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CASE 13.727

REPORT ON THE MERITS

FABIO GADEA MANTILLA
NICARAGUA

Approved by the Commission at its session No. 2190 held on October 29, 2020

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I. INTRODUCTION

1. On October 5, 2011, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition filed by Björn Arp (hereinafter “the petitioner”) alleging the international responsibility of the Republic of Nicaragua (hereinafter “the state of Nicaragua,” “the state,” or “Nicaragua”) for violating the human rights enshrined in the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) to the detriment of Fabio Gadea Mantilla, in the context of his political participation as a presidential candidate in the elections of 2011, in which President José Daniel Ortega Saavedra participated.

2. The Commission approved admissibility report No. 179/18 of December 26, 2018.¹ On January 31, 2019, the Commission notified both parties of said report and stated its availability to help them reach a friendly settlement, although the conditions for proceeding with this option were not in place. The parties benefited from the regulatory time-limits to submit their additional observations on the merits. All information received was duly forwarded to the parties.

II. ALLEGATIONS OF THE PARTIES

A. Petitioner

3. As a context to the petition, the petitioner indicated that, at the time of the incidents, in various countries of Latin America, attempts were being made to consolidate the initiative of an alleged “human right to indefinite reelection” of their presidents on the basis of Article 23 of the American Convention. He alleged that the Political Constitution of Nicaragua, in force at the time of the incidents, stipulated, in its Article 147, that no president or vice-president of the republic could run as a candidate for the same office if they had already served two terms. He also stressed that the above-mentioned article also banned immediate reelection to constitutional terms of office. He added that, at the time of the incidents, José Daniel Ortega Saavedra was serving his third term as President of Nicaragua.

4. The petitioner stated that, on March 9, 2011, the alleged victim filed, with the Supreme Electoral Council (*Consejo Supremo Electoral—CSE*) his candidacy to run for president, on behalf of the Independent Liberal Party Alliance (*Alianza del Partido Liberal Independiente*), in Nicaragua’s presidential elections to be held on November 6, 2011. He indicated that both the alleged victim and the other candidates decided to participate in the elections, bearing in mind that the incumbent President Ortega could not lawfully run for reelection pursuant to the provisions of the electoral system in force at the time. Nevertheless, the latter did submit his candidacy for the above-mentioned elections as the candidate for the Sandinista National Liberation Front (*Frente Sandinista de Liberación Nacional—FSLN*), in breach of the ban set forth in Article 147 of Nicaragua’s Political Constitution.

5. The petitioner pointed out that, on April 1, 2011, he filed, along with other candidates, an appeal challenging the registration of President Ortega’s candidacy, arguing that it violated the Constitution’s ban on continuous reelection, as set forth in Article 47 of the Constitution. He stated that, on April 4, 2011, the CSE dismissed the remedy challenging the candidacy by declaring that the presidential candidate José Daniel Ortega Saavedra had been duly registered and appeared in the register for the elections of 2011.

6. The petitioner indicated that the CSE’s ruling was based on a judgment issued by the Constitutional Chamber of the Supreme Court of Justice on October 19, 2009, whereby said court ascertained that restricting the number of presidential terms of office that a person could serve constituted a violation of the right to equality and declared that Article 147(a) and (b) of the Constitution were nonapplicable and ordered the CSE to certify President Ortega and the other citizens who had filed an appeal for protection on constitutional

¹ IACHR. Report No. 179/18. Petition 1360-11. Admissibility. Fabio Gadea Mantilla. Nicaragua, December 26, 2018. In this decision, the Commission declared that the petition was admissible with respect to Articles 8, 23, 24, and 25 of the American Convention in connection with Articles 1.1 and 2 of the same instrument.

grounds (*amparo*) as citizens eligible to participate in the 2011 elections. This ruling was again upheld by the plenary chamber of the Supreme Court of Justice on September 30, 2010.

7. The petitioner stated that the registration of President Ortega, on the basis of the above-mentioned rulings, violated the principle of constitutional supremacy, bearing in mind that said rules prevailed over the constitutional provision referring to the electoral system. He underscored that Article 182 of the Constitution of Nicaragua provides that laws, treaties, orders, or provisions that run counter to or alter the provisions of the Constitution shall have no standing whatsoever. He also established that the Constitution envisages stringent mechanisms whereby its contents can be amended, and the judicial branch of government is not included among the institutions that can alter the Constitution, let alone in response to an appeal for protection on constitutional grounds (*amparo*). He indicated that the above-mentioned judgments cannot have any effect to amend the Constitution, let alone to modify the electoral system provided for in the Constitution.

