

**REPORT No. 13/12**  
PETITION 1064-05  
ADMISSIBILITY  
LUIS FERNANDO GUEVARA DIAZ  
COSTA RICA  
March 20, 2012

**I. SUMMARY**

1. The Inter-American Commission on Human Rights (hereinafter, the "Inter-American Commission" or "IACHR"), received on July 12, 2005<sup>1</sup> a complaint filed by the Finance Ministry Employees' Union (SINDHAC) [*Sindicato de Empleados del Ministerio de Hacienda*], Mr. Luis Fernando Guevara Díaz, and Ms. María de los Ángeles Díaz Cascante, legal guardian of Mr. Guevara Díaz (hereinafter, "the petitioners"), on behalf of Luis Fernando Guevara Díaz (hereinafter, "the alleged victim"), against the State of Costa Rica (hereinafter, the "State" or "Costa Rica"). The petitioners claim that the State violated the rights of the alleged victim, having allegedly discriminated against him because of his physical disability and having dismissed him from a job he held in the Finance Ministry.

2. The petitioners claim that the State is liable for having violated the norms of the American Convention on Human Rights (hereinafter, the "Convention" or the "American Convention") as well as Article 18 of the Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, the "Protocol of San Salvador" (hereinafter, the "Protocol of San Salvador"). They affirm that they exhausted domestic legal remedies by filing an amparo appeal that was decided by the Constitutional Bench of the Supreme Court on 14 February 2005.

3. The State claims that it has not violated human rights, that all domestic legal remedies have not been exhausted, and that there is a pretense to use the IACHR as a court of fourth resort.

4. Without prejudging on the merits of the complaint, having analyzed the positions of the parties and in compliance with the requirements provided in Articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for the purpose of examination of the alleged violation of the rights enshrined in Articles 8.1, 24, and 25 of the American Convention, in keeping with the provisions of Articles 1.1 and 2 of that Convention. The Commission further decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States (OAS).

**II. PROCEEDINGS BEFORE THE COMMISSION**

5. The petition, which was addressed to the IACHR, was originally sent and received on July 12, 2005 at the Inter-American Court of Human Rights. The petition was forwarded by the Inter-American Court to the IACHR and was received on 19 September 2005. On 11 May 2010, the Commission transmitted the pertinent portions to the State and gave it two months to file its response, in keeping with Article 30.3 of its Regulations. The State filed its response on July 7, 2010; it was duly forwarded to the petitioners. On May 20, 2010, the State requested clarification on the

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<sup>1</sup> On July 12, 2005 the petition was received by the offices of the Inter-American Court of Human Rights (hereinafter, the "Inter-American Court") and subsequently sent by that Court to the IACHR, the complaint having been received by the Executive Secretariat of the IACHR on 19 September 2005.

date of filing the petition before the IACHR. The Commission sent its reply by communication dated July 19, 2010.

6. The Commission received additional information from the petitioners through communications dated August 20, 2010 and February 21, 2011. These communications were duly forwarded to the State.

7. The Commission received additional information from the State through communications dated November 2, 2010 and May 11, 2011. These communications were duly forwarded to the petitioners.

### **III. POSITIONS OF THE PARTIES**

#### **A. Position of the petitioners**

8. The petitioners claim that Luis Fernando Guevara Diaz provided services free of charge to the Finance Ministry of Costa Rica during approximately eight years until, on June 4, 2001, he was hired on an interim basis as a "Miscellaneous Worker 1".<sup>2</sup>

9. They report that while performing his duties as an interim worker, Mr. Guevara Díaz voluntarily<sup>3</sup> entered a competitive hiring process for appointment as a holder of the title to that position. They report that after taking the preliminary tests – which were administered in a differentiated manner because of his disability – a list was made of eligible participants, who were subsequently interviewed. The petitioners assert that Mr. Guevara Díaz was slated in first place on that list, given that he had achieved the highest score (78.97%).<sup>4</sup> The petitioners claim that after the selection process had been concluded, Mr. Guevara found out from unofficial sources that he had not been selected to occupy the position for which he had competed and which he currently held on an interim basis within the Finance Ministry, and that a person had been appointed in his place, this person being from outside the institution and free of any type of disability. They further state that as of June 16, 2003, the interim appointment of Mr. Guevara Díaz was terminated and that he has been unemployed since that date.<sup>5</sup>

