

REPORT No. 179/18
PETITION 1360-11
 REPORT ON ADMISSIBILITY
 FABIO GADEA MANTILLA
 NICARAGUA
 December 26, 2918

I. INFORMATION ABOUT THE PETITION

Petitioner:	Björn Arp
Alleged victim:	Fabio Gadea Mantilla
Respondent State:	Nicaragua
Rights invoked:	Articles 23 (Right to participate in government), 24 (Equal protection), 25 (Judicial Protection) of the American Convention on Human Rights ¹ in connection with Articles 1.1 and 2 thereof

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	October 5, 2011
Additional information received at the stage of initial review:	December 13, 2011, October 2, 2012 and January 31, 2014
Notification of the petition to the State:	September 5, 2017
State's first response:	November 8, 2017
Additional observations from the petitioner:	March 27, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument deposited on September 25, 1979)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 8 (right to a fair trial), 23 (right to participate in government), 24 (equal protection) and 25 (judicial protection) of the American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the same instrument
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, Article 46.2.a exception is applicable
Timeliness of the petition:	Yes, pursuant to Section VI

V. ALLEGED FACTS

¹ Hereinafter "the Convention" or "the American Convention."

² The observations submitted by each party were duly transmitted to the opposing party.

1. The petitioner alleges a violation of the right of Fabio Gadea Mantilla (hereinafter “the alleged victim” or “Mr. Gadea”) to equal participation in government, in particular, the right to stand as a candidate for elected office, inasmuch as he considers the acceptance of the candidacy of a political rival, Nicaraguan President José Daniel Ortega Saavedra (hereinafter “President Ortega”) in the 2011 presidential elections, to be illegal. He further contends that the approval by the Nicaraguan Congress of Articles 146 and 147 of that country’s Constitution, which provide for indefinite reelection, is illegitimate.

2. He contends that the alleged victim, a candidate of the Independent Liberal Party Alliance (*Alianza del Partido Liberal Independiente*), had filed with the Supreme Electoral Council (CSE) to run for president of Nicaragua on November 6, 2011. He argues that President Ortega, who at that time had already held said office for two presidential terms, had also filed as a candidate of the Sandinista National Liberation Front (FSLN) in those same elections, even though pursuant to Article 147³ of the Political Constitution of Nicaragua (hereinafter “the Constitution”), he was barred from taking part as a candidate in the elections.

3. On April 1, 2011, jointly with other candidates, the alleged victim brought a challenge to the candidates for President, claiming that President Ortega’s filing as a candidate violated the constitutional ban on consecutive term reelection provided for under Article 147(a) of the Constitution. Nonetheless, on April 4, 2011, the CSE dismissed the challenge declaring President Ortega’s registration and filing as a presidential candidate to be in order.⁴ He alleges that the decision was not grounded in fact and law, but was instead solely based on the judgment of the Supreme Court of Justice of Nicaragua of September 30, 2009, which settled a petition for constitutional relief via *amparo* filed by Daniel Ortega upholding his right to take part as a presidential candidate, despite the ban provided under Article 147 of the Constitution. Accordingly, he claims infringement of the principle of constitutional supremacy that is in force in Nicaragua, because the judgment of the Supreme Court illegally preempted the constitutional provision regarding the rules on who may stand for election.

4. The petitioner cites alleged political interference in the decisions of the Supreme Electoral Council, which would be an infringement of the rights of the political parties’ candidates and also of the electorate. In this context, the petitioner asserted that subsequent to the CSE’s decision, the National Assembly of Nicaragua approved amendments to Articles 146 and 147 of the Constitution to allow indefinite reelection. He argues that this amounts to an illegitimate approval and a power grab by the executive branch of government. Additionally, he noted that for the 2016 elections, the government abolished opposition political parties, including the party of the alleged victim, by supplanting the legitimate representatives of certain parties, in accordance with their bylaws. In so doing, the petitioner claims that the State muzzled all political opposition.

5. The petitioner also claims an infringement of the right to judicial protection because of the alleged victim’s inability to defend himself as a consequence of the provisions of Article 173.14⁵ of the Constitution, in relation to the lack of legal remedies available to appeal the decision issued by the Supreme Court of Justice denying the challenge to the presidential candidacy of the current President. In this regard, he cites the legal precedent of the case of *Yatama v. Nicaragua*, noting that even though the Inter-American Court of Human Rights ordered the State to adopt legislative measures to establish an effective judicial remedy to challenge the decisions of the Supreme Electoral Council; such measures have still not been implemented, because domestic legislation must be amended.

6. In response, the State moves for the petition to be declared inadmissible, on the grounds that it does fulfill the admissibility requirements set forth in Article 46.b of the Convention and in Article 32.1 of the

³ Article 147 of the Political Constitution of Nicaragua in force at the time of the events reads: “The following persons may not run for President or Vice President of the Republic: persons who have exercised the full powers of the presidency at any time during the period when the election for the following term is held, nor anyone who has exercised them for two presidential terms.

⁴ Said decision had been published in the Official Gazette on April 7 of that year.