8. Specifically, in terms of the law, the petitioner argued that the right to a **fair trial, political rights, the right to judicial protection, and the right to adopt provisions under domestic law** had been violated. Regarding **the right to a fair trial**, he argued that said right was violated because the CSE's ruling upholding President Ortega's candidacy is groundless and is confined to indicating that its ruling is based on the judgment of the Supreme Court of Nicaragua of September 30, 2010, without specifying why said judgment should prevail over the express wording of Nicaragua's Constitution.

9. Likewise, in connection with judicial guarantees, he alleged that the Supreme Electoral Court lacked independence and impartiality and pointed out that said institution was subject to political interference. He stated that, after the CSE's ruling, in 2014 the National Assembly of Nicaragua adopted the amendment to Articles 146 and 147 of the Constitution, authorizing indefinite reelection and enacting measures such as the right to rule by decree. He alleged that it was a demonstration of how the executive branch of government was coopting powers. He added that, in 2016, the government abolished opposition political parties, including that of the alleged victim, by replacing the legitimate representatives of said political parties as established by their statutes.

10. The petitioner also contended that **political rights** were violated, in terms of the right to participate on equal terms. Regarding this, he stated that the CSE registered President Ortega's candidacy in breach of Article 147 of the Constitution and that said registration changed the rules governing the electoral process. He added that, by virtue of the principle of equality, there would no reason to grant President Ortega an exceptional status with respect to compliance with the Constitution.

11. The petitioner explained that, according to the inter-American system, the constraints on reelections were aimed at observing the principle of proportionality. Regarding this, he stated that the limits on presidential terms of office are geared to preventing the indefinite consolidation of power of incumbent presidents. He therefore alleged that it is a measure aimed at achieving the general goal of ensuring freedom and equality of opportunities for all citizens.

12. Finally, he argued there was a violation of the **right to judicial protection and the duty of adopting provisions under domestic law**, bearing in mind that there are no effective remedies to challenge the CSE's rulings. Regarding this, he stated that, according to the Constitution, it was not possible to file ordinary or extraordinary remedies against the CSE's rulings. He stressed that, in the case of *Yatama v. Nicaragua*, the Inter-American Court ordered the state to establish an effective legal remedy; nevertheless, Nicaragua has still not adjusted its domestic law accordingly.

B. State

13. As background to the case, the state of Nicaragua pointed out that in Nicaragua democracy is exercised directly, on the basis of a participatory and representative approach, as illustrated in the 19 electoral processes and more than 45 elections leading to the rotation of political and ideological schools of thought to be at the helm of government.

14. Specifically regarding the alleged victim, it stressed that none of his rights were violated and that the Political Constitution guarantees a level playing field for Nicaraguans to exercise their political rights. It states that evidence for this can be found in the alleged victim's registration as a presidential candidate running in the elections of 2011.

15. As for the alleged victim's argument that he registered as a presidential candidate bearing in mind that President Ortega would not be able to participate, it states that this is not true because he was aware of the judgment issued by the Constitutional Chamber of the Supreme Court of Justice of October 19, 2009, upheld by the September 30, 2010 ruling of the Supreme Court of Justice, which declared that Article 147 of the Constitution was nonapplicable and authorized the incumbent President to be reelected. It contended that, regarding this, when the 2011 elections were convened on October 28, 2010, the constitutional provisions on the ban of reelection were devoid of any standing.

16. Furthermore, with respect to the right to reelection, the state alleged that the 1987 Constitution did not provide any norms or principles for the banning of reelection and it was on the basis of the constitutional amendment of 1995 that the ban on reelections was introduced with Article 147. It stated that the incorporation of this provision led to a contradiction in the Constitution as Articles 27, 47, 48, 50, and 51 enshrine the principle of absolute equality before the law for all citizens. It concluded that Article 147 undermined key values and constitutional principles of the Nicaraguan nation and that the judgment of the Supreme Court of Justice of September 30, 2010 observed key principles of international law regarding the equality of all citizens. It states that the provisions of the 1987 Constitution, the Law on Elections, and the principle of equality before the law were the grounds substantiating President Ortega's bid for the presidency in 2011.