10. The petitioners present a series of considerations to question the above-mentioned selection process, claiming that it produced discriminatory outcomes to the injury of the alleged victim. Among these considerations the petitioners claim that according to applicable regulations, the power to appoint or select is regulated in such a way that it can produce situations of discrimination. Specifically, they claim that the relevant labor authority can appoint any of the three persons on the proposed list of candidates, given that its power is discretionary. The petitioners hold that this is a flaw in the system. They argue that in this case, in order to ensure equality, the scores achieved by the alleged victim and his job performance, both during the years he worked free of

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<sup>2</sup> The petitioners indicate that consideration must be given to the fact that as of 29 May 1996, Law No. 7600 went into effect in Costa Rica, the "Law of Equal Opportunities for Persons with Disabilities", and that at that time the victim had already been working for two years providing free services to the State.

<sup>3</sup> They make clear that the alleged victim was not called by the Department of General Civil Service, but that he entered voluntarily.

<sup>4</sup> The petitioners underscore that at that time, the alleged victim had been working at the State agency for about ten years.

<sup>5</sup> As for his merits as a worker position, the petitioners add that he received a letter congratulating him for his work, and the coordinator of human resources in the Finance Ministry, through a letter dated 7 July 2003, stated that "having reviewed the personnel file of that employee, it has been determined that there is no report of any labor or behavior problems of any kind."

charge and those he worked as an interim worker, must necessarily have been considered. The petitioners further claim that, though interim workers are granted no special rights when competing for a position (in cases where comparison is made with individuals that do not have any physical disability), in the case of persons with disabilities special treatment is required when processing and making competitive hiring decisions. In particular, they assert that if a person has a disability and has rendered years of service to the State, their track records and services rendered should be considered, adopting a decision that is grounded in selection and not merely discretion, so as to give those persons equal and fair treatment.

11. Additionally, the petitioners claim that the head the maintenance area of the Finance Ministry – the alleged victim’s direct boss – in official document AM-044-2003 of June 13, 2003, one day after the alleged victim was informed of his dismissal, recommended that Luis Fernando Guevara Díaz not be appointed due to his problems with mental retardation and emotional blockage, considering him not apt for the position.<sup>6</sup> The petitioners claim that the head of the maintenance area of the Finance Ministry does not have the professional competence or formal authority to issue such a recommendation, which goes so far as to contradict the judgment of the National Council for Special Rehabilitation and Education (CONARE), whom the petitioners claim to be the body that officially certified Mr. Guevara Díaz as a “miscellaneous worker”. The petitioners claim that the foregoing demonstrates the mistreatment to which the alleged victim was subjected and the discriminatory act by the employer’s representative, which presupposes a “flagrant violation of his basic human rights which render the administrative action” of his dismissal to be “absolutely null and ineffectual.”

12. The petitioners add that when they took the alleged situation before the domestic courts through an amparo appeal, the Constitutional Bench of the Supreme Court did not protect Luis Fernando Guevara Díaz, given that the Court did not set aside the discriminatory act that had affected the alleged victim and for which he was ultimately dismissed from his job.<sup>7</sup> They hold that restrictive criteria were applied and not criteria that protects human rights, in consideration of applicable law and the particular history of the case.

13. As for the exhaustion of domestic remedies, the petitioners claim that, as indicated above, on August 5, 2003, Mr. Luis Fernando Guevara Díaz filed an amparo appeal against the Finance Ministry, which was declared out of order by the Constitutional Bench of the Supreme Court of the Republic of Costa Rica by resolution dated February 14, 2005. In this regard, the petitioners claim that the Constitutional Bench in did actually hear the alleged case of discrimination and rejected the claim that the Finance Ministry had acted in a discriminatory manner, whereby the petitioners hold that the complaint filed did fall within the jurisdiction of the Constitutional Bench. They further explain that the Constitutional Bench heard the merits of the discrimination case filed by the alleged victim, given that when that court deems a matter or case not be of a constitutional nature or lying outside its jurisdiction, the Court establishes this fact and declares the case groundless, which the petitioners claim did not occur in this case. In fact, they claim that the appeal

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<sup>6</sup> Specifically, the petitioners state that the document read as follows: “I also point out that because of his PROBLEMS WITH MENTAL RETARDATION AND EMOTIONAL BLOCKAGE HE SUFFERS (information provided by his mother) I CONSIDER THAT HE IS NOT AN APT INDIVIDUAL for the position.”

