



University for Peace  
Universidad para la Paz



INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE MATTER OF

**YATAMA v. NICARAGUA**

SUBMITTED BY

YABTI TASBA MASRAKA NANIH ASIA TANKANKA (YATAMA), THE  
*CENTRO NICARAGÜENSE DE DERECHOS HUMANOS*, AND THE  
CENTER FOR JUSTICE AND INTERNATIONAL LAW (CEJIL)

Brief of *Amicus Curiae* submitted by the United Nations University for Peace, San

Jose, Costa Rica

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Honorable Court:

The Legal Clinic in the Department of International Law at the U.N. University for Peace, under the supervision of Professor Hassan El Menyawi and Attorney Stephanie J. Gliege present this brief *amicus curiae* on behalf of YATAMA in the matter of YATAMA v. Nicaragua submitted by Yabti Tasba Masraka Nanih Asia Tankanka (YATAMA), The *Centro Nicaragüense De Derechos Humanos*, and The Center For Justice and International Law (CEJIL) regarding the human rights of YATAMA, an indigenous regional political party in Nicaragua.

## **INTRODUCTION**

This amicus brief represents what we hope to be an inspiration for thinking about this case, a type of frame from which to track a pathway for a decision. Unlike other types of amicus briefs, this one provides a brief description of the basic arguments that we consider strongest for the YATAMA candidates. This amicus brief provides a sequence of thoughts that develop a case for the YATAMA candidates.

We wrote this amicus brief intending to ensure that the YATAMA candidates be properly recognized as a group deserving of judicial protection, particularly in cases dealing with electoral matters. By doing this, we believe that YATAMA's practices and traditions will be incidentally respected. Our amicus represents the position that concern and respect for indigenous political parties like the YATAMA streams from ensuring their participation in government, and more specifically, the political and judicial elements of a nation.

## **ARGUMENTS**

### **I. Introduction**

The rights of the candidates presented by the political party, YATAMA, (hereinafter "the candidates" or "YATAMA candidates") were violated during the November 5, 2000 municipal elections in Nicaragua because the candidates were illegally excluded from the election. Even though the *Consejo Supremo Electoral* (hereinafter 'CSE') recognized YATAMA as a political party with 'legal personality,' the YATAMA candidates were excluded based upon provisions of electoral laws that were passed in January of 2000. YATAMA appealed to the CSE's self-review mechanism, seeking recourse for their decision to exclude YATAMA candidates, however their appeals were never answered. YATAMA then turned to the judicial system of Nicaragua where the Nicaraguan Supreme Court, claiming they lacked jurisdiction, dismissed their case. Thus the candidates were again faced with the having no available avenue to seek recourse. After following these procedures, like CEJIL and the Inter-American Commission of Human Rights, we assume that the YATAMA candidates exhausted all domestic remedies.

Article 25 of the *American Convention on Human Rights* (hereinafter ‘*American Convention*’ or ‘*Convention*’) obligates Nicaragua to provide recourse when the fundamental rights of its citizens are violated.<sup>1</sup> Article 25 of the *American Convention* maintains the fundamental right to judicial protection, stating:

Everyone has the right to simple and prompt **recourse**, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this *Convention*, even though such violation may have been committed by persons acting in the course of their official duties.<sup>2</sup>

State Parties undertake:

- (a) to ensure that any person claiming such remedy shall have his rights determined by a competent authority provided for by the legal system of the state;
- (b) to develop the possibilities of judicial remedy; and
- (c) to ensure that the competent authorities shall enforce such remedies when granted.<sup>3</sup>

Article 25 was violated by the failure of the CSE to review their decision and the dismissal of the case by the Nicaraguan Supreme Court, for reasons not based on the merits of the case, because the YATAMA candidates were left without any recourse where their fundamental rights that had been violated. These candidates suffered numerous violations of their fundamental rights protected under the *American Convention*, specifically their right to a fair trial.<sup>4</sup>

- II. The YATAMA candidates’ Article 8 right to a fair trial was violated by the CSE and by the Nicaraguan judicial system.

