge's fitness for office, i.e., through the disciplinary system.[28]

(ii) Any disciplinary proceedings against judges must respect due process guarantees and judges must be afforded an effective remedy to challenge the decision.[29] These guarantees "apply regardless of the name given to the domestic proceedings whereby judges are relieved of duties, be it termination, dismissal, or removal."[30]

As for prosecutors, the IACHR has established that "like judges, prosecutors should be given a certain degree of tenure or fixed tenure in their positions because of the fundamental role they play in the justice system." In its 2009 report *Democracy and Human Rights in Venezuela*, it said that the stability of prosecutors in their positions "is indispensable to guarantee their independence from political changes or changes in the government,"[31] and that this should be reflected in a proper appointment system and a disciplinary system that ensures all the applicable guarantees, in order to "prevent a prosecutor from being arbitrarily separated from service for having taken an unpopular decision."[32]

At the universal level, the *UN Guidelines on the Role of Prosecutors* provide that the laws should guarantee them reasonable conditions of service, remuneration, "and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations,"[33] while at the European level, the Council of Europe's Committee of Ministers has recommended that States ensure that all prosecutors enjoy reasonable conditions of service, including tenure.[34]

7. Justice reforms in democratic transition processes

International law allows for exceptions to the guarantee of security of tenure. One of them applies to the transition processes following the collapse of authoritarian and corrupt regimes, where the justice system either allowed or failed to confront human rights violations and serious corruption, which could have been prevented if not for widespread impunity. Such exceptional circumstances, where the checks and balances that ensure the rule of law fail or cease to be effective, call for a reform or reorganization of the justice system. This could include investigating the background of personnel appointed by the previous regime (when they are considered complicit in the violations committed) as a measure of non-repetition,[35] all while respecting due process guarantees.

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[28] IACHR, *Guarantees for the Independence of Justice Operators*, para. 186.

[29] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 147.

[30] IACHR, *Case 12.600 Hugo Quintana Coello et al. (Supreme Court of Justice) Ecuador (Merits)*, August 2, 2011, para. 108.

[31] IACHR, *Democracy and Human Rights in Venezuela*, OEA/ Ser.L./V/II. Doc. 54, December 30, 2009. para. 229.

[32] IACHR, *Guarantees for the Independence of Justice Operators*, para. 189; European Commission for Democracy through Law (Venice Commission), *Report on European standards as regards the independence of the judicial system. Part II – The prosecution service*, adopted by the Venice Commission at its 85th Plenary Meeting (Venice, 17-18 December 2010), para. 18.

[33] United Nations, *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc.A/CONF.144/28/Rev. 1 p. 189 (1990); principle 6.

[34] Council of Europe, *Recommendation Rec(2000)19 of the Committee of Ministers to Members States on the role of public prosecution in the criminal justice system*, adopted by the Committee of Ministers on 6 October 2000 para. 5.d

[35] United Nations. Human Rights Council. *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Fabian Salvioli*, A/HRC/39/53, 25 July 2018, para. 31; *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff*, A/HRC/30/42, 7 September 2015, para. 55.

Principle 30 of the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* of the United Nations states that: "The principle of irremovability, as the basic guarantee of the independence of judges, must be observed with respect to judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement."

8. Provisional, transitional, or interim status

Indefinite provisional status is the opposite of security of tenure. Provisional judges and prosecutors are therefore exposed to the risk of being easily removed, even for no reason, when their provisional status is indefinite. The IACHR has warned that indefinite provisional status (without a set time limit or term of office) undermines independence and creates the risk that justice authorities may make decisions solely to please the authority that determines whether they will remain in the position, thus raising objective doubts about their independence.[36]

The Commission has also stated that provisional status "must be the exception and not the rule," and that although "in exceptional circumstances, it may be necessary to appoint judges on a temporary basis, such judges must not only be selected by means of an appropriate procedure, they must also enjoy a certain guarantee of tenure in their positions."[37] This means that provisional status may be admissible in exceptional circumstances, but it is synonymous with free removal; provisional justice authorities should enjoy stability while serving the term or condition of their appointment, during which they may only be removed for disciplinary reasons through a process that provides full guarantees.

The IACHR has also addressed the provisional status of prosecutors, indicating that their lack of stability "could also necessarily lead to difficulties in identifying, pursuing, and concluding specific lines of investigation as well as in meeting the procedural deadlines set for the investigation phase." It noted in particular that changes in investigating prosecutors have a negative impact on investigations, especially on the rights of victims in criminal proceedings involving human rights violations.[38]

9. Term of office

Under international law, in order to guarantee the necessary stability for justice authorities to act independently, it is important that the term of office (i) is defined, and (ii) that it is also sufficient. In the opinion of the IACHR and the Special Rapporteur on the Independence of Magistrates and Lawyers, appointments that are for longer periods of time and not subject to reelection or confirmation, especially for senior positions in the justice system, are more conducive to independence.[39]

10. Reelection and/or confirmation in office

[36] IACHR, *Guarantees for the Independence of Justice Operators*, para. 90.
[37] *Ibid.*, para. 93.
[38] IACHR, *Democracy and Human Rights in Venezuela*, para. 265.
[39] IACHR, *Guarantees for the Independence of Justice Operators*, para. 84; United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, Leandro Despouy*, A/HRC/11/41, 24 March 2009, para. 54.

Confirmation is the legal possibility of remaining in office, provided that subsequent approval is obtained from an authority, while reelection is the legal possibility of being elected again to office for an additional period. According to the IACHR and the Special Rapporteur on the Independence of Magistrates and Lawyers, both situations contribute to fragility, especially when the confirmation or reelection may be discretionary,[40] because it gives rise to the risk that justice authorities will behave in a manner to curry favor with the authority in charge of this decision, or at least to be perceived by society as doing so.

The IACHR has additionally stated that, where there are systems in place for reelection or confirmation, "the term for which a justice operator is appointed should not coincide with the changes of government or the terms of the legislature."[41]

11. Accountability

Accountability has been defined in general terms, as the obligation or the will to assume responsibility or answer for one's own acts. When such acts are carried out in the exercise of authority or public power, institutions and officials must answer for them, in accordance with previously established rules. According to the United Nations Secretary General, accountability is an inherent concept of the rule of law, which requires that the law establish clear accountability mechanisms and procedures to increase transparency, impartiality, and the integrity and predictability of public and private institutions,[42] in line with that established by the United Nations *Convention against Corruption*, whose article 8.1 includes the obligation of States to promote "integrity, honesty, and responsibility among their public officials." At the Inter-American level, the Inter-American Commission on Human Rights has pointed out that the lack of control over authoritative acts is one of the institutional factors that facilitates corruption,[43] and has considered accountability as one of the basic principles of the fight against corruption from a human rights perspective.[44]

Regarding the accountability of justice systems, the United Nations Special Rapporteur for the Independence of Magistrates and Lawyers has clarified that both independence and accountability are essential elements of an efficient justice system, without any need to interpret that the demand for accountability is an attack on judicial independence. However, it also warns that, in certain situations, the inability to increase judicial accountability or to address judicial corruption has been used by governments as a pretext to launch large-scale attacks against the independence of the judiciary.[45]

Therefore, for the Rapporteur, it is necessary to find an appropriate balance between independence and accountability, and for this, it is necessary to clearly define "the acts for which justice authorities should be held accountable, before whom they should be held accountable, and through which processes."[46] Further, accountability mechanisms must be independent to avoid external interference.[47]

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[40] IACHR, *Guarantees for the Independence of Justice Operators*, para. 86.
[41] *Ibid.*, para. 88.
[42] United Nations. Security Council. *Security General Report "The rule of law and transitional justice in conflict and post-conflict societies,"* S/2004/616*, 24 August 2004.
United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, Gabriela Knaul,* A/HRC/26/32, 24 April 2014.
[43] IACHR, *Corruption and Human Rights,* para. 116.
[44] *Ibid.*, para. 120.c.
[45] United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, Gabriela Knaul,* A/HRC/26/32, 24 April 2014, para. 22-23.
[46] *Ibid.*, para. 55.
[47] *Ibid.*, para. 49.

Like independence, accountability has an institutional dimension and a personal dimension, and from each of them, it can cover internal and external aspects.