<sup>7</sup> In the amparo appeal, the petitioners filed a supportive document, submitted by the Defender of the Inhabitants of the Republic of Costa Rica, with the Constitutional Bench of the Supreme Court of Justice, on October 14, 2003. In that document, the submitting agency requests that the competition for employment conducted by the Finance Ministry and that injured the rights of the alleged victim be annulled, so as to “restitute the basic violated rights of Mr. Guevara, providing him with conditions that ensure equal opportunity.” Among the conclusions expressed in that document is this one: that in the competition to occupy the position, “Mr. Guevara Díaz suffered discrimination because of his disability and because in the use of discretionary authority to appoint, the Administration injured the principle of equality, given that the reason for excluding Mr. Guevara is clear, while no reason is given to justify the appointment that was made.

was not declared groundless, but that the Constitutional Bench dismissed the case following a study of its merits.

14. The petitioners conclude by asserting that the main cause for the dismissal of the alleged victim was his disability and that therefore his human rights under domestic law, the American Convention on Human Rights, and its Additional Protocol were violated. They add that it is insufficient that polices and laws be created to eliminate discrimination, but that specific actions must be taken to eliminate it.

## **B. Position of the State**

15. The State indicates that Mr. Luis Fernando Guevara Díaz was hired for Job No. 010179, on an interim basis, by the Finance Ministry on June 4, 2001, as a miscellaneous worker (assigned to general services) in what was at that time called the "Finance Ministry's Technical Unit for Provisioning and Services". It asserts that in 2002 the office of human resources of the Finance Ministry opened an external competitive process No. 01-02 for the purpose of filling a series of vacant positions, one of which was the aforementioned Job No. 010179 which, as has been stated, was held on an interim basis by the alleged victim. The State explains that on March 18, 2002 Mr. Guevara entered the aforementioned competitive process for the job classes of miscellaneous worker 1 and 2, as well as for the position of concierge.

16. The State asserts that for the competitive process it adhered to regulations that address workers that have some degree of disability, having given special tests to the alleged victim,<sup>8</sup> on which he scored 78.97 points on tests for general services workers and was therefore included in selection list No. 16-2003 of March 6, 2003. The State affirms that this list of candidates was submitted for consideration by the Coordinator of the Technical Unit for Provisioning and Services for the purpose of proceeding with the interview round, which took place on March 31, 2003, after which the winning candidate was appointed.

17. The State explains that the selection was carried out in accordance with Article 27 of the Civil Service Statute<sup>9</sup> and underscores that the selection is influenced by "the discretionary power of the authorized head who is not obliged to choose the candidate with the highest score, given that the three candidates on the list are interviewed under equal conditions." The State adds that as for the time Mr. Guevara Díaz worked on an interim basis for the Finance Ministry, that period does not determine acquisition of the regular position, as was established by the Constitutional Bench of the Supreme Court.<sup>10</sup>

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<sup>8</sup> Tests prepared specifically for the miscellaneous worker and mini-multi questions. The state indicates that these tests were duly evaluated by the psychologist of the Technical Unit for Medical Services in the Finance Ministry.

<sup>9</sup> The State asserts that Article 27 of the Civil Service Statute establishes that:

"The Minister of authorized Head shall choose the new employee from among the top three from the list of eligible candidates submitted by the General Civil Service Division, unless he/she has sufficient reason to object to them [...].

When a candidate on the list has been sent three times to the same Ministry and lesser-qualified candidates have been chosen, the Minister of Head shall give to the General Civil Service Division the reasons for not having chosen that candidate."

<sup>10</sup> The State cites the jurisprudence of the Constitutional Bench of the Supreme Court, which has set forth:

"(...) In an infinite number of cases the Bench has held that the fact that a servant has been appointed on an interim basis for several years, to perform a particular job of interest to him or her does not by virtue constitute any acquired right in his or her favor that obliges the Administration to appoint him or her as the holder of that position or any other, given that the right to occupy a public position cannot be acquired by the simple passing of time or by having held other similar posts for a certain period, but rather by having proven to have the adequacy to perform the job, as provided in Article 192 of the

18. The State indicates that Mr. Guevara Díaz was terminated as of June 16, 2003, in view of the fact that he was not chosen to fill the vacant position, about which he was duly notified on June 13, 2003, through an official communication dated June 12, 2003.<sup>11</sup>