Article 8 of the *American Convention* gives every person "the right to a hearing . . . by a competent, independent, and impartial tribunal . . . for the determination of his rights."<sup>5</sup> The YATAMA candidates' rights were violated by the CSE's decision to exclude them from the election, which potentially impacts their Article 23 rights guaranteeing "every citizen" the "right and opportunity to (a) to take part in the conduct of public affairs . . ." and "(b) to vote and be elected in genuine

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<sup>1</sup> *American Convention on Human Rights*, Article 25.

<sup>2</sup> *American Convention* Article 25(1)(emphasis added).

<sup>3</sup> *American Convention* Article 25(2)(b). This paragraph refers to ‘judicial remedy.’ In this amicus brief, we use the notion of ‘recourse’ as described in Article 25(1) as equivalent to the notion of ‘judicial remedy’ referred to in Article 25(2)(b).

<sup>4</sup> *American Convention*, Article 8.

<sup>5</sup> *American Convention*, Article 8(1).

periodic elections."<sup>6</sup> In this sense, the importance of preserving the YATAMA candidates' Article 8 rights potentially also protects their Article 23 rights.

The candidates tried to exercise their Article 8 'right to a hearing . . . with due guarantees' by submitting an appeal for review to the CSE. However, the CSE never responded to their appeal. Additionally, the Nicaraguan judicial system denied the YATAMA candidates a fair trial in violation of Article 8 because the case was dismissed without a determination on the merits of the case as required under Article 8.

*The CSE's Decision and Failure to Review YATAMA's claims violates Article 8.*

The decision by the CSE to exclude the YATAMA candidates and CSE's failure to respond to their appeals violates Article 8 of the *Convention* because the tribunal lacks competency, independence, and impartiality.<sup>7</sup> The European Court of Human Rights has held that a competency determination requires "that the court verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the *Convention*."<sup>8</sup> Applying the reasoning of the European Court to this case requires this Honorable Court to examine the way in which the domestic laws of Nicaragua have been interpreted and applied to the YATAMA candidates. The fact that the CSE, using the Nicaraguan Electoral Law, denied the YATAMA candidates from participating in the election and then did not give them the opportunity to review the decision is clear evidence that the principles of the *American Convention* have been violated, specifically Article 8 that recognizes the right to a fair trial. Thus the CSE's competence was insufficient to protect the rights guaranteed to the YATAMA candidates under the *American Convention*.

The independency requirement under Article 8 of the *American Convention* is also violated by the CSE proceedings in this case. A tribunal that lacks independence is one in which "the functions and competences of the judiciary and executive are not clearly distinguishable or where the latter is able

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<sup>6</sup> Though guaranteeing a right to be elected, Article 23 does not guarantee the election of particular individuals or parties. The Section 3 of the Canadian Charter of Rights and Freedoms, which states under its 'democratic rights' that: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." The right to be elected under this section has been recognized by the Canadian Supreme Court as guaranteeing a right "to play a meaningful role in the electoral process." The Court stated that "full political debate ensures an open society benefiting from diverse opinions...[P]articipation in the electoral process has an intrinsic value independent of the outcome of elections." See *Figueroa v. Canada* (Attorney General), 1 S.C.R. 912, 2003 SCC 37 (2003). In the present case, the YATAMA candidates were denied the opportunity to play a meaningful role in the electoral process. Though YATAMA had legal personality, denial of their right to participate in the election and to be elected, due to a un-reviewable decision of the CSE, violates the American Convention.

<sup>7</sup> It should also be noted, however, that even if the CSE had responded, the CSE would not have been able to give them a fair trial because the tribunal does not meet the requirements of Article 8 of the Convention.