In its **institutional dimension**, accountability must encompass the entire institutional organization of the justice system (Judiciary, Prosecutors, Public Defenders), which must be responsible for the exercise of its functions, and may encompass the following mechanisms:

- From an internal perspective, the existence of permanent mechanisms and procedures to supervise the independence, competence, objectivity, and impartiality of justice authorities on a permanent basis. To prevent these mechanisms from being used improperly as instruments of retaliation or internal pressure, disciplinary offenses and sanctions must be clearly established, procedures must be carried out by an independent body, and there must be the possibility of judicial review of the sanctions. Also found in this perspective are independent self-government bodies and rules that guarantee the civil liability of justice institutions in the event of judicial error.

- From an external perspective, the existence of effective mechanisms so that citizens, organized civil society, the media, human rights commissions, and the parliament can monitor the operation of the justice system. Institutional dialogues with parliament, publicity for all hearings and publication of court decisions, transparency of institutional information, existence of a website, or use of social media and the media to explain important resolutions are examples of this type of mechanisms.

- In the case of prosecutors, the Special Rapporteur has identified mechanisms such as the presentation of public reports by the attorney general, the preparation of public audits on prosecutorial financial or organizational matters, the establishment of fiscal councils, or the judicial review of judicial decisions.

- For the Inter-American Commission, the right to an effective remedy, as a mechanism to claim the violation of a right and obtain reparation, can be used as a form of accountability.[48]

On the other hand, in its **individual dimension**, accountability encompasses the responsibility of justice authorities regarding their conduct, and may encompass mechanisms such as, for example, the obligation of judges to draft resolutions in an understandable language, to explain their legal opinions, and to accept a system for registering their economic interests or other interests. Individual accountability also includes the obligation to respect rules of conduct and ethics so that judges can behave appropriately and adequately in their positions, both in their professional and private lives. Certain activities, such as affiliation in political parties or public participation in political acts, should be avoided by judges if they want to avoid compromising impartiality and the trust of citizens in the judicial system.[49]

12. Right to an effective remedy

The right to an effective remedy is enshrined in Article 25.1 of the American Convention on Human Rights (judicial protection), and creates an obligation for States to provide all persons subject to their jurisdiction with an effective judicial remedy against acts that violate their rights under the Convention, as well as those recognized under the Constitution and the law.

[48] IACHR, *Corruption and Human Rights,* para. 120.c.
[49] United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, Gabriela Knaul,* A/HRC/26/32, 24 April 2014, para. 57-58.

Inter-American case law has established that it is not enough for such a remedy to be provided for in the law or to be formally admissible; rather, it must be genuinely suitable for establishing whether a violation has been committed and for providing the necessary redress.[50] It has also held that an effective judicial remedy "cannot be reduced to a mere formality, but must examine the reasons put forward by the plaintiff and expressly address them," even if this does not necessarily lead to a favorable outcome for the plaintiff.[51]

II. Key issues and standards relevant to the case analysis

1. Attorney General Magdalena Escobar's tenure in office

Paragraph 14 of the case states that Magdalena Escobar was appointed Attorney General on September 1, 2005 for a 15-year term that would end on September 1, 2020. However, a few months after her appointment, there was a coup d'état that led to the adoption of a new Constitution in 2007 (paragraph 2), the Ninth Transitional Provision of which states that the heads of oversight bodies "shall remain in their positions on a transitional basis" provided that they comply with the requirements established for the position. In the case of Magdalena Escobar, she was "confirmed" in the position through a Presidential Decree on March 20, 2008.

Consequently, the first issue that arises is related to Magdalena Escobar's (ME) security of tenure (or irremovability from office) as Attorney General. The response to this problem is fundamental to the coherence of the entire defense strategy of both the State and the petitioners. In this respect, the teams can take several positions:

- **First position: ME enjoyed tenure from September 1, 2005 to September 1, 2020, which protected her even in the face of the constitutional change.** According to this position, the Ninth Transitional Provision should be considered **ineffective** in relation to ME, and therefore, she has the right to remain in office until the end of her original term and may be removed only on disciplinary grounds with due process guarantees. If this position is taken, the call for a new selection process for the appointment of Attorney General could be substantively equivalent to a dismissal.

- **Second position: ME enjoyed tenure from September 1, 2005 to September 1, 2020 but was not protected from the constitutional change.** According to this position, although the Ninth Transitional Provision was in itself a violation of the guarantee of tenure in the office of Attorney General (by converting a permanent position into a transitional one), it did have a legal effect on ME, by making her term of office *transitional.* This second position can also give rise to several variations:

- ***First variation of the second position:*** ME's term of office became transitional when the 2007 Constitution came into force on November 25 of that year, but only until she was confirmed in office. According to this position, the March 20, 2008 confirmation would be tantamount to a new appointment, to which the new constitutional rules would apply, i.e. ME's appointment would be for life (paragraph13). Consequently, the call for a new selection process for the appointment of an Attorney General could be substantively equivalent to a dismissal.

  It is important to note that this position is the only one that can explain the status of ME's term of office between November 5, 2007 and March 20, 2008.

[50] I/A Court H.R., *Case of Lagos del Campo v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340 [only in Spanish], para. 188.
[51] I/A Court H.R., *Case of Dismissed Employees of Petroperú et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344 [only in Spanish], para. 155.

- ***Second variation of the second position:*** ME's term of office became transitional when she was confirmed on March 20, 2008, at which time it was verified that she met the requirements established in the 2007 Constitution. According to this position, the confirmation cannot be equated with a new appointment, as that would violate the constitutional rules for choosing the Attorney General, which require a selection process that involves the Nominating Board. In line with this position, the call for a new selection process is necessary in order to eliminate the transitional status of the position that ME had been occupying on a temporary basis and make it permanent.

  Those who argue this position can reinforce it by asserting that nothing prevented ME from participating as a candidate in the new selection process.

- ***Third variation of the second position:*** ME's term of office became transitional when she was confirmed on March 20, 2008, at which time it was verified that she met the requirements established in the 2007 Constitution. This position also maintains that confirmation cannot be equated to a new appointment, and that it is necessary to call for a new selection process; however, for this third variation, the call for candidates issued by President Obregón was intended to affect the investigations that ME had been conducting in the META Emails case, and therefore, its objectives were not legitimate.

  Those arguing this position could assert (i) that there were acts that revealed an apparent interference in the selection process, such as the President's tweeting of a photograph of a confidential session (paragraph 27); (ii) that the President chose a person with close ties to his family circle (paragraph 37); and (iii) that Attorney General Domingo Martínez replaced the prosecutors of the Special Unit for the META Emails case during his first week in office.

  Third position: ME was appointed by a president who was exercising power illegitimately, and therefore, was not protected by the guarantee of security of tenure. According to this position, the guarantee of security of tenure can only be acquired under conditions of full respect for the rule of law, which was not the case with ME, who was appointed by a dictator who had been in power for almost 20 years. Consequently, the Ninth Transitional Provision does not violate any guarantees, but rather seeks to reestablish democratic order without affecting the country's institutional framework.

  The argument against this third position is that Magdalena Escobar was appointed just a few months before former President Ramiro Santa Maria was overthrown, so there is no evidence that she acted in the interests of his government. The exception to the guarantee of security of tenure would require a case-by-case analysis, rather than a mere generalization, as being appointed by an undemocratic government would not be sufficient grounds to justify the removal of a justice authority.

Possible positions of the petitioners

Given that Magdalena Escobar's motion to vacate and subsequent petition are based on the premise that she enjoyed security of tenure at the time President Obregón called for the new selection process, the petitioners should assert (i) the first position (ii) the first variation of the second position, (ii) the third variation of the second position.

Possible positions of the State

For its part, the State can assume (i) the second variation of the second position, and (ii) the third position.

2. Effects of the call for the selection process on the independence of Attorney General Magdalena Escobar

According to paragraph 23 of the hypothetical case, once the new selection process was announced, Prosecutor General Magdalena Escobar filed a Motion to Vacate to challenge its validity, asserting that had the same substantive effects as a removal from office, and therefore affected her right to security of tenure, to due process, and to work, as well as the guarantee of independence of the Office of the Attorney General of the Republic.