19. In consideration of the date on which the termination was communicated to the alleged victim, the State in its allegations mentions two official communications that were issued questioning the Mr. Guevara Díaz's aptitude for the job. The State claims that both communications are dated subsequent to notification of termination and that therefore there is no causal nexus with the administrative action of Mr. Guevara Díaz's termination. Specifically, the State indicates that on June 13, 2003, the coordinator of the Technical Unit for Provisioning and Services – who was in charge of the selection process for filling the vacant position – issued an official communication indicating that Luis Fernando's behavior "has had a negative impact on his job experience and his attitudes could even affect his personal safety, I reiterate, because of the types of duties he performs and therefore I suggest that his appointment be reconsidered," to which the State attached a copy of the communication of June 13, 2003, signed by the chief of the maintenance area, Mr. Guevara Díaz's immediate boss (to whom the petitioners allude in their claims). The State claims that the head of the maintenance area did not participate directly in choosing the candidates and that both communications were received by the Technical Unit for Human Resources on June 13, 2003, that is, one day after Mr. Guevara Díaz's termination notice. The State affirms that the fact that Mr. Guevara Díaz was notified of his termination on the same day as the above-mentioned communications were delivered to the Technical Unit for Human Resources is strictly a coincidence.

20. The State further asserts that current national and international law in Costa Rica has as one of its fundamental objectives the provide the necessary conditions to ensure that persons who suffer any type of disability can achieve full social participation under equal conditions of quality, opportunity, rights, and duties as all other citizens. The State reports that the progressive and expansive trend of human rights has caused the State of Costa Rica to join in the struggle against any form of discrimination that is contrary to human dignity and that by Law No. 7948 of November 22, 1999 the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities was incorporated in the body of domestic law.

21. In the matter of exhaustion of domestic remedies, the State claims that this requirement of the Convention has not been met, given that not all domestic legal appeals have been exhausted. The State explains that the Constitutional Bench, by hearing the amparo appeal filed by the alleged victim, issued its ruling on possible discriminatory treatment, determining in its resolution of February 14, 2005, and with founded reasoning, that Mr. Guevara's rights had not been threatened. The State claims that despite the alleged victim having filed that amparo appeal,<sup>12</sup> did not impede him, as the Constitutional Bench itself indicated in its resolution, from arguing the legality of the selection procedures in the appropriate court, given that the matter goes beyond the

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Constitution, such that the most to which the servant under these conditions has a right is to be considered for participation, in keeping with the applicable legal and regulatory provisions, in competitive processes that are called in order to fill the position of his or her interest, as occurred in the case in question, insofar as he or she meets the requirements to do so and is eligible.

<sup>11</sup> The State explains that the entire appointment process was conducted according to the Rules of Law 7600, "Law of Equal Opportunity for Persons with Disabilities", also mentioning Article 84 of that Law which provides that "the Civil Service Division will adapt recruitment procedures and mechanisms and the selection of personnel to the particular conditions of the individual, so as to assess his or her adequacy for performing the job."

<sup>12</sup> The State also mentions other appeals filed by the alleged victim. It indicates that by resolution on 11 July 2003, the appeal for reversal and nullification filed by the alleged victim was decided, to wit, that no omissions or irregularities were found in the procedure given that all pertinent laws had been followed. The State also indicates that on 8 October 2003, the appeal filed in this decision was declared out of order.

competence of the Constitutional Bench. The State indicates that Article 49 of the Constitution establishes a plenary and universal jurisdiction for administrative complaints that allows an interested party to impugn or attack any conduct or manifestation by an administrative body before this jurisdictional order. The State claims that aspects that go beyond fundamental rights of equality and non-discrimination shall be heard and argued fully in the appropriate judicial court because, given the most summary nature of an amparo appeal, all matters related to aptitude for the job and the legality of the decision to terminate would necessarily have to be argued in another jurisdiction.