17. Furthermore, the state underlined that the assertion made by the petitioner that the elections had been an "act of robbery" is slanderous because the OAS itself, in its electoral observation report, had recognized the results, and therefore the petitioner must prove his "rash" statement. It also indicated that there are no material damages to be provided to the alleged victim because the party for which he participated in the 2011 elections, received a sizeable reimbursement, an amount higher than what it had spent for the electoral process.

18. As for the law, it argued that it did not violate **the right to a fair trial**. It alleged that the guarantees of due process of law and access to effective legal remedy are governed by Article 34 of the Constitution and that the judgment of the Constitutional Chamber of the Supreme Court of Justice of October 19, 2009 upheld by the plenary of the Supreme Court of Justice on September 30, 2010 was duly motivated to rule that Article 147 of the Constitution was nonapplicable, as a result of which there was no violation of the right to a fair trial. It added that the candidacy of the alleged victim was duly registered, on the same footing as those of the remaining candidates.

19. The state argued that allowing President Ortega's political participation in the 2011 elections did not violate the alleged victim's **political rights**. Regarding this, it stated that the political rights of Nicaraguan citizens are recognized in the Constitution and the only limitation that can be imposed is based on age. It added that it is the state's obligation to remove obstacles that in fact prevent equality among Nicaraguans and their participation in the country's political, economic, and social life. It concluded that it is the sovereign people who decide the country's destiny, and they cannot be prevented from electing the persons they deem most suitable to the office.

20. It alleged that the right to reelection as provided for in Nicaragua is consistent with the American Convention and the inter-American system and that it is also recognized in the jurisprudence and constitutional norms of countries such as Costa Rica and Honduras. It also added that the information provided by the alleged victim about the state's supposed abolition of opposition political parties for the 2016 elections is untrue. It asserted that, in the general elections of 2011, there were 18 political parties participating and that the political party for which the alleged victim was running as a candidate in the 2011 elections has been exercising its legal status fully and has participated in all elections convened since 1990.

21. Regarding the **right to judicial protection** and the **duty to adopt provisions under domestic law**, the state presented diverging positions at different times. First, it stated that the alleged victim had access to available remedies for appealing the ruling of the CSE which registered President Ortega's candidacy. It also stated that, when the Supreme Court of Justice's judgments were being issued, the appeal for clarification was available.

22. Second, it stated that electoral law stipulates that, in electoral matters, appeals are not admissible because an electoral process needs to guarantee certainty and security. It also stated that, under domestic law, constitutional and legal provisions have been adopted to guarantee the right of citizens to judicial protection.

III. DETERMINATIONS OF FACT

A. General context of the concentration of power and undermining of the rule of law in Nicaragua

23. The IACHR has documented, through its monitoring mechanisms, a general context of concentration of power in the hands of the executive branch and the undermining of democratic institutions in Nicaragua, abetted by the apportionment of the branches of government to members of the administration's political party, as well as the lack of independence and impartiality of certain monitoring bodies. In that respect, on repeated occasions the IACHR has received complaints filed by civil society on how appointments to various government institutions—the Supreme Court of Justice (CSJ), the Office of the Comptroller General, the Supreme Electoral Council (CSE), and the Office of the Attorney General of the Republic—have been given to members of the ruling political party and how this has undermined the people's exercise of their political rights, right to freedom of association and assembly, right to freedom of expression, and right to the circulation of ideas, (...).² According to the Interdisciplinary Group of Independent Experts appointed by the IACHR, this process of undermining democratic institutions can be identified as starting at the end of the nineties and has intensified since 2007 when José Daniel Ortega Saavedra came into office as President of the Republic.³

24. As for the Office of the United Nations High Commissioner for Human Rights, it has underscored that, since the presidential elections of 2006, the institutional framework has been undermined by the concentration of the branches of government in the hands of the ruling party. This has contributed to reduced civic space, the lack of independence of the judiciary and the national human rights institution (Office of the Human Rights Defender), recurrent allegations of corruption, electoral fraud, and media censorship, and high levels of impunity (...).⁴

25. Specifically, regarding the absence of independence the judicial branch, the IACHR has contended that:

[T]he state of Nicaragua does not have an independent judicial branch of government because of appointment procedures tainted by factors such as nepotism or influence and manipulation by the government's political party. Since 2000, the Supreme Court of Justice was composed of 16 justices and 16 alternate judges were appointed to the court, which made it possible to distribute the seats to the country's two principal political forces. In 2010, President Daniel Ortega approved Presidential Decree 03/2010 that made it possible for the judges of the Supreme Court of Justice to keep their seats although their terms of office had expired. In this context, in 2013, the then United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut, reported the huge political leverage involved in appointing the judges of the Supreme Court of Justice, and in particular because the government's political majority in the National Assembly made it possible to appoint state officials without the endorsement of any other political representation. By 2014, the FSLN and judges close to the President held three of the four chambers of the judicial branch of government.⁵

² IACHR, Annual Report 2018, chapter IV. B Nicaragua. General Human Rights Situation since April 2018. Concentration of power and undermining the rule of law, para. 27.