Position of the petitioners

Whatever variation of the argument is used with respect to the above point, the petitioners must necessarily take the position that Magdalena Escobar enjoyed tenure at the time the call for candidates was issued, either because she was still within the terms of her original appointment, or because the confirmation is tantamount to a new appointment, or because—even if her term of office is temporary—she cannot be removed by any means or with the aim of affecting ongoing investigations.

The petitioners can also point out that the provisional or transitional nature of her term of office is in itself an additional violation of the guarantee of independence, because it failed to meet the requirements of being subject to a time limit or a condition (see Definitions, points 6 and 8), which made the Attorney General vulnerable to political interference. This was evidenced by the fact that when she launched investigations that affected the interests of the ruling party, the President reacted immediately by activating a selection process that had the direct effect of ending her term of office.

It can also be argued that while undermining the security of tenure of a prosecutor violates his or her independence as an individual, in the case of the Attorney General, it also has more serious effects, since it affects the independence of the institution as a whole. This is especially true if that security is undermined by the highest political authority, the President of the Republic.

As for the possible violation of the right to due process, the petitioners must demonstrate that, due to the particularities of the case, the call for a new selection process amounted to a removal or a penalty intended to hinder the progress of corruption investigations. To this end, the petitioners can cite the President's public accusations and comments on social media. This position requires the petitioners to argue that Magdalena Escobar could not be removed or disciplined without a prior process with full guarantees, as required by Article 8.1 of the American Convention.

Position of the State

For its part, the State should argue that Magdalena Escobar did not enjoy security of tenure, either because the democratic transition process justified the creation of transitional terms of office, or because Escobar's appointment was never permanent given that it was made during a dictatorial government rather than under the rule of law. Under this premise, the State should maintain that calling for a selection process should not be considered a penalty, but rather a necessary act to provide stability to an office that had been occupied on a transitional basis; therefore, rather than undermining the independence of the prosecutor's office, it sought to strengthen it.

As for the violation of the right to work, the State could argue that there was nothing to prevent Magdalena Escobar from participating in the new selection process, which would have ensured her continuity in office if she had sufficient merit and qualifications to be chosen again.

Finally, with respect to the intent to put a stop to the corruption investigations in the META Emails case, the State could contend that the government is committed to the fight against corruption, and that the progress made towards the establishment of an International Commission against Impunity (CICIFIS) in the country, at the President's initiative, is proof of this. The State can maintain that Escobar is using this argument to hide her selective and politically motivated use of criminal prosecution against the President's immediate circle.

3. International standards applicable to the selection of senior justice system authorities

Paragraphs 25 to 36 of the hypothetical case describe the process for selecting the Attorney General of the Republic of Fiscalandia that resulted in the appointment of Domingo Martínez, and which was subsequently challenged (including its outcome) by Maricruz Hinojosa and Sandra del Mastro, both career prosecutors who participated in that process.

The Inter-American system has established some minimum parameters to be observed in the selection and appointment of justice authorities, which should be "in the requirements and (…) in the procedure and assessment of qualifications (…), with a view to ensuring that those selected and appointed will act independently."[52] The IACHR has also noted that when those processes are run by political authorities, States have an obligation to ensure, substantively speaking, that "these procedures must not and cannot be perceived by the public as being decided on the basis of politics," for which it has recommended the adoption of enhanced safeguards.

This means that, in the hypothetical case, **the participating teams should identify that the international standards are applicable even at the Nominating Board stage, and throughout the process until the final selection by the President. The teams should also recognize that, because it is a political mechanism and one for the election of the Attorney General, the State of Fiscalandia has an obligation to implement enhanced safeguards, and that the applicable standards are more stringent.**

In addition, at the universal level, the UN Special Rapporteur on the Independence of Magistrates and Lawyers has referred specifically to the appointment of Attorney General. She stated, in her report on the status and role of prosecutors, that even in systems where governments maintain a certain level of control over the selection of the Attorney General, "it is important that the method of selection maintains public confidence and the respect of the judiciary and the legal profession," and that cooperation among different governmental bodies is preferable to an appointment made by a single body, in which case expert advice should be sought.[53]

Along these lines, in the European sphere, the Venice Commission contends that the manner in which the Attorney General is chosen has a significant impact on ensuring the proper functioning of the institution as a whole. It considers that, although no single, categorical principle can be formulated as to who should choose the Attorney General, the procedure to be adopted must give the public confidence. To this end, it suggests seeking the advice or involvement of experts who have no partisan political ties and who are respected by the public and trusted by governments. It additionally recommends that advice on the professional

[52] IACHR, *Guarantees for the Independence of Justice Operators*, para. 59.
[53] United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, Gabriela Knaul,* A/HRC/20/19, 07 June 2012, para. 64.

qualification of candidates for Attorney General should be taken from representatives of the legal community and of civil society.[54]

It is important to note that **compliance with international standards in the selection of prosecutors, especially for the position of Attorney General, is one of the main guarantees of the external independence of prosecutors' offices**, which should be identified by the participating teams.

In the following section, we will discuss the various aspects of the selection process for the Attorney General of Fiscalandia, starting with each of the specific standards that are applicable. We will then move on to outline the possible arguments of the parties.

a. Transparency and Publicity

Transparency and openness in selection processes not only help to provide greater certainty about the integrity and suitability of candidates and inspire confidence in the objectivity of the process, but also ensure equal access to the position. They are fundamental standards when it comes to the selection of high-level authorities—as is the case with the Attorney General—and are a critical safeguard when the selection is made by political bodies, in which case the standard of maximum transparency should be adopted.

Maximum transparency is derived jointly from Articles 13 and 8.1 of the American Convention on Human Rights, and requires States to proactively provide all information they receive, seek, obtain, or produce in the course of the selection process, with the exception of information that may affect the candidates' privacy, and to do so in a comprehensive, simple, timely, and accessible manner.

Possible arguments of the petitioners

The petitioners should identify the following violations of the maximum transparency standard in the hypothetical case:

- First, the criteria and internal procedure followed by the President to appoint the members of the Nominating Board (NB) were unknown. There was also no information available on the backgrounds of its members (paragraph 25).
- The rules and criteria used to evaluate the candidates were neither adopted nor published before or together with the public call for candidates, which prevented the applicants from knowing the standards against which they would be assessed and compared to each other (paragraph 26).
- Although Article 2 of Law 266 of 1999 recognizes the principle of transparency, the NB met for the first time in private, and decided that its sessions would be completely confidential (paragraph 26).
- The NB published a shortened list of candidates and "suitable candidates," without publicly disclosing the reasons for the cut (paragraph 28).
- The "Guidelines for the evaluation of candidates for the position of Prosecutor General of Fiscalandia" were approved as an internal working paper and never published (paragraph 29).
- The information presented by the candidates was not published in its original format, but rather in a "summary" prepared by the NB itself, which could not be verified by the citizens or by the candidates (paragraph 29).
- The proficiency test was not published (paragraph 30).
- The criteria for the merit-based grading of the applicants' backgrounds, which were applied by each member of the NB, were also unknown (paragraphs 31 and 33).

[54] European Commission for Democracy through Law (Venice Commission), *Report on European standards as regards the independence of the judicial system. Part II – The prosecution service*, adopted by the Venice Commission at its 85th Plenary Meeting (Venice, 17-18 December 2010), para. 34-36.

- Although the interviews were open to the public, they were not broadcast live by official media (explanatory question 38).
- The scores obtained during the interviews, the way in which they were assessed, the debate within the NB, and the reasons for changing the existing ranking were not made public (paragraph 36).
- The President did not explain why he chose Domingo Martínez (paragraph 36).

Possible arguments of the State

The State, for its part, could argue that the principle of transparency is already enshrined in Article 2 of Law 266 of 1999, and that the NB has discretionary power to adjust the specific rules on publicity for this selection process. It could also argue that, in submitting their applications, the petitioners accepted the terms set out in the call for candidates, and therefore could not challenge the formation of the NB. In addition, the petitioners made no prior claim concerning these issues. The State may also argue that the NB could have provided information at the request of the petitioners or any other candidate, including any citizen or civil society organization, but that no such request was ever made.

b. Selection based on merit and professional qualifications

Under this standard, justice authorities should be selected on the basis of their merits and professional qualifications, and persons should be chosen who are reputable and suitable, with appropriate legal training or qualifications[55] in line with the particular nature and specificity of the duties to be performed. The IACHR has insisted that, in order to ensure that those qualifications will be properly assessed, "objective criteria [should be established] […] for an accurate determination," which should "be embodied in State regulations, so as to ensure that they are observed and are mandatory."[56] This also makes it difficult for appointments to be motivated by other considerations, such as political interests.