22. In summary, the State claims that the process in which Mr. Guevara Díaz participated was conducted according to national and international law pertinent to disabilities, and that he had access to the job he wanted under equal conditions to those of other candidates, without discrimination or prejudice.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. Jurisdiction: *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae***

23. The petitioners have standing, in principle, according to Article 44 of the American Convention, to file petitions with the Commission. The petition identifies as the alleged victim as an individual to whom the State of Costa Rica has committed itself to respect and guarantee the rights enshrined in the American Convention. As for the State, the Commission recognizes that Costa Rica has been a Party State to the American Convention since April 8, 1970, the date on which it deposited its ratification instrument, and of the Protocol of San Salvador since November 16, 1999. Therefore, the Commission has *ratione personae* jurisdiction to examine the petition.

24. Likewise, the Commission has *ratione loci* jurisdiction to hear the petition, given that in it are alleged violations of rights protected under the American Convention and the Protocol of San Salvador that are claimed to have taken place in the territory of Costa Rica, a Party State to those treaties. The Commission has *ratione temporis* jurisdiction because the obligation to respect and guarantee the rights protected under the American Convention and the Protocol of San Salvador were in force for the State on the date the facts alleged in the petition purportedly took place.

25. The Commission has *ratione materiae* jurisdiction because the petition contains accusations of possible violations of human rights protected by the American Convention. As for the Protocol of San Salvador, though the IACHR lacks *ratione materiae* jurisdiction under its system of individual petitions to rule on an individual case of violations of Article 18 of the Protocol, pursuant to the provisions in Articles 26 and 29 of the American Convention, the IACHR can consider the provisions contained in the Protocol in the interpretation of other applicable provisions of the American Convention and of other treaties over which it does have *ratione materiae* jurisdiction.<sup>13</sup> Therefore, the Inter-American Commission will interpret the articles of the Protocol of San Salvador to the extent it is deemed relevant in its applicability to the American Convention.<sup>14</sup>

##### **B. Requirements for admissibility of the petition**

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<sup>13</sup> See IACHR Report No. 44/04, Laura Tena Colunga et al (Inadmissibility), Mexico, October 13, 2004. Paragraphs 33-40; IACHR, Jorge Odir Miranda Cortez et al (Admissibility), El Salvador, Case 12.249, Report No. 29/01, paragraph 36.

<sup>14</sup> Article 19.6 of the Protocol of San Salvador establishes the following: In the event that the rights established in paragraph a) of Article 8 and in Article 13 have been violated by an action directly imputable to a Party State to this Protocol, that situation could take occur through the participation of the Inter-American Commission for Human Rights and when there is standing, of the Inter-American Court of Human Rights, to the application of the system of individual petitions regulated by Articles 44 to 51 and 61 to 69 of the American Convention on Human Rights.

## 1. Exhaustion of domestic legal remedies

26. Article 46.1 of the American Convention provides that, for a petition filed with the Inter-American Commission in accordance with Article 44 to be admissible, there must first have been an attempt to exhaust all domestic legal remedies, pursuant to generally recognized principles of international law. The purpose of this requirement is to allow domestic authorities to hear of the alleged violation of a protected right and, if appropriate, to resolve it before the case is heard in an international court. Therefore, if a petitioner claims to have exhausted all domestic legal remedies, the claims lodged with the IACHR must have already been heard by national judicial bodies.<sup>15</sup>

27. As for this requirement, the petitioners claim that they exhausted all domestic remedies with the Constitutional Bench's ruling on February 14, 2005, on the merits of an amparo appeal submitted to its hearing. On the other hand, the State claims that domestic legal remedies were not exhausted given that the petitioner should have turned to the labor courts to pursue those matters that lie beyond the jurisdiction of the amparo appeal, such as aptitude for the job and the legality of the decision to terminate.

28. The Commission considers it pertinent to point out that in order to verify whether there has been compliance with the Convention's requirement that all domestic legal remedies be exhausted, it must identify the object of the complaint and analyze whether the domestic actions taken could have remedied the alleged complaint. In this regard, the Commission indicates that the object of the complaint in this case refers to alleged discriminatory treatment of Mr. Guevara Díaz in the competitive hiring process to fill a position he had been performing on an interim basis in the Finance Ministry. To that extent, the Commission considers it pertinent to verify if this case was heard by domestic courts through appeals that could have proved to be appropriate and effective in resolving this type of situation at the domestic level.<sup>16</sup>

29. The information submitted to the case file shows that Mr. Guevara Díaz filed an appeal for reversal seeking replacement and nullification on June 18, 2003. On July 11, 2003, the appeals for nullification and reversal were decided by the Finance Ministry's superior office and administrative division, which declared the appeals groundless and "out of order", respectively. On June 18, 2003 the Finance Ministry ruled that the appeal of those decisions were out of order.