<sup>8</sup> *Carbonara and Ventura v. Italy*, European Court of Human Rights, Application No. 24638/94, Judgment of 30 May 2000.

to control or direct the former.”<sup>9</sup> The Inter-American Democratic Charter, which recognizes the connection between human rights protections and democracy, emphasizes independency as essential to democracy, emphasizing the importance of both the separation of powers and independence of the branches of government.<sup>10</sup> In this case, the CSE is an executive body because it is made up of political party representatives of the two major parties. Thus, the CSE, acting as a judicial tribunal charged with determining rights, completely lacks independence from the executive and violates the independency requirement of Article 8.

Additionally, the impartiality requirement of Article 8 has not been met in the determination of the rights of the YATAMA candidates in the CSE. Impartiality has been determined by the ‘absence of prejudice or bias.’<sup>11</sup> As the facts of this case demonstrate, the CSE is filled with only members from the two dominant political parties. Impartiality can be highly compromised if persons issuing a judgment have any interest in the outcome of the decision. A member of one political party certainly has an interest in preventing other political parties from fully participating in an election. In this case, the members of the CSE clearly have a stake in the outcome of their decisions regarding allowing or disallowing candidates to run in elections because their parties have candidates that may run against a candidate for which they are making an eligibility determination. Many national jurisdictions are governed by only a few political parties, however in the case of application of electoral laws, the party-affiliation of the magistrate becomes much more important, especially where the magistrate is a member of a different political party than the potential electoral candidate. Therefore, in cases involving electoral matters, the impartiality of the judge is even more necessary. The combination of the CSE being part of the executive, combined with the fact that the magistrates are nominated by only two political parties creates interests that truncate possibilities for the involvement of smaller, third parties. Therefore, in the case of executing electoral laws, having magistrates appointed by two parties can potentially jeopardize the candidate’s right to a fair trial as the possible introduction of third parties into the Nicaraguan political system goes to the fate (the loss) of the two-party system of Nicaragua that is represented on the CSE. In conclusion, the lack of competence, independence, and impartiality at the CSE results in a clear violation of the YATAMA candidates’ Article 8 protections.

*The Nicaraguan Supreme Court’s failure to provide ‘due guarantees’ violates Article 8.*

The decision of the Nicaraguan Supreme Court and their interpretation of the electoral law which led to the dismissal of the case based on their lack of jurisdiction violates Article 8. The Inter-American Commission has determined that Article 8 includes a requirement for ‘due guarantees’

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<sup>9</sup> *OlóBahamonde v. Equatorial Guinea*, Human Rights Committee, Communication No. 468/1991, views of 20 October 1993; see also *Human Rights Reference Handbook* 188 (Magdalena Sepulveda, et al, eds., University for Peace 2004).

<sup>10</sup> Inter-American Democratic Charter, Article 3, OAS General Assembly Resolution (September 11, 2001). Article 29(d) of the American Convention allows this Honorable Court to give effect to ‘other international acts of the same nature’ [as the American Declaration]. See also Article 129 of the Nicaraguan Constitution which establishes the separation of powers for the State of Nicaragua.

<sup>11</sup> *Piersack v. Belgium*, European Court of Human Rights, Application No. 8692/79, Judgment of 1 October 1982.

during the time that rights are being determined under the *Convention*.<sup>12</sup> Due guarantees require that the offended party get a suitable defense, which includes intervention by a “competent, independent and impartial judicial body to determine the claim's legality.”<sup>13</sup> The Commission held that a judicial body who lacks the power to determine the claim's legality, and thus the scope of the rights claimed, violates Article 8 because it prevents the petitioner from ever obtaining a favorable decision. A favorable decision can never be obtained because *any* decision is precluded by a tribunal without the power to determine the claim's legality. In this case, such ‘due guarantees’ were not present during the determination of the YATAMA candidates’ rights because the intervening tribunal, the Nicaraguan court, did not avail itself of the power to determine the scope of the rights claimed by the YATAMA candidates. Therefore the candidates were never given the possibility of obtaining a favorable decision. The YATAMA candidates’ rights to present a defense of their legal claim was never allowed due to the lack of the power of the court to uphold their rights. Thus, the decision of the Nicaraguan Supreme Court did not satisfy the requirements of fair trial and consequently Article 8 of the *Convention* was violated.