³ Interdisciplinary Group of Independent Experts of the Inter-American Commission on Human Rights, for Nicaragua (GIEI Nicaragua), Final Report 2018, p. 43.

⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), Human rights violations and abuses in the context of protests in Nicaragua, 18 April-18 August 2018, para. 8.

⁵ IACHR, Annual Report 2018, chapter IV. B Nicaragua. General Human Rights Situation since April 2018. Concentration of power and undermining the rule of law, para. 99.

26. Likewise, the IACHR *Special Rapporteurship for Freedom of Expression* has stated that in Nicaragua “a duopoly has been consolidated in the media, controlling the majority of television and radio broadcasting media. In fact, most audiovisual media is under the political control of the President’s family or of one businessperson with ties to the government. As a result, these media are highly biased and their journalists encounter obstacles when they wish to carry out their work independently (...).”⁶ For example, in its Annual Report for 2011, the Special Rapporteurship underscored that it:

has received information indicating that multiple presidential broadcasts have continued to be employed on all cable television channels to transmit messages that even include partisan elements. Such actions are carried out based on administrative order 009-2010 of the Nicaraguan Institute for Telecommunications and Postal Service (TELCOR), according to which subscriber-based television channels must make their services and facilities available to the Government of the Republic during times of national emergency. According to reports, last January 10 several cable television channels that did not link their signals up to the presidential speech were reportedly blocked when President Ortega issued his Government Report in a public square. In addition, on July 19, open channels and cable channels were forced to air the official celebration of the 32nd anniversary of the triumph of the Sandinista revolution.⁷

B. Relevant regulatory framework and background to the instant case

27. The Commission recalls that, at the time of the incidents, the Political Constitution of Nicaragua of 1987 had the following provisions in connection with the parts that are relevant for the instant case:

ARTICLE 47. To be elected for office, the candidates for President and Vice President of the Republic must obtain at least forty-five percent of the valid votes, as relative majority. (...) If no candidate obtains the required percentage, a second election shall be held for the candidates who obtained first and second places, and the candidate with the highest number of votes shall be elected.

In order to be eligible as President or Vice President it is necessary:

1. To be a national of Nicaragua.
2. To fully enjoy one’s civil and political rights.
3. To be at least twenty-five years old
4. To reside continuously in the country for four years prior to the election; this does not apply to persons who during the aforementioned period were engaged in diplomatic missions, were working in international organizations or were pursuing studies overseas.

The following persons may not run for President or Vice President of the Republic:

- a. 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.

ARTICLE 173. The Supreme Electoral Council has the following functions:

(...) No appeal, ordinary or extraordinary, shall lie against the decisions taken by the Supreme Council on electoral matters.⁸

28. According to information in the public domain, President José Daniel Ortega Saavedra served as President under the constitutional system between 1985 and 1990 and between 2006 and 2011, and has been holding the office of President until now.

29. On October 15, 2009, President Ortega and several other Nicaraguans who held public office as municipal mayors expressly requested the Supreme Electoral Council “to apply the constitutional principles of unconditional equality of all Nicaraguan citizens, as set forth in the preamble and Articles 27, 47, 48, 50, and 51

⁶ IACHR, Annual Report 2018, chapter IV. B Nicaragua. General Human Rights Situation since April 2018. Concentration of power and undermining the rule of law, para. 114.

⁷ IACHR, Annual Report of the Inter-American Commission on Human Rights 2011, OEA/Ser.L/V/II.Doc.69, December 30, 2011, para. 450.