30. Also, it is accredited that in the judicial branch, the alleged victim filed an amparo appeal on August 5, 2003 against the Finance Ministry for acts of discrimination in the workplace, alleging that his disability was the grounds for his termination, in which case his rights would have been violated, including those protected by the Constitution, the Convention, and the Protocol of San Salvador. In its ruling of February 14, 2005, the Constitutional Bench of the Supreme Court declared without standing the appeal that had been filed, concluding that, "the facts claimed by the appellant do not constitute a threat or violation of his constitutional rights, without prejudice regarding argument over the legality of the procedure used to select candidates to occupy the job Mr. Guevara Díaz wanted, in the appropriate administrative court, because this being a matter that exceeds the jurisdiction of this Constitutional Court." Specifically, as to the merits of the dispute the Court stated:

...examination of the evidence provided and the documents and reports given under oath, we conclude that the appellant was appointed on an interim basis to the position of Miscellaneous

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<sup>15</sup> See IACHR, Report No. 67/01, *Tomás Enrique Carvallo Quintana* (Argentina), June 14, 2001, paragraph 56.

<sup>16</sup> IACHR, Report No. 70704 (Admissibility), petition 667/01, *Jesús Manuel Naranjo Cárdenas et. Al*, Venezuela, 15 October 2004, paragraph 52; IACHR, Report No. 57/03 (Admissibility), petition 12.337, *Marcela Andrea Valdés Díaz*, Chile, 10 October 2003, paragraph 40.

Worker I in the Ministry that is being challenged; subsequently, with aims to fill the vacant post, an outside competitive process was initiated in which the servant Guevara Díaz had full opportunity to participate, for which were applied special and specific tests because of his disability, in fulfillment of current law, tests that were in fact evaluated by the psychologist of the Technical Unit for Medical Services in that Ministry. The appellant achieved eligibility to hold the position and to participate fully in the selection of the candidate who would hold that position in question, having made it onto the list of candidates. From this we deduce that the appellant had the same conditions of access to the job he wanted as did the other candidates, and the procedure does not reveal any acts that could be considered discriminatory against him. Though it is accurate that there is a note by the head of the maintenance division of the Finance Ministry, in which are mentioned the disability problems suffered by the appellant, this Court has heard the statement under oath (under penalty of law) that the selection of the servant to occupy the vacant post was made prior to the aforementioned note and that the note in no way influenced the choice of the appropriate person for the position. This being the case, and in accordance with the pondered judgment of this Constitutional Court, the constitutional amparo appeal is exhausted in the determination of equal participation by those interested in being on the list, and it is not incumbent to review the legality, timeliness, or convenience of the decision by the competent bodies in the selection itself, which is carried out in the exercise of discretionary powers.”<sup>17</sup>

31. In this regard, the IACHR considers it important to underscore that the amparo appeal, as conceived by jurisprudence in Costa Rica, is an action for constitutional guarantees that aims to “maintain or reestablish the enjoyment of rights enshrined in the Constitution, as well as those that are fundamental in character, established in international human rights instruments”.<sup>18</sup> The Commission further emphasizes that Law No. 7135 of Constitutional Jurisdiction of Costa Rica indicates that the amparo appeal guarantees fundamental rights and liberties, except for those protected by the appeal for habeas corpus, and has standing “against any provision, agreement, or resolution and, generally, against any action, omission, or simple material act not founded in an effective administrative act, by public servants or bodies that have violated, are violating, or threaten to violate any of those rights. The amparo appeal will have standing not only in response to arbitrary acts, but also in response to actions or omissions based on rules that have been incorrectly interpreted or improperly applied.”

32. The Commission observes that in this case the legal benefit sought through the amparo appeal was the enjoyment and exercise of the right to equality and non-discrimination, which were considered to have been violated in the process leading up to the termination of the alleged victim. Furthermore, the IACHR observes that the Constitutional Bench heard and ruled on these aspects, not having declared the amparo appeal groundless but rather having declared it to be out of order, subsequent to an analysis of the merits of the contested matter. In summary, it is the Commission’s understanding that the petitioner filed an appeal that could have proven appropriate for remedying the claim.