III. The lack of recourse for violations of the YATAMA candidates’ fundamental rights violates Article 25 of the *Convention*.

Nicaragua violated Article 25 of the of the *American Convention* by its failure to allow an *amparo*, or any other type of recourse, for violation of YATAMA’s rights protected under the *Convention*. In the *Mayagna v. Nicaragua case*, the Court recognized that Article 25 of the *Convention* has established, in “broad terms’ the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights.”<sup>14</sup> The obligation’s importance is emphasized by the reasoning of the court that:

[T]he inexistence of an effective recourse against the violation of the rights recognized by the *Convention* constitutes a *transgression* of the *Convention* by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.<sup>15</sup>

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<sup>12</sup> *Carranza v Argentina* (Case 107087; Report 30/97), InterAmerican Commission, 4 BHRC 459, 30 September 1997. (hereinafter ‘*Carranza*’)

<sup>13</sup> *Id.*

<sup>14</sup> *Mayagna (sumo) Awas Tingni Community v. Nicaragua Case*, Inter-American Court of Human Rights, Series C No. 79, Judgment of 31 August 2001, para. 111 (hereinafter ‘*Mayagna case*’); citing *Constitutional Court case*, Inter-American Court of Human Rights, decision of January 31, 2001. C Series No. 71, para. 89; and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights) Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of October 6, 1987. A Series No. 9, para. 23.

<sup>15</sup> *Mayagna case*, para. 113 (emphasis added), citing *Ivcher Bronstein Case*, Inter-American Court of Human Rights, Judgment of February 6, 2001. C Series No. 74, para.136; and *Cantoral Benavides case*, Inter-American Court of Human Rights, Judgment of 18 August 2000. C Series No. 69, para. 164; and *Durand and Ugarte case*, Inter-American Court of Human Rights, Judgment of 16 August 2000. Series C No. 68, para. 102.

In this case, the decision made by the CSE to exclude YATAMA candidates did not determine whether there had been a violation of the candidates' human rights, nor does not provide a legal remedy against violations of those rights. The Nicaraguan Supreme Court's dismissal of the case also did not establish whether there had been a violation of their human rights and thus did not provide an effective remedy. Failure to provide recourse for violations of fundamental rights is a violation of Article 25 of the *Convention*. In this case, the right to a fair trial protected under Article 8 was violated without any recourse as required by Article 25. Thus the *Convention* has clearly been 'transgressed' by Nicaragua.

*Amparo is an appropriate recourse and complies with Article 25*

The right to the recourse of *amparo* for decisions of the CSE exists under Nicaraguan law and thus is an appropriate type of recourse. Article 76 of the Electoral Law of Nicaragua allows political parties and groups to appeal to an *amparo* before 'tribunals of justice' for final resolutions of the CSE.<sup>16</sup> The YATAMA candidates presented an *amparo* action on 30 August 2000, which was appealed to the Nicaraguan Supreme Court two months later. The action was filed against the CSE because their decision to exclude the candidates from the election was a 'final resolution' of the CSE and thus appeal-able under Article 76 of the Electoral Law. Nonetheless, the Supreme Court of Nicaragua followed Article 51(3) of the Amparo Law which states that *amparo* is not allowed for electoral matters and Article 173 of the Nicaraguan Constitution which states that there is no recourse for resolutions of the CSE in electoral matters. Using these latter two laws, the Supreme Court decided that it lacked jurisdiction for the claims of the YATAMA candidates<sup>17</sup> and thus put itself in violation of the *American Convention* Article 25 for failing to provide recourse for violations of fundamental rights. Article 51(3) of the Amparo Law and Article 173 of the Constitution violate the *American Convention* because they prevent recourse for violations of fundamental rights. Article 76 of the Electoral Law,<sup>18</sup> allowing the recourse of an *amparo* should have been observed for Nicaragua to be in compliance with the *American Convention*.