The merit standard not only makes it possible to challenge the appointment of a particular individual, but also to question how the selection process is designed. In order to meet this objective, the process must include tools for identifying and assessing the merit of candidates, while incorporating safeguards to ensure that the final decision is not made on other grounds.

These tools include, for instance, an ideal profile describing the essential qualities for the job, as well as objective criteria to determine whether a person has those qualities. The use of "scales" or "rating tables" lends greater objectivity to the rating, but they should also be evaluated in terms of their substantive content, to keep from favoring formal requirements. The personal interview is also an extremely useful tool for identifying merit, but it must be properly prepared; furthermore, its relative weight must be reasonable and not excessive with respect to the other evaluations, because interviews allow for a greater degree of discretion in scoring.

Possible arguments of the petitioners

There are some circumstances in the hypothetical case that would allow the petitioners to challenge the selection process and the appointment of Domingo Martínez based on the merit standard, as described below:

<u>Selection process</u>

[55] IACHR, *Guarantees for the Independence of Justice Operators*, para. 75. See also, Article 9 of the Universal Charter of the Judge, unanimously approved by the delegates attending the meeting of Central Council of the International Association of Magistrates in Taipei (Taiwan), 17 November 1999.
[56] *Ibid.*, para. 78.

- Article 103 of the Constitution establishes the requirements to serve as Attorney General, but there was no law or regulation defining elements such as "good moral character," or "good physical and mental health, as well as spiritual peace."
- Some of the documentation requested in the call for applications was insufficient for ruling out ties that would affect the suitability of the candidates—for instance, the affidavit stating that they had no economic, political, or organized crime ties that could jeopardize their independence (paragraph 26).
- There were no objective criteria to assess the candidates' backgrounds (paragraph 31), as the files were reviewed and graded by different people, each "in his or her judgment."
- The minimum score for passing the background evaluation stage was modified, lowering the merit requirement so that the majority could pass (paragraph 31).
- The weight of the interview stage was excessive (40%) in relation to other evaluations.
- The individuals proposed on the shortlist of three were not the ones who demonstrated the greatest merit at the more objective stages of the selection process (paragraph 36).
- The duration of the interviews was not reasonably sufficient to assess the candidates in depth.

<u>The appointment of Domingo Martínez as Attorney General:</u>

- Domingo Martínez was ranked #18 on the merit list after the proficiency and background assessments, so there were 17 people better qualified for the position. The NB never provided its rationale for changing the order of the list after the interviews.
- Domingo Martínez was appointed just 5 minutes after the press conference at which the NB announced the shortlist; therefore, it was physically impossible for the President to assess the merits of the candidates on that list in such a short time.
- The news article on Domingo Martínez revealed his ties to the President's family; however, some of this information should have been in his file or should have been detected and investigated by the NB when it evaluated his merits for the position.

Possible arguments of the State

For its part, the State can submit that the selection mechanism for the Prosecutor General is a public, merit-based competition, with several stages designed to evaluate different facets of the applicants, such as their knowledge, experience, and fitness for office. It can argue that, although they were not public, the NB did approve some guidelines that provided direction and lent objectivity to the assessment made by each member of the NB. Regarding the modification of the minimum score, it can argue that it was applied to everyone equally, so as not to eliminate worthy applications before reaching the interview stage, which carried considerable weight in the total score (40%). As to the relative weight of the interview, the State can assert that there is no standard that requires the assignment of a specific weight to each stage, which each State defines according to the specialty and profile of the justice authority to be selected. Regarding the change in the order of merit in the composition of the shortlist of three candidates, the State can argue that it was the result of observations made during the interviews, and that there is no "right to be appointed" to the position.

With regard to the questions raised about the appointment of Domingo Martínez, the State can argue that the NB provided the President with a list of three people of equal merit, so that the selection of any one of them was equally valid. The decision was also based on the excellent work that Martínez had been doing as head of the internal oversight body of the Office of the Attorney General, in connection with the suspicious developments in the META Emails case; those developments may have involved the political use of the criminal justice system by former Attorney General Magdalena Escobar, given that she was appointed by former President Ramiro Santa Maria, whose democratic credentials were questionable. Finally, the State

can argue that the information that was disclosed about Martínez did not necessarily justify his disqualification, and that in any case, it was not brought to the attention of the NB in time to be assessed.

c. Participation of Civil Society

The IACHR has been emphatic on the need for selection processes to be "open to public scrutiny," especially when appointments to the top positions in the justice system are made by political bodies, as this significantly reduces the discretionary power of the competent authorities and therefore the potential for undue interference in the selection process.[57] Along these lines, the Commission has welcomed the regulatory frameworks that provide for the possibility of a "public objection," allowing any citizen or civil society organization to challenge specific nominations, as well as to express their concerns or support.[58]

In its recent report on *Corruption and Human Rights*, the IACHR has reiterated that States must guarantee public participation in selection processes,[59] and has considered citizen participation to be one of the basic principles of any anti-corruption policy, as well as a *right*, which can be exercised through the rights to assemble, associate, express oneself, inform oneself and have equal access to public office (Articles 13, 15, 16, and 23.1 of the ACHR). "By considering participation a right, emphasis is placed on the breadth, depth, and legitimacy of the participatory process."[60]

Possible arguments of the petitioners

The hypothetical case includes some situations that the petitioners may call into question under the standard of citizen participation:

- In forming the NB, President Obregón appointed three public servants as representatives of civil society (paragraph 25.d).
- The timetable for the selection process did not include a stage or deadline for civil society to object to or support specific candidates (paragraph 26).
- While members of civil society were allowed to attend the public interviews, they were not allowed to ask questions directly, nor did the interviewers ask any of the questions they submitted in writing (paragraph 34).
- The dismissal of the *amparo* petition under the "sovereign power" argument restricted civil society's right to an effective remedy to challenge the violation of basic principles and the rules of the selection process.

Possible arguments of the State

In its defense, the State can argue that the petitioners cannot question the composition of the NB since they submitted to it when they presented their applications, and in any case they failed to raise any challenges in this regard during the process. In addition, it can say that although the timetable did not set a deadline for objections, there was nothing to keep civil society from submitting relevant information to the NB. This is evidenced by the fact that the NB received suggested questions from civil society, even though there was no formal procedure for doing so. On the issue of sovereign power, the State can argue that, although the NB is responsible for conducting the screening process, the final decision as to who will be selected as Attorney General is a discretionary and political power of the President. Therefore, the fact that candidates were included on the shortlist did not mean that one of them would necessarily be chosen for the position.

[57] IACHR, *Guarantees for the Independence of Justice Operators*, para. 80.
[58] *Ibid.*, para. 81
[59] IACHR, *Corrupción y Derechos Humanos* [Corruption and Human Rights], para. 300.
[60] *Ibid.*, para. 120.d.

d. Equal opportunity and nondiscrimination

At the Inter-American level, the right to equal access to public office is guaranteed by Article 23.1 of the ACHR and is fully applicable to the selection and appointment of justice authorities. This standard imposes various requirements, including:

(i) The selection criteria must be objective and nondiscriminatory. The UN Guidelines on the Role of Prosecutors establish that these criteria "embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, color, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned."[61]

(ii) States must ensure that persons who have the qualifications are able to compete as equals, even in the case of persons temporarily occupying the positions, who cannot be treated with privileges, advantages, or disadvantages.[62]

(iii) States must remove clearly discriminatory requirements and standards and those which, because of their scope or ambiguity, may result in *de facto* discrimination that undermines equal opportunity, for example, those relating to "morality," which may be interpreted in a subjective and discretionary manner.

(iv) States must ensure that the composition of justice systems reflects the diversity of societies, and in particular that minority or underrepresented groups are appropriately represented, in order to guarantee their access to justice. This is especially relevant in the case of women, who have limited access to the highest positions in the justice system, as well as indigenous peoples and people of African descent.