33. Furthermore, as regards the lack of filing an appeal in the ordinary labor court, the IACHR deems it important to reiterate that the requirement that all domestic legal remedies be exhausted doesn’t mean that alleged victims have to obligation to exhaust all remedies at their

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<sup>17</sup> Constitutional Bench of the Supreme Court of Justice of Costa Rica, Resolution No. 2005-01424, 14 February 2005.

<sup>18</sup> Article 48 of the Constitution of Costa Rica sets forth that: “Every person has the right to appeal for habeas corpus to guarantee his/her personal freedom and integrity, and to the amparo appeal to maintain or reestablish the enjoyment of other rights enshrined in this Constitution, as well as those that are fundamental in character established in the international human rights instruments that are applicable to the Republic. Both appeals are of the jurisdiction of the Bench indicated in Article 10.

disposal.<sup>19</sup> The Commission concludes that the appeal sought to protect the right of equality and that exhaustion of that appeal served to bring the complaint before the State and to allow it to resolve the matter appropriately, as provided by Article 46.

34. Because of the foregoing, the Commission considers that in this case the Convention requirement that domestic legal remedies be exhausted has been met, as established in Article 46.1 of the American Convention.

## **2. Time period for filing the petition**

35. Pursuant to Article 46.1 of the Convention, for a petition to be admitted it must be filed within six months of the date on which the alleged victim of rights violations was notified of the definitive ruling at the national level. In this case, the Commission considers it necessary to note specifically the fact that the petitioners sent their petition, addressed to the IACHR, to the office of the Inter-American Court where it was received on July 12, 2005. Subsequently, the Inter-American Court sent the petition to the IACHR, where it was received by the executive secretariat on September 19, 2005, the date on which the Commission became aware of the matter. Therefore, the IACHR considers July 12, 2005 as the date on which the complaint was lodged with the system, when analyzing the time period for filing the petition.

36. Considering the circumstances of this case, which include the exhaustion of domestic remedies with a ruling by the Constitutional Bench of the Supreme Court on February 14, 2005, which resolved the amparo appeal filed by the alleged victim, and that the petition was lodged on July 12, 2005, the Commission considers that in this case the requirement set forth in Article 46.1.b of the American Convention has been fulfilled.

## **3. Double jeopardy and matters tried in international courts**

37. The file contains no indication that this petition is a matter pending in another international proceeding. Furthermore, the Commission did not receive any information indicating the existence of this type of situation, nor that the petition is a reproduction of a previously examined petition or communication. For this reason, the Commission considers the requirements of Articles 46(1)(c) and 47(d) of the Convention to have been fulfilled.

## **4. Characterization of the facts**

38. The Commission considers that it is not fitting at this stage of the proceeding to decide whether or not the alleged violations against the alleged victims took place. For purposes of admissibility, the IACHR must at this time resolve only whether facts are exhibited that, if proven, would characterize violations of the American Convention, in keeping with Article 47.b of the Convention, and whether the petition is "manifestly groundless" or "obviously out of order", pursuant to paragraph (c) of that Article. The criterion for evaluating these extremes is different than the criteria required for ruling on the merits of a petition. The IACHR must conduct a *prima facie* evaluation to determine if the complaint supports the apparent or potential violation of a right

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<sup>19</sup> Both the Court and the Commission have held on repeated opportunities that: "(...) the rule that requires the prior exhaustion of domestic remedies is conceived in the interest of the State, because it seeks to prevent the State from having to respond before an international body for acts imputed against it without first having had the opportunity to remedy those acts by its own means." Therefore, if the alleged victim contested the matter through any of the valid and appropriate alternatives provided by the domestic legal system and if the State had the opportunity to remedy the matter within its own jurisdiction, the purpose of the international norm is fulfilled. IACHR, Report No. 70/04 (Admissibility – Petition 667/01, Jesús Manuel Naranjo Cárdenas et. Al. – Retirees of *Empresa Venezolana de Aviación VIASA v. Venezuela*); 13 October 2004, paragraph 52.

guaranteed by the American Convention, but not to establish the existence of the violation.<sup>20</sup> In this stage it is fitting to make a summary analysis that does not imply a prejudgment or an advance opinion on the merits. The Regulations of the Inter-American Commission, in establishing an admissibility stage and a separate merits stage, reflects this distinction between the evaluation the Inter-American Commission must make for the purposes of declaring a petition admissible and that required to establish whether or not there a violation has been committed imputable to the State.<sup>21</sup>

39. Neither the American Convention nor the Regulations of the IACHR require the petitioner to identify the specific rights that have allegedly been violated by the State in the matter submitted to the Commission, though petitioners may do so. It is incumbent on the Commission, based on the jurisprudence of the system, to determine in their admissibility reports which provisions of the relevant Inter-American instruments are applicable and could establish the rights violations if the alleged facts are proven by sufficient elements.