*No recourse on the merits violates Article 25 of the American Convention*

Recourse that satisfies Article 25 of the *Convention* has been interpreted by the Inter-American Commission, in *Carranza v. Argentina*,<sup>19</sup> any recourse on the **merits** of the petitioner's claim. In *Carranza*, the Petitioner was not seeking restitution or a decision on illegality of his removal from judicial office. His complaint focused on the lack of a judicial decision on the merits of his claim because the Argentine Supreme Court found that it did not have jurisdiction over the claim and dismissed his case as a non-justiciable political matter. The commission stated that, "the right to judicial recourse expressed in art 25 . . . was not exhausted by free access to and development of the judicial recourse; the intervening body had to reach a reasoned conclusion on the claim's **merits**, establishing the appropriateness or inappropriateness of the legal claim that gave rise to the judicial

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<sup>16</sup> Ley Electoral de Nicaragua, Artículo 76 (2000).

<sup>17</sup> Judgment of the Supreme Court of Nicaragua, 24 October 2000. Annexed to the Demanda presented by CEJIL.

<sup>18</sup> The Electoral Law in Nicaragua holds the same status as the constitution. Article 184, Nicaraguan Constitution.

<sup>19</sup> See *Carranza case*.

recourse.”<sup>20</sup> Judicial recourse requires that a judicial proceeding “establish the truth or error of the claimant's allegation.”<sup>21</sup> Additionally, to be effective, the judicial recourse has to be “suitable for protecting the rights violated and for a person claiming a judicial remedy to 'have his rights determined' for the purposes of art 25(2) required the intervening body to make a decision on the facts and alleged right at issue.”<sup>22</sup>

In this case, YATAMA appealed to the judicial body provided for by law,<sup>23</sup> seeking a judicial remedy to protect the party and the candidates from acts in violation of their rights protected in the *American Convention*. The determination by the Nicaraguan court that Article 179 of the constitution prevents it from deciding “electoral matters,” essentially releasing itself of jurisdiction over the case, prevented establishing the truth or error of their claim. Thus, no determination of the candidates' rights was made and thus there was no protection of those rights. Therefore, there was no effective legal recourse for YATAMA's claims as required by Article 25 of the *Convention* and by not deciding on the merits of their claim, the State of Nicaragua has violated Article 25. It should be noted, as the Inter-American Commission did in the *Carranza case*, that this argument is not to judge the validity and appropriateness of the judicial decision of the Nicaraguan Supreme Court. The argument is only to say that the decision is not appropriate where its application results in a violation of the rights protected under the *American Convention*.

*Recourse for violations of fundamental rights is essential to democracy*

This Honorable Court has recognized the importance of Article 25 as being essential to democracy,<sup>24</sup> stating that “the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, “is one of the basic mainstays, not only of the *American Convention*, but also of the Rule of Law in a democratic society, in the sense set forth in the *Convention*.””<sup>25</sup> Article 20 of the American Declaration<sup>26</sup> supports that same notion, stating that nothing can prohibit the rights and guarantees of a representative democracy. Failure to follow basic principles of democracy allows for violations of fundamental rights as was seen in the 2000 elections in Nicaragua. The violations of the rights of the YATAMA candidates and the lack of recourse to determine those rights are a clear violation of the *Convention*.

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<sup>20</sup> See *Id.*

<sup>21</sup> See *Id.*

<sup>22</sup> See *Carranza case*.

<sup>23</sup> Electoral Law Article 76 stating that an *amparo* action is allowed for final resolutions of the CSE.