Possible arguments of the petitioners

The hypothetical case includes some situations that the petitioners may call into question under the standard of equality and the principle of nondiscrimination:

- The NB is made up exclusively of men.
- Applicants who were already working or had worked in the prosecutor's office were exempted from the proficiency test, and were assigned the highest score, giving them an unwarranted advantage over other applicants.
- The absence of objective criteria for assessing applicants made the process more discretionary, thus affecting equal opportunity.
- The female candidates Maricruz Hinojosa and Sandra del Mastro were treated differently during the interviews and were asked fewer questions than the others.

Possible arguments of the State

[61] United Nations, *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc.A/CONF.144/28/Rev. 1 (1990), principle 2.a.

[62] IACHR, *Guarantees for the Independence of Justice Operators*, para. 62.

On this issue, the State may again cite the fact that the composition of the NB is not something that the petitioners can challenge, having consented to it when they took part in the selection process. With regard to the exemption of those who were working or had worked in the public prosecutor's office from the test, the State could argue that the difference in treatment was justified by the need to expedite the process. Moreover, its impact on the equality of conditions would be inconsequential, as any other candidate would also have the opportunity to obtain the highest score on the proficiency test if he or she could prove the same level of knowledge. The State could further argue that the petitioners benefited from the exemption, and therefore cannot call it into question. Regarding the disparate treatment, the State could argue that it was unnecessary to ask the women additional questions as the requisite information was already provided in the existing documentation.

4. Disciplinary proceedings against Judge Mariano Rex

Paragraph 2 of the case states that Article 50 of the 2007 Constitution of Fiscalandia strictly prohibited presidential reelection, after the country experienced nearly 20 years of uninterrupted government. A few months after his election, President Javier Alonso Obregón filed a writ of *amparo* challenging Article 50, alleging that it directly violated his human right to elect and be elected and the right of the people to vote for the political platform of their choice (paragraph 15).

Judge Mariano Rex, presiding over the First Constitutional Court of Berena, denied the *amparo* action at the first instance, on the grounds that the right to elect and be elected was not absolute, and that it could be limited by other constitutional principles like the alternation of power in government. After applying the "balancing" technique, he concluded that the ban on presidential reelection was (i) appropriate, (ii) necessary and (iii) proportionate (paragraph 40 and answer to clarification question #1).

After it was appealed, the Supreme Court assumed jurisdiction over the action, claiming that it was a "high social impact" case. In its judgment of October 10, 2017, the Court held that Judge Rex had incorrectly applied the balancing technique in this specific case, as he had failed to consider the president's age and popularity, and that, therefore, he had failed to properly state the reasoning for his decision. In the Court's opinion, held that an absolute prohibition was excessive and infringed on the human right to reelection, concluding that Obregón had the right to run again for the Presidency of the Republic (see answer to clarification question #1).

In addition, the Court ordered that Judge Mariano Rex be investigated for having committed a serious breach of his duty to state the reasoning for his decision in the case (paragraph 41).

Thus, the Investigative Unit of the Internal Oversight Body (IOB) of the Judiciary opened a confidential investigation into Judge Rex. Once the Unit's report was approved by the Chief Justice of Internal Oversight, it was served on Rex so that he could timely and properly exercise his defense and submit evidence within the established time limits. After the oversight hearing, Rex was summoned to a "final merits hearing" before the full Supreme Court, where he argued his defense for 20 minutes. He contended that the difference in opinion with the Supreme Court could not be considered a failure to properly state the reasons for his decision; otherwise, any judge or magistrate whose decision is changed by an appellate court would be guilty of serious administrative misconduct. He also maintained that the disciplinary authority had not provided any rationale for the "serious" and "inexcusable" nature of his alleged failure to comply with the law.

After this hearing, the full Supreme Court decided to remove him from the bench, as provided in Article 62 of the Judiciary Act for cases of serious administrative infractions. The infraction that he was accused of, governed by Article 55 of the same law, was "inexcusable failure to properly state the reasoning for judgments and judicial decisions."

a. Security of tenure

As mentioned in number 6 of the section "Definitions," a starting point for the analysis of the dismissal of Judge Mariano Rex, is the security of the judge's tenure, recognized by international law. This guarantee gives him the right to remain in office and that carries "reinforced guarantees" of stability, which protect his independence.[63]

Security of tenure entails the prohibition of removing a judge from his position, except for two types of circumstances: (i) the fulfillment of the term of his mandate, or of the condition of his appointment, or of the age of forced retirement, and (ii) causes related to his lack of suitability to exercise the position, determined through a disciplinary process. The United Nations' *Basic Principles on the Independence of the Judiciary,* establish that "judges may only be suspended or removed from office for incapacity or behavior that prevents them from continuing to carry out their functions."[64]

Regarding the last point - the disciplinary process against justice authorities - international law requires that the guarantees of due process be respected and that an effective remedy be given to the judges to question the final decision. This requirement is also applicable, regardless of the form and name given to the mechanism by which the separation of judges from their office (nullity of appointment, dismissal, cessation, removal, or any other denomination)[65] occurs, and it is based on both its independence and the sanctioning nature of these types of procedures.

Consequently, both the petitioner and the State's representation must begin by acknowledging the security of tenure of Judge Mariano Rex, and the State's obligation that the procedure against him comply with all the aforementioned guarantees, and that they are developed in detail at continuation.

b. Due process guarantees in disciplinary proceedings against justice authorities

The Inter-American Human Rights System has included in its articles 8.1, 8.2, 8.4. and 9, a series of rights and guarantees applicable to the exercise of the State's non-criminal sanctioning power.[66] In this section we will only refer to those that are relevant to the solution of the hypothetical case.

b.1. Competent, independent, and impartial authority

Article 8.1 of the American Convention on Human Rights requires that the authority in charge of knowing the situation and imposing disciplinary sanctions on judges or other justice authorities, be a competent, independent, and impartial authority. Inter-American jurisprudence has established standards for each of these attributes.

(i) Independent authority

Inter-American jurisprudence has developed parameters to assess whether, in a specific case, the authority in charge of knowing the situation and imposing sanctions, offers sufficient guarantees of its independence, in the terms required by Article 8.1 of the Convention. When it has evaluated this aspect, the Inter-American

[63] I/A Court H.R., *Case of Reverón Trujillo v. Venezuela.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 116.
[64] United Nations. *Basic Principles of the United Nations on the Independence of the Judiciary*, principle 18.
[65] IACHR, *Guarantees for the Independence of Justice Operators*, para. 186-187.
[66] These guarantees are: Article 8.1 (competent, independent, and impartial authority, sufficient motivation, reasonable time, legal certainty about when a sanction can be imposed, right to be heard); Articles 8.2 and 8.4 (presumption of innocence, prior notification of the charge, adequate means to exercise a defense, right to appeal, *ne bis in idem*); Article 9 (principle of legality of disciplinary grounds and applicable sanctions, non-retroactivity of the unfavorable disciplinary rule).

Court has indicated that "the independence of any judge means that there is an adequate appointment process, with a term established in office and with a guarantee against external pressure."[67]

It has also indicated that independence must be evaluated "both in its institutional aspect, that is, in relation to the Judiciary as a system, as well as in connection with its individual aspect, that is, in relation to the person of the specific judge;"[68] and that the American Convention protects the right of individuals to have their dispute resolution authorities "be and appear to be independent."[69]

In this regard, according to the Inter-American Commission, it must be verified if the institutional independence of the sanctioning body is guaranteed by regulations, so that it is not ascribed to nor hierarchically, administratively, or functionally dependent on any other authority. This is so because it is possible for other powers or organs of the State to interfere.[70] The Commission has pointed out that when disciplinary control is exercised in a hierarchical manner, strict adherence to the principle of legality, and respect for due process guarantees, must be monitored. It has also noted that there are guarantees for the independent action of the disciplinary authority.[71]

Paragraph 41 of the hypothetical case and the answer to clarifying question 18 establish that the body in charge of the disciplinary investigation is the Supreme Judge of Internal Control, while the body in charge of imposing sanctions is the entire Supreme Court of Justice. For their part, the 26 judges of the Supreme Court of Justice are elected by the Legislative Assembly by a qualified majority of 2/3 of the number of deputies, from a list proposed by a Nominating Board, to occupy the position for a period of 15 years.