⁵ Article 173.14 of the Political Constitution of Nicaragua establishes: [...] The decisions of the Supreme Council on electoral matters shall not be subject to any ordinary or special appeals.

IACHR Rules of Procedure. It argues that the petition was not filed within the statutory time period, in view of the fact that it was lodged 13 months after the decision of the Supreme Court of Justice of September 30, 2010 settling the *amparo* suit for constitutional relief filed by President Ortega. Additionally, the State contends that there is no infringement to the exercise of the alleged victim's rights, inasmuch as the Political Constitution ensures equal treatment for Nicaraguans in the enjoyment of political rights and, as proof thereof, cites the access that the alleged victim had to stand as a presidential candidate during the 2011 elections, as well as his having been a member of the National Assembly based on a second place finish in the voting in accordance with Article 133 of the Constitution.

7. The State underscores its role of protector of fundamental rights, arguing that the 2011 election campaign was held on the basis of the liberties comprising the right to participation, which had been exercised by the alleged victim and other candidates for office, inasmuch as they brought a challenge before the Supreme Electoral Council to the admission of the candidacy of the current leader of Nicaragua and, also, filed requests for reimbursement of campaign expenses. It notes that even though it is true that the challenge was dismissed, the decision of the Supreme Electoral Council is legal and properly based in the Supreme Court judgment of September 30, 2009, which ruled on the *amparo* suit for constitutional relief brought by President Ortega granting him the right to participate as a presidential candidate. The State contends that all of the foregoing is a consequence of the State's role as a steward of human rights in its judicial function to provide access to justice.

8. As to the alleged failure to uphold Article 147 of the Constitution, the State cites judgment No. 504, which was handed down by the Supreme Court on October 19, 2009. In said judgment, the Court ruled on the *amparo* petition for constitutional relief filed by President Ortega and several mayors of municipalities challenging the administrative decision issued by the Supreme Electoral Council on October 17, 2009, denying the motion filed by them to set aside the principle of disqualification from standing as candidates for President and Vice President of the Republic, as well as for Mayor and Vice Mayor. It claims that in exercising its jurisdiction to protect fundamental rights, the judiciary in turn allowed President Ortega to have access to constitutional remedies through the *amparo* proceeding. It argues that said judgment accepted the petition for relief (*amparo*) on the grounds that the constitutional provisions of Articles 147 and 178 led to discrimination and disqualification from running for the public offices of President, Vice President, Mayor and Vice Mayor, and claims that it seeks to lift the ban on reelection for any public office in order to not infringe the right to participate in government.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. The petitioner claims to have exhausted domestic remedies, when the ruling of April 4, 2011, issued by the Supreme Electoral Council and published April 7 that year was issued, rejecting the "challenge of the candidates for president." It notes that there are no remedies available in the Nicaraguan legal system to appeal any rulings of the Supreme Electoral Council and, therefore, he was precluded from appealing any decisions, pursuant to Article 173 of the Constitution. The State, in turn, argues that the filing of the petition was not timely, because the date that must be used to establish exhaustion of domestic remedies is based on the Supreme Court decision of September 30, 2010, settling the *amparo* claim brought by President Ortega.

10. In view of these considerations, as well as the fact that the State has not indicated what remedies should have been pursued to challenge the decision of the Supreme Electoral Council, nor has it disputed that this decision was not appealable, as provided by the Constitution, the Inter-American Commission finds that in the instant petition the exception to the rule of prior exhaustion of domestic remedies set forth in Article 46.2(a) of the American Convention is applicable.

11. Furthermore, with respect to timeliness of the petition, according to the information available in the case file, the ruling of the Supreme Electoral Council, which disallowed the candidacy of the alleged victim, is from April 4 and was published in the Official Gazette on April 7, 2011 and the petition before the Commission was received on October 5, 2011; therefore, in accordance with the exception to Article 46.2(a) of the American Convention, the IACHR concludes that the instant petition was lodged in a timely fashion thus

satisfying the admissibility requirement for timeliness of the filing, as provided for under Article 32.2 of the Rules of Procedure of the Inter-American Commission.

VII. ANALYSIS OF COLORABLE CLAIM TO THE ALLEGED FACTS

12. Based on the considerations of fact and law provided by the parties and the nature of the matter before it, the Commission finds that the alleged inability to appeal the decision of the Electoral Council and the consequent infringement of his political rights to stand as a candidate on an equal basis could tend to establish⁶ violations of the rights enshrined in Articles 8 (right to a fair trial), 23 (right to participate in government), 24 (equal protection) and 25 (judicial protection) of the American Convention, in connection with Articles 1.1 and 2, to the detriment of Mr. Fabio Gadea Mantilla.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 23, 24 and 25 of the American Convention, in connection with Articles 1.1 and 2;

2. To notify the parties of the instant decision; proceed to the examination of the merits of the matter; and publish this decision and include it in the Commission's Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 26th day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva (dissenting opinion), Second Vice President; Francisco José Eguiguren Praeli (dissenting opinion), Joel Hernández García (dissenting opinion), Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁶ In this regard, see, IA Court of HR. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, pars. 254-259.