<sup>24</sup> See, *Mayagna case*

<sup>25</sup> *Mayagna case*, para. 112; see also *Ivcher Bronstein Case*, Judgment of February 6, 2001. C Series No. 74, para.135; *Constitutional Court case*, decision of January 31, 2001. C Series No. 71, para. 90; and *Bámaca Velásquez case*. Judgment of November 25, 2000. C Series No. 70, para. 191.

<sup>26</sup> American Declaration on the Rights and Duties of Man, Article 20.

## CONCLUSION

*Amici* assert that at least two provisions of the *American Convention* have been violated in this case, Article 8 and Article 25. The CSE's failure to review their decision to exclude the YATAMA candidates from the November, 2002 elections and the Nicaraguan Supreme Court's dismissal of the case without providing 'due guarantees' violate their fundamental right to a fair trial protected by Article 8 of the *Convention*. Consequently, Nicaragua failed to comply with Article 25 of the *Convention*, requiring the state to ensure that the YATAMA candidates' right to judicial protection for violation of their fundamental rights. Given that the candidates were not provided *any* recourse for violation of their fundamental rights, Article 25 was clearly violated.

Given that the first municipal elections in the whole Caribbean history of Nicaragua were realized less than 10 years ago, in 1996, respect for procedures designed to protect the fundamental rights of all citizens are essential to provide the foundation for democracy in the region. In a case such as this that involves electoral matters, which are human rights-sensitive issues, it is essential to have at one's disposal the possibility of recourse for violations of fundamental rights. Additionally, and especially in light of major reforms to electoral laws, the impartiality and independence of the court or tribunal where recourse is sought carries special importance. Given that an *amparo* action is recognized by the Nicaraguan law as an appropriate form of recourse, the candidates should have been allowed their *amparo* claim. However, any method of appropriate recourse would have been a good step in the direction of democracy- building.

The new electoral laws clearly prejudiced YATAMA in the way they were enforced. For example, even though YATAMA had legal personality, the candidates presented by YATAMA in the *Región Autónoma del Atlántico Sur* (RAAS) were not permitted to register by the CSE because YATAMA had partnered with another political party that did not meet the requirements of the new electoral law. In the *Región Autónoma del Atlántico Norte* (RAAN), YATAMA presented its list of candidates to the Regional Electoral Council offices in RAAN. The regional office did not inform YATAMA that they had to present their list to the national office. Additionally, the CSE did not comply with the Electoral Law, which states that when the CSE denies a petition or the participation of a candidate for not meeting the legal requirements, the CSE has the obligation to notify the party within three days of the resolution so that the candidates have time to correct the error that the CSE has alleged prevent registration of their candidates.<sup>27</sup> Not only did the CSE not notify of the rejection, once they did notify and YATAMA appealed to the CSE to reconsider, the CSE never responded to their appeals. This sampling of facts highlights the importance of why recourse is so essential, specifically so that that these types of events can be reviewed anew.

## REPARATIONS

Article 1 of the *American Convention* obligates States Parties to respect the rights and freedoms protected in the *Convention* and to ensure that legal effect is given to the exercise those rights and freedoms. Accordingly, *Amici* recommend this Honorable court to order the State of Nicaragua to comply with Article 25 to ensure the availability of an *amparo* or other type of recourse for electoral

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<sup>27</sup> Electoral Law, Article 84; see also Demanda de CEJIL, page 22.

matters. To bring Nicaragua into compliance with Article 8, the recourse must be available in a court or tribunal that is competent, impartial and independent. Such procedures will protect the fundamental rights outlined in the *American Convention* and will put a check on the power of the CSE, thereby strengthening democracy in Nicaragua. The State of Nicaragua is best situated to determine the exact method of how Nicaragua will be brought into compliance with the *American Convention*.

Additionally, *Amici* recommend this Honorable Court order an Apology by the State to the YATAMA candidates for their failure to provide recourse for the events surrounding the 2000 elections.