(ii) Competent authority

Regarding competency, Article 8.1 of the American Convention guarantees the right to be tried by "a competent court (...) established before the law," which implies that justice authorities have the right to have both the authority and the disciplinary procedure established previously in the law. Therefore, "[t]he State should not create courts that do not apply duly established procedural norms to replace the jurisdiction that normally corresponds to ordinary courts. This is to avoid people being judged by special courts, created for the case, or on an ad hoc basis."[72]

(iii) Impartial authority

Inter-American jurisprudence has repeatedly defined the trait of impartiality, indicating that it requires "(…) that the judge who intervenes in a particular dispute should approach the facts of the case, subjectively lacking any prejudice and, likewise, offering sufficient guarantees of an objective nature that dispel any doubt that the defendant or the community may harbor regarding the lack of impartiality."[73] In this regard, the Inter-American Court has adopted the distinction made by the European Court of Human Rights between subjective impartiality, which must be presumed in a relative manner, and objective impartiality, which

[67] I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71. para. 75.
[68] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 55.
[69] I/A Court H.R., *Case of López Lone et al. v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302. para. 218.
[70] IACHR, *Guarantees for the Independence of Justice Operators*, para. 197.
[71] *Ibid.*, para. 198.
[72] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 50.
[73] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 56; I/A Court H.R. *Case of López Lone et al. v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302. para. 233.

requires that the judge provide elements that eliminate fears, suspicions, and legitimate doubts about his bias.[74]

For the Inter-American Court of Human Rights, the recusal option is relevant, which it considers a procedural institution designed to protect the right to be tried by an impartial body. The challenge gives the parties the right to provoke the separation of the judge from a specific case when there are "demonstrable facts or convincing elements that produce well-founded fears or legitimate suspicions of partiality about their person."[75]

Possible arguments of the petitioner

Regarding the requirement of *independent* authority, it could be argued that, although formally the Supreme Court of Justice and the Supreme Judge of Internal Control enjoy institutional independence with respect to the other powers of the State, there are no sufficient guarantees of independence of the Supreme Judge of Internal Control with respect to the Plenary of the Supreme Court, because:

> (i) The design of the disciplinary control mechanism, which concentrates the jurisdictional and disciplinary powers in the Supreme Court of Justice, makes it so the Supreme Judge of Internal Control (who is also a magistrate of said Court) is forced to contradict the legal criteria of the entire collegiate body (made up of 25 supreme judges), to support that there is no serious defect in the motivation of the decision of Judge Mariano Rex.
>
> (ii) The position of the Supreme Judge of Internal Control discourages him from making a decision of this type, because his mandate is extremely short (2 years) and at the end of it, he will again be part of the enitre Supreme Court of Justice.
>
> Regarding the requirement of an *impartial* authority, it must be identified that in the specific case, the Supreme Court of Justice does not have the capacity to decide on the disciplinary responsibility of Judge Mariano Rex, because it has prejudicial or preconceived notions about the quality of the motivation of his decisions. The Court previously acted as a body that reviewed its content, and having itself determined, in use of its jurisdictional powers, that the deliberation made by said judge was incorrect.
>
> Likewise, according to the answer to clarifying question 22, the decision to revoke the judgment of Judge Mariano Rex was adopted by the entire Court, and not by its constitutional section, since the Court exercised its power of attraction. Therefore, there was no material possibility that Judge Mariano Rex could use the recusal to guarantee the impartiality of the body in the disciplinary process, since this would have involved challenging the 25 magistrates that make up the entirety of the Court.
>
> *Possible arguments of the State*
>
> The State can argue that the election mechanisms of the Supreme Court of Justice and the Supreme Judge of Internal Control contain guarantees against undue interference by other powers of the State, which in the case of the Court is also guaranteed for the duration of the mandate of its members (15 years), and that the Supreme Judge of Internal Control exercises his function *independently*.

[74] IACHR, *Guarantees for the Independence of Justice Operators*, para. 200.
[75] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 63.

Regarding impartiality, the State can argue that not all judgments that are revoked or annulled by the entire Court, even for reasons of motivation, can give rise to a removal sanction, but only those in which the defects are of such seriousness, that they demonstrate the lack of suitability of the judge to remain in office. In addition, it may indicate that the investigation of the disciplinary offense is carried out by a different and independent body of the entire Court - the Supreme Judge of Internal Control - who must analyze the conduct and present a prior report so that a decision can be made. Finally, it can be argued that Judge Mariano Rex did not use the recusal option, and therefore cannot assume that it had been unsuccessful.

b.2 Sufficient Motivation

The requirement of sufficient motivation has been considered by the jurisprudence of the Inter-American Court as one of the "due guarantees" generically mentioned in Article 8.1. of the American Convention, which consists of "the externalization of the reasoned justification that allows reaching a conclusion," which guarantees that the decisions that affect the rights of individuals are not arbitrary.[76]

In this regard, the Court has specified that sufficient motivation must be analyzed in each case, according to the nature of the decision, because in all cases "it does not require a detailed response to all the arguments of the parties."[77]

Regarding the difference in their scope, the participating teams must identify that "the degree of motivation required in disciplinary matters is different from that required in criminal matters, due to the nature of the processes that each is intended to resolve, as well as the greater speed that must characterize disciplinary processes, the standard of proof required in each type of process, the rights at stake and the severity of the sanction. "[78]

Next, the standard of motivation applicable to the administrative sanctioning acts must be identified. According to the Inter-American Court, this standard requires "the precise indication of what constitutes an offense and the development of arguments that allow us to conclude that the reproached conduct has sufficient weight to justify that the person does not remain in office." Further, "the reasons why the norm or norms in question are violated [when handling disciplinary offenses] "must be expressly, precisely, clearly and unambiguously expressed, in such a way that allows the person to fully exercise their right of defense, at the time of appeal of said decision."[79]

The case of the sanction imposed against Judge Mariano Rex, linked to the motivation of his decision, must lead the participating teams to distinguish between:

> (i) A sanction motivated by the discrepancy of legal criteria, that is, by the content of the decision, which is unacceptable from the point of view of international law, and
>
> (ii) A sanction motivated by a judicial decision whose grounds illustrate a lack of suitability or incompetence for the exercise of the function.

For this purpose, it may be useful for the participants to refer to or compare the case of Judge Mariano Rex, with the response given by the Inter-American System regarding the concept of an "*inexcusable*

[76] I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* para. 77.
[77] *Ibid.*, para. 90.
[78] I/A Court H.R., *Case of Flor Freire v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 315. para. 191.
[79] *Ibid.*, para. 184-185.

judicial error," a matter that was addressed by the Inter-American Court through the case, *Apitz Barbera et al. v. Venezuela.*

In said case, the Court indicated as a starting point, that "judges cannot be removed solely because their decision was revoked through an appeal or review by a higher judicial body" given that "they should not be compelled to avoid dissenting from the reviewing body of its decisions, which definitively only exercises a differentiated and limited judicial function to attend to the recursive points of the parties dissatisfied with the original ruling."[80]

For the Court, the purpose of the recourse system (to control the correctness of the lower judge's decisions) is different from the purpose of the disciplinary system (to assess the judge's conduct, suitability, and performance). Therefore, the simple declaration of an error in the former cannot automatically generate a disciplinary offense in the latter, but rather, there must be an **autonomous analysis** that takes into account the seriousness of the conduct and the proportionality of the sanction.[81]

In this case, the motivation of the decision should reflect the distinction between a "reasonable difference of legal interpretations" and an "inexcusable judicial error" that illustrates the judge's lack of suitability to exercise his function,[82] and that contains an analysis of the latter "as a disciplinary offense." For the Court, this implies that the decision imposing the sanction for this reason contains (i) a motivation related to the suitability of the judge to exercise office, (ii) a motivation on the seriousness of the offense allegedly committed and the proportionality of the sanction, and (iii) an analysis that responds to the main allegations of the accused judge.[83]

Possible arguments of the petitioner

Based on the foregoing regarding the obligation of sufficient motivation, the petitioner must argue that the sanction imposed on Judge Mariano Rex does not contain an analysis of the elements of "serious" and "inexcusable" provided by law, nor does it support how the content of the decision reflects a lack of suitability of the judge to occupy the post (see answer to clarifying question 1).