40. In this case, the petitioners claim discriminatory treatment against Mr. Luis Fernando Guevara Díaz, because of allegedly discretionary selection in a competitive hiring process to fill a position he held in the Finance Ministry, which led to his termination at that institution. The State, for its part, affirms that the process in which Mr. Guevara Díaz participated was carried out in keeping with national and international law governing matters related to persons with disabilities, and that the alleged victim had access to the job he sought under conditions that were equal *vis-à-vis* other candidates.

41. The Commission considers that the arguments put forth by the petitioners with regards to the possible violation of the right to equality and judicial protection, to the injury of the alleged victim, are not manifestly groundless. Concerning this, the Commission must, in the merits phase, determine if during the competitive process and appointment the alleged victim was given guarantees of equal treatment.<sup>22</sup> In particular, [the Commission must consider] the alleged gap between the “Law of Equal Opportunity for Persons with Disabilities” and the legal regulation that would establish a discretionary power for selecting from a list of proposed candidates for the job, the alleged lack of grounds for the selection made, and the alleged lack of judicial protection.

42. Therefore, the IACHR considers that the facts of the petition characterize violations of the rights established in Articles 8.1, 24, and 25 of the American Convention, as these relate to the provisions of Articles 1.1 and 2 of that Convention. Additionally, the Commission indicates that for the purpose of analyzing the merits it will rely on the provisions of the Protocol of San Salvador and

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<sup>20</sup> See IACHR Report No. 128/91, Case 12.367, *Mauricio Herrera Ulloa and Fernán Vargas Rhomeoser of the “La Nación” newspaper* (Costa Rica), 3 December 2001, paragraph 50; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), 24 February 2004, paragraph 43; Report No. 32/07, Petition 429-05, *Juan Patricio Marileo Saravia et al* (Chile), 23 April 2007, paragraph 54.

<sup>21</sup> See IACHR Report No. 31/03, Case 12.195, *Mario Alberto Jara Oñate et al* (Chile), 7 March 2003, paragraph 41; Report No. 4/04, Petition 12.324, *Rubén Luis Godoy* (Argentina), 24 February 2004, paragraph 43; Petition 429-05, *Juan Patricio Marileo Saravia et al* (Chile), 23 April 2007, paragraph 54; Petition 581-05, *Victor Manuel Ancalaf Llaupe* (Chile), 2 May 2007, paragraph 46.

<sup>22</sup> For the effects of analysis of characterization, the Commission cites the jurisprudence of the Inter-American Court, which sets forth the following:

Persons with disabilities are often the object of discrimination because of their condition, therefore the States shall adopt measures that are legislative, social, educational, work-related, or of any other type as needed so that all discrimination associated with mental disabilities be eliminated, and to create the conditions for full integration of these persons into society. (Inter-American Court of Human Rights, Case *Ximenes Lopes vs. Brazil*, ruling on the merits, 4 July 2006, paragraphs 13 and 105).

the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities,<sup>23</sup> for interpretative purposes.

## **V. CONCLUSION**

43. The Commission concludes that it has jurisdiction to hear this petition and that the petition complies with the requirements for admissibility as established in Articles 46 and 47 of the American Convention and Articles 30, 36, and other portions of its Regulations. Based on the arguments of fact and law expounded above, and without prejudging on the merits of the matter,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

#### **DECIDES:**

1. To declare the petition admissible with respect to the rights enshrined in Articles 8.1, 24, and 25 of the Convention, and Articles 1.1 and 2 of that same Convention.
2. To notify the State and the petitioners of this decision.
3. To continue with the analysis of the merits of the case.
4. To publish this decision and include it in the Annual Report of the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012.  
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rodrigo Escobar Gil, Rosa María Ortiz, and Rose-Marie Antoine, Commissioners.

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<sup>23</sup> The State of Costa Rica deposited its ratification instrument for this Convention on 8 February 2000.