## BACKGROUND

After extensive research and multiple meetings with colleagues and students affiliated with the Department of International Law at the United Nations University for Peace we have come to the conclusion that a case can be made in favor of the YATAMA candidates through the optic of the provision on judicial protection of the *American Convention* (Article 25). To find a breach of Article 25, there must be a breach of some other fundamental right. We explain that the breach of a fundamental right in this case is a breach of the right to a fair trial (Article 8). We argue that the YATAMA candidates did not receive a fair trial in the *Consejo Supremo Electoral* (hereinafter ‘CSE’), and that they have a right to recourse as provided for under their Article 25 right to judicial protection.

In the process of determining which legal issues we would rely on to as a central argument of this case, we considered many other arguments that we do not discuss. We focus our attention throughout the amicus on explaining how a case can be made for the YATAMA through the optic of Article 8 as a fundamental right that was breached and that Article 25 requires there to be recourse for that breach. However, we do not detail why we consider other arguments to be unsubstantial. We consider the following description important to briefly explore some of the reasons why we do not consider other possible arguments to be applicable.

An argument that might be made that we do not consider sufficiently strong to find in favor of the YATAMA candidates is based on Article 24(2), which ensures the “right to equal protection.” One incarnation of the equal protection argument is that the YATAMA candidates were discriminated by the CSE for being a primarily “indigenous” political party. Although this might be true, we found it difficult to gather evidence to support the position that other parties were treated in a different manner. Furthermore, it can be said that showing how one group is disadvantaged compared to another group that was favored advances arguments about inequality. The electoral law reforms in this case, however, applied on all groups, including the major political parties. Nonetheless, instead of arguing that there was discrimination on the face of the electoral law, it could be argued that there were discriminatory effects. However, the difficulty with this argument is that while there might be discrimination in effect, to make a strong case, it is necessary to show how the YATAMA candidates were singled out to comply with particular requirements by the SEC (and other governmental agencies). However, it seems that many other parties were required to follow similar rules, including local parties in RAAN and RAAS.

A related argument that is advanced through the optic of Article 24(2) (i.e., the right to equal protection) is that indigenous candidates of YATAMA are disproportionately disadvantaged because they must meet the same requisites as other non-indigenous candidates when indigenous people have neither the same possibilities nor the same capacity to meet these requirements. In particular, the argument is advanced by stating that the rule that YATAMA ought to obtain a petition of 3% signatures (i.e., 3% signatures rule) to be granted legal personality, and that it ought to have candidates running in 80% of the municipalities in RAAN and RAAS (i.e., 80% municipalities rule) is advanced as a type of culturally insensitive rules that impede the participation of YATAMA candidates. The more general request of this argument is that the state of Nicaragua ought to have adopted special measures to promote and facilitate political participation of indigenous peoples’ with regard to their customary law, as well as with regard to their own customs and traditions. And the more particular request is that the 3% signatures rule and the 80% rule should not be applicable on the YATAMA, a party with indigenous candidates and voters.

The problems with this argument are various. First, the argument that non-indigenous candidates do not have the same capacity to meet the requirements of the newly reformed electoral laws seems inaccurate. The YATAMA political party, made up of many self-identified indigenous candidates, did manage in the forthcoming years to satisfy all the criteria, and have even been able to secure political power.<sup>28</sup> In this sense, it is inconsistent to say that it is difficult for the YATAMA party to be able to follow the reformed electoral laws. Second, the argument is advanced with the presupposition that a political party can be seen as “indigenous.” But this assumption is less clear because many persons might vote for the YATAMA candidates although they do not self-identify as “indigenous.” Also, there are many political parties in and outside of Nicaragua that possess candidates and voters that are not made up of a single racial, ethnic, or religious group. Political parties possess diverse voters and candidates. It seems unjust to allow some political parties some distinctive status not to follow electoral laws, while charging other political parties with abiding by them. This task and the parameters by which this would occur seem difficult to justify at best, and is something we felt should be discouraged. Also, many in Nicaragua might develop resentment toward the YATAMA and other parties if this is the path we take. Their election results will not be seen as legitimate. It seems preferable to move to have a system in which the electoral laws are applied to all political parties. Third, the 3% rule has been found to be unconstitutional by the Supreme Court of Nicaragua. Again, YATAMA candidates have been successful in years following the elections of November 2000 and have secured political power in spite of the continued application of the new electoral laws since the reform in 2000. Fourth, it is difficult to say that because of the mere existence of electoral rules that the customs of indigenous groups, in particular those represented in the YATAMA political party, are not being considered. The newly reformed electoral laws do not explicitly disallow any of the customs and traditions of the YATAMA in the course of selecting candidates according to their traditions. In fact they have continued to select candidates according to their customary traditions in each year since the electoral reforms have been in force. The fact that the candidates were not elected in 2000 does not imply that the candidates were not selected according to their customs and traditions.