At this point, the petitioner can argue that it is simply a difference in legal criteria or can even acknowledge the existence of a legal error by way of applying the proportionality test by Judge Mariano Rex. Both positions are valid. The important thing is that it be maintained that, even if there had been an error, it has not been properly demonstrated that said error is of such magnitude that it justifies the separation from the position.

Possible arguments of the State

For its part, the State's position must defend that the defects of motivation found in the judgment of Judge Mariano Rex are of such a magnitude, that they reveal his incapacity or lack of suitability to exercise the position. For this, it can argue that the case of the re-election of the President was of the highest public interest and, therefore, required greater rigor in the analysis, and consideration of all the relevant circumstances when making the judgment. The State must maintain and justify that it is not a divergence of legal opinions, or a difference of interpretation in the legal norm, but rather, defects in reasoning in the application of the proportionality test, which led to a different conclusion.

[80] *Ibid.*, para. 84.
[81] *Ibid.*, para. 86.
[82] *Ibid.*, para. 90.
[83] *Ibid.*, *loc. cit.*

b.3 Right to Review

At the Inter-American level, the state obligation to provide resources for judicial control of the procedure and of the sanction imposed is based on Article 8.2.h of the American Convention and is part of the right to due process of law. But, in addition, the Inter-American Commission has considered that "the stage of reviewing the sanctioning decision is part of the disciplinary process that must be observed in order to effectively dismiss a justice authority."[84]

Consequently, "the States must provide in their disciplinary regimes both a possibility to appeal the ruling before a higher court who performs a review of factual and legal aspects, as well as ensuring a suitable and effective judicial remedy in relation to possible violations of rights that occur within the disciplinary process itself."[85] In the latter case, the obligation to provide an effective remedy would be derived from Article 25 of the American Convention on Human Rights.

According to paragraph 7 of the hypothetical case, the Supreme Court of Justice is in charge of applying, in a single instance, the removal sanction of judges. Likewise, the answer to clarifying question 51 indicates that an appeal for reconsideration can only be filed against the sanction before the same full session. Finally, the answer to clarifying question 23 indicates that the removal decisions issued by the Supreme Court of Justice can be challenged through an *amparo* process.

Possible arguments of the petitioner

The petitioner can argue that the appeal for reconsideration does not comply with the requirements of the right to a review under the terms of Article 8.2.h because it is resolved by the same authority whose decision must be reviewed. It can also argue that the *amparo* process does not meet the requirements of Article 25 either, because as this process is designed, it is the Supreme Court of Justice, through its Constitutional Section (made up of magistrates who also make up the entirety of the Court), which would ultimately rule on said *amparo*, which would make these magistrates "judge and party."

Possible arguments of the State

For its part, the State should maintain that, since it had not attempted to formulate an appeal for reconsideration or an *amparo* process, Judge Mariano Rex has no evidence that these remedies are not effective. It can invoke principle 20 of the United Nations' *Basic Principles Regarding the Independence of the Judiciary*, which indicates that the principle of independent review of decisions taken in disciplinary procedures, suspension or separation of office, "may not be applied (...) to the decisions of the Supreme Court."

c. Principle of Legality

Paragraph 41 of the hypothetical case and the answer to clarifying question 19 indicate that Judge Mariano Rex was dismissed on the grounds of "serious and inexcusable breach of the duty to duly administer his decisions," conduct that was foreseen in Article 55 of the Organic Law of the Judicial Power of Fiscalandia as a serious administrative offense, to which its article 62 assigned the sanction of dismissal. Therefore, another possible aspect to analyze is whether said lack satisfies the requirements of the principle of legality, in the terms required by Article 9 of the American

[84] IACHR, *Guarantees for the Independence of Justice Operators*, para. 237.
[85] *Ibid.*, para. 238.

Convention on Human Rights, that is, as one of the fundamental principles that regulate the exercise of the punitive power of the State.

The principle of legality requires the classification of a conduct as unlawful, and the establishment of its consequences, but also that the rules of the disciplinary process be prior to the moment in which the attributable conduct occurs. Specifically, with regard to offenses, it also implies "establishing a clear definition of the incriminated conduct, the establishment of the elements of its legal effects, and the delimitation of non-punishable behavior."[86]

The degree of precision of the conduct is also fundamental, since the judges must be able to foresee, to a reasonable degree, both the circumstances and the consequences of their own conduct.[87] For the Inter-American Commission, "this is essential for judges to guide their own behavior in accordance with a current and certain legal order."[88] Consequently, the norms that describe broad or vague causes, and that therefore give sanctioning bodies a degree of discretion to interpret them are unacceptable from the point of view of international law. The Commission itself has established that, given that it is an exception to the guarantee of stability of judges, due to the seriousness of its consequences, these rules must be submitted "to the strictest judgment of legality".[89]

Possible arguments of the petitioner

Regarding this issue, it could be argued that the fault described in article 55 of the Organic Law of the Judicial Power of Fiscalandia, does not have the sufficient degree of precision that would have allowed Judge Mariano Rex to adapt his conduct to the standard required by the norm; and that, therefore, it does not pass the strict legality judgment that must be applied in this case. It could also be argued that, from the facts of the hypothetical case, it does not follow that there is a legal definition of what should be understood as a "serious" and "inexcusable" motivational defect, and that therefore, the principle of legality included in Article 9 of the Convention is violated.

Possible arguments of the State

For its part, the State can argue that the conduct described in Article 55 of the Organic Law of the Judicial Power of Fiscalandia has a sufficient degree of precision so that the recipients of the standard of conduct - the judges of Fiscalandia - can foresee the consequences that are derived from it. They can sustain that not just any type of motivational vice can give rise to a dismissal sanction, but only those that are of the utmost gravity, to the point of not being able to justify themselves with a different interpretation of the law. Therefore, the law, by including the terms "serious" and "inexcusable," would already be incorporating sufficient details into the conduct that can be attributed.

5. Rules of admissibility for petitions filed with the Inter-American human rights system

a. Analysis of admissibility in light of the current situation at the time of conducting the admissibility analysis

[86] *Ibid.*, para. 207-207, and I/A Court H.R. *Case of Usón Ramírez v. Venezuela.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55.
[87] ECHR, *Case of Maestri v. Italy (Application. No. 3974/98).* Judgment. Strasbourg, 17 February 2004, pg. 30.
[88] IACHR, *Guarantees for the Independence of Justice Operators*, para. 213.
[89] IACHR, *Guarantees for the Independence of Justice Operators*, para. 211.

As it appears from paragraphs 45 to 47 of the hypothetical case, Magdalena Escobar presented her petition before the Inter-American Commission on Human Rights on August 1, 2017. At this point, a final judgment had not yet been issued in the process of Nullity of an Administrative Act initiated against the Extraordinary Presidential Decree of June 14, 2017. The final judgment was issued on January 02, 2018 by the Supreme Court of Justice. The admissibility report was issued on December 30, 2018.

In this regard, the Commission has established that "in situations in which the evolution of the facts initially presented internally implies a change in compliance or non-compliance with the admissibility requirements, (…) the analysis [of admissibility] must be made from the current situation at the time of the admissibility ruling."[90] Consequently, the analysis of the exhaustion of domestic remedies for purposes of admissibility of Magdalena Escobar's petition must be made by taking into account the situation existing as of December 30, 2018.

b. Exhaustion of internal remedies

The requirement of exhaustion of domestic remedies is established in Article 46.1.a of the American Convention, which establishes that, in order for a complaint presented before the Inter-American Commission in accordance with Article 44 of the Convention to be admissible, it is necessary that the domestic remedies have been tried and exhausted in accordance with generally recognized principles of international law.

The Commission establishes in its admissibility reports that "this requirement is intended to allow national authorities to learn about the alleged violation of a protected right and, if appropriate, have the opportunity to resolve it before it is known to an international body" and that this "applies when resources that are adequate and effective to remedy the alleged violation of human rights are effectively available in the national system."

Therefore, according to the Commission, "Article 46.2 specifies that the requirement does not apply when there is no due process in domestic law for the protection of the right in question; or if the alleged victim did not have access to the remedies of domestic jurisdiction; or if there is an unwarranted delay in the decision on said resources."