Another argument that we did not consider sufficiently strong to find in favor of the YATAMA candidates is one based on Article 23, which ensures the “right to participate in government.” The argument is advanced again through the optic of indigenous identity. It is advanced as the participation of indigenous candidates (YATAMA) being impeded during the elections of November 2000 in light of the reforms, as well as by the actions of the CSE. The argument is also advanced as indigenous communities being prevented to elect their own candidates according to their own customs and traditions. Specifically, the argument is advanced by stating that the signature and municipality rules that YATAMA must comply with are culturally insensitive and impede the participation of YATAMA candidates as well as their ability to elect their candidates according to their own customs. The implicit request in this argument is that the government ought to remedy this situation by taking legislative measures or measures of another character to safeguard YATAMA’s political rights to free elections to be elected by their own traditions.

As described above, the argument that the customs of YATAMA were impeded does not seem to be accurate since the reformed electoral laws do not directly or indirectly require that YATAMA change their process of selecting candidates. In fact, since 2000, they continue to select their candidates according to their customs and traditions. The claim that the signatures rule and the

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<sup>28</sup> See <http://www.elecciones2004.net.ni/escrutinio/index.php>.

municipality rule impeded the right of the YATAMA candidates to be elected is not a statement that the candidates were not selected on the basis of their customs and traditions. In fact, they were, even in the year 2000. Not being on the ballot by itself constitutes evidence of a violation of the right to be elected, or more generally, to participate in elections. Then, the only possible argument that can be made is that the 3% signatures rule and the 80% municipality rule conspired to make it impossible for YATAMA candidates to be on the ballot box in the year 2000 (for whatever reason including the possibility of being a party primarily populated by indigenous candidates). But it is difficult to make such a broad statement about YATAMA's inability to follow these rules, because in years following 2000, YATAMA managed to successfully follow them. This diminishes the possible claim that they are inherently or systematically incapable of following the 3% signatures rule and the 80% municipality rule. Also, the signature rule was found to be unconstitutional in 2002 by the Supreme Court of Nicaragua, and therefore is currently a moot point, since it is no longer applicable.

We consider Article 8 (right to fair trial) and Article 25 (right to judicial protection) to be the articles that appropriately link with the facts and make a strong case in favor of the YATAMA candidates. The locus of the case is in the CSE and the decisions they arrived at with respect to the YATAMA candidates. We consider the SEC to have not provided a fair trial, and that the *American Convention* requires recourse by a competent court or tribunal. In this sense, some type of recourse in the form of an appeal is required. We consider this argument to be one that would satisfy the YATAMA and other groups that might be affected by reforms in electoral laws in the future in Nicaragua and more generally in other nations in the Americas. If rights are affected by reforms to electoral laws, political parties should be afforded the opportunity to have their cases heard in a competent court or tribunal, and they deserve to have recourse (in some form or another) especially if at the first instance the case is heard by a court that lacks impartiality and independence, like the SEC that is directly under the executive branch (as opposed to the judicial branch) of the government.