On the other hand, Inter-American jurisprudence considers that the exception of failure to exhaust domestic remedies is a defense available to the State, and therefore, it can waive it tacitly or expressly.[91] Likewise, it has established that it *must* be presented by the States during the appropriate procedural moment, which is the admissibility stage before the IACHR.[92] It considers that the States have the burden of naming the resources that have not yet been exhausted, as well as providing the basis that demonstrates their effectiveness in the situation that is denounced.[93] It has clarified that it is not for the Court or the Commission to identify *ex officio* what the domestic remedies to exhaust are, or correct the lack of precision of the State's arguments.

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[90] IACHR. Report 2/08. Petition 506-05. José Rodríguez Dañín, Bolivia. March 6, 2008. para. 57, citing IACHR, Report No. 20/05, Pettion 714/00 ("Rafael Correa Díaz"), February 25, 2005, Peru, para. 32; IACHR, Report No. 25/04, Case 12.361 ("Ana Victoria Sánchez Villalobos et al"), March 11, 2004, Costa Rica, para. 45; IACHR, Report No. 52/00, Cases 11.830 and 12.038. ("Laid off workers of the Congress of the Republic"), June 15, 2001, Peru, para. 21.

[91] I/A Court H.R., *Case of Herzog et al v. Brazil*, para. 49; *Case of Velásquez Rodríguez v. Honduras*. Preliminary Objections, para. 88; Case of *Favela Nova Brasilia vs. Brazil*, para. 76; Case of *Castañeda Gutman v. Mexico*, para. 30; Case of the *People of Saramaka. v. Suriname*, para. 43; and Case of *Salvador Chiriboga v. Ecuador*, para. 40.

[92] I/A Court H.R., *Case of Chocrón v. Venezuela*, Judgment of July 1, 2011; Series C No. 227, citing Cfr. *Case of Velásquez Rodríguez v. Honduras.* Preliminary Objections. Judgment of June 26, 1987. Series V No. 1, para. 88.

[93] *Ibid.*, *loc. cit.*

In the hypothetical case, the State of Fiscalandia raised the exception of lack of exhaustion of domestic remedies in the three petitions that comprise the hypothetical case.

In the case initiated by Judge Mariano Rex, the State maintained that the petitioner did not initiate any internal judicial process to question the dismissal decision. However, it failed to identify the remedy that should be exhausted or to justify how a remedy that would have to be resolved as a last resort would be effective, by the same authority that issued the contested act.

In the case initiated by Magdalena Escobar, the State maintained that, at the time the petition was filed, the petitioner had not used all the resources within the Nullity of Administrative Act process. However, exhaustion occurred before the admissibility report was issued, so this exception must be rejected.

Finally, in the case of Maricruz Hinojosa and Sandra del Mastro, the State did indicate that the domestic remedy that had to be exhausted to challenge presidential decisions and those of the Nomination Board was the Nullity Process. The details of this process have been explained in the answer to clarifying question 32. According to what was indicated therein, the petitioner can argue that the acts carried out by the Nominating Board are not subject to Administrative Law and that due to its composition, this entity is also not part of the Public Administration, especially considering that it incorporates representatives of the community of lawyers and civil society.

III. Essential documents and resources on international law standards applicable to prosecutors and prosecution services

Inter-American System

Inter-American Commission on Human Rights

Thematic and country reports

- 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.
- IACHR, *Corrupción y Derechos Humanos* [Corruption and Human Rights], OEA/Ser.L/V/II. Doc. 236, December 6, 2019.
- IACHR, *Report on the Situation of Human Rights Defenders in the Americas.* OEA/Ser.L/V/II.124 Doc.5 rev.1, March 7, 2006.
- IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas.* OEA/Ser.L/V/II. Doc.66, December 31, 2011.
- IACHR, *Situation of Human Rights in Mexico*. OEA/Ser.L/V/II. Doc. 44/15, December 31, 2015.
- IACHR, *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion.* OEA/Ser.L/V/II. Doc. 43/15, December 31, 2015.
- IACHR, *Situation of Human Rights in Honduras.* OEA/Ser.L/V/II. Doc. 42/15, December 31, 2015.
- IACHR. *Democracy and Human Rights in Venezuela,* OEA/ Ser.L/V/II. Doc. 54, December 30, 2009.

Resolutions

- IACHR. Resolution 1/17 "*Human Rights and the Fight Against Impunity and Corruption*," adopted on September 12, 2017.
- IACHR. Resolution 1/18 *"Corruption and Human Rights,"* adopted in Bogotá, Colombia, during the 167th Session of the IACHR, March 2, 2018.

Public hearings on prosecutors' offices

- Hearing entitled *"Prosecution and Human Rights in Argentina,"* held on March 24, 2014, in Washington DC, during the 150th Session of the IACHR;
- Hearing entitled *"State of Independence and Autonomy of the Justice System in Mexico,"* held on April 17, 2017, in Washington, DC, during the 161st Session of the IACHR;
- Hearing entitled *"Human Rights and the Independence of the Office of the Public Prosecutor of Peru,"* held on March 2, 2018, in Bogotá, during the 167th Session of the IACHR;
- Hearing entitled *"Transparency in the mechanisms for appointing senior justice system authorities in Central America,"* held on September 5, 2017, in Mexico City, during the 167th Session of the IACHR;
- Hearing entitled *"Human Rights and the Selection of the Attorney General in Honduras,"* held on May 7, 2018 in Santo Domingo, Dominican Republic, during the 168th Session of the IACHR;
- Hearing entitled *"Judicial Independence and the Selection process for the Attorney General in El Salvador,"* held on December 6, 2018 in Washington, DC, during the 170th Session of the IACHR;
- Hearing entitled *"Guarantees for the Independence of the Judiciary and Justice Operators in Bolivia,"* held on October 1, 2018 in Boulder, Colorado, during the 169th Session of the IACHR, which addressed, among other matters, the selection of Bolivia's Prosecutor General.

Inter-American Court of Human Rights

Judgments

- *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71.*
- *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135.*
- *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182.*
- *Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197.*
- *Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302.*
- *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266.*

Universal System

- 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 at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- United Nations, *Guidelines on the Role of Prosecutors,* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc.A/CONF.144/28/Rev. 1 p. 189 (1990).
- United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul*, A/HRC/20/19, 7 June 2012.
- United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy*, A/HRC/11/41, 24 March 2009.

- United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul*, A/HRC/26/32, 24 April 2014.
- United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur, Gabriela Knaul, Communications to and from Governments*, A/HRC/14/26/Add.1, 18 June 2010.
- United Nations. Economic and Social Council. Commission on Human Rights. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy. Addendum. Preliminary report on a mission to Ecuador*. E/CN.4/2005/60/Add.4, 29 March 2005.
- United Nations. Security Council. *Report of the Secretary General "The Rule of law and Transitional Justice in Conflict and Post-Conflict Societies,"* S/2004/616*, 24 August 2004.

European System

- Council of Europe, *Recommendation Rec(2000)19 of the Committee of Ministers to Members States on the role of public prosecution in the criminal justice system*), adopted by the Committee of Ministers on 6 October 2000.
- Council of Europe, *European guidelines on ethics and conduct of public prosecutors. "The Budapest guidelines,"* Adopted by the Conference of Prosecutors General of Europe, 6th Session, 31 May 2005.
- Council of Europe. Consultative Council of European Prosecutors*. Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors."* CCPE (2018)2, adopted in Strasbourg on 23 November 2018.
- Council of Europe. Consultative Council of European Prosecutors (CCPE) and Consultative Council of European Judges (CCJE). *The Bordeaux Declaration on "Judges and Prosecutors in a Democratic Society,"* adopted in Strasbourg on December 8, 2009.
- European Commission for Democracy through Law (Venice Commission), *Report on European standards as regards the independence of the judicial system. Part II – The prosecution service*, adopted by the Venice Commission at its 85th Plenary Meeting (Venice, 17-18 December 2010).
- European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission opinions and reports concerning prosecutors,* CL-PI(2015)009. *Undergoing update.*

Other

- International Association of Prosecutors. *Standards of professional responsibility and statement of the essential duties and rights of prosecutors.* Adopted on 23 April 1999.

- Ibero-American Association of Public Prosecutors. *Mexico Declaration*, adopted during its XXVI General Assembly on 6 September 2018.