⁸ Political Constitution of the Republic of Nicaragua of 1987, Articles 147, 173, and 178.

of the Constitution, to participate in the nation's political affairs, without any limitations other than those stipulated in terms of age and suspension of civil rights on the basis of final court judgments; they also requested the NONAPPLICABILITY of the electoral ban on running for the office of President and Vice-President, Municipal Mayor and Deputy Mayor.”⁹

30. On October 16, 2009, the Supreme Electoral Council dismissed this petition, on the basis of the following terms:

The Supreme Electoral Council has the following duties: 1. Organize and conduct elections, plebiscites, and referendums that are called in accordance with the provisions of the Constitution and law; ... 4. Apply constitutional and legal provisions referring to electoral processes. Also monitor observance of said provisions by candidates participating in general and municipal elections. 14. All others given to it by the Constitution and law. So that, although there might have been a possible constitutional contradiction between the constitutional principle of unconditional equality as set forth in Articles 27, 48, 50, and 51 of the Constitution and the principle of the constitutional reelection ban preventing the President and Vice-President of the Republic, Municipal Mayors and Deputy Mayors from participating consecutively as candidates in electoral processes to be held in the elections of November 2011 and 2012, IT DOES NOT PERTAIN TO THE PRESENT SUPREME ELECTORAL COUNCIL TO RESOLVE SAID CONTRADICTION.”¹⁰

31. By virtue of the above, President Ortega and other persons filed an appeal for protection on constitutional grounds (*amparo*) with the Constitutional Chamber of the Supreme Court of Justice of Nicaragua, arguing that said ruling constitutes a “true and absolute political ban, as it prevents them from participating actively in future national and municipal elections. That said administrative ruling breaches, harms, and undermines the fundamental and supreme principles underpinning the Political Constitution itself.”¹¹

32. On October 19, 2009, the above-mentioned Chamber issued judgment No. 504 whereby it ruled that the appeal was admissible and judged that Article 147 of the Constitution was nonapplicable. The Chamber reasoned that:

According to the Political Constitution, namely Article 173 *in fine* and Article 1(a) *in fine*, there can be no remedy, either ordinary or extraordinary, brought against the rulings issued by the Supreme Electoral Council in this matter, because it is the highest court governing elections in the country and because of that it has exclusive competence in electoral matters (Judgments No. 1-1997, 133-1999, and 151-1999 of the Constitutional Chamber), although this is not the case in administrative matters where said rulings are liable to jurisdictional monitoring (see judgment of the Supreme Court of Justice No. 29-2007, at 4:50 p.m., of August 13, 2007, Cons. III, “unnamed” appeal on the conflict of competence filed by the engineer René Núñez Téllez, Speaker of the National Assembly v. Supreme Electoral Council).

(...) Now, said public offices elected by direct suffrage show evidence of INEQUALITY REGARDING EQUALITY OF TERMS, only with reference to the President and Vice-President of the Republic and Municipal Mayors and Deputy Mayors, because said inequality regarding equality of terms consists of: “The right to run for the same public office consecutively in subsequent elections.” For the President and Vice-President: THEY ARE NOT ALLOWED (Article 147 of the Constitution); Mayor and Deputy Mayor: THEY ARE NOT ALLOWED (Article 178 of the Constitution); Congresspersons of the National Assembly: they are allowed; Representatives to PARLACEN: they are allowed; and congresspersons in Autonomous Regional Councils (RAAS and RAAN): they are allowed. As a result, the constitutional provisions in which this electoral ban appears is only for the President and Vice-President and for Mayors and Deputy Mayors and constitutes unfair treatment, when it is clear that there is equality of terms, running counter to the principle of equality and the principle of proportionality, which recognizes that the only limitation is the one indicated in the dogmatic part by the Original Constitutional Convention, that is, age and a criminal conviction or civil ban.

(...) As a result, the present Constitutional Chamber hereby declares nonapplicability, as of notification of the present judgment, of Article 47 (of the Constitution), solely in that part that literally reads in its entirety: “The following persons may not run for President or Vice President of the Republic: a. Persons who have exercised the

⁹ Judgment No. 504 of the Constitutional Chamber of the Supreme Court of Justice, October 19, 2009.

¹⁰ Judgment No. 504 of the Constitutional Chamber of the Supreme Court of Justice, October 19, 2009.

¹¹ Judgment No. 504 of the Constitutional Chamber of the Supreme Court of Justice, October 19, 2009.

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 (...).

(...) The Supreme Electoral Council is instructed to deliver a certification to those citizens who appeared here, through the attorney Eduardo José Mejía Bermúdez, as citizens eligible to exercise their political, constitutional, and electoral rights in order to participate in the elections to be held in 2011 and 2012, in the same public offices in which they are currently serving, as candidates for President, Vice-President, Mayor, and Deputy Mayor, respectively, without any further requirements or conditions other than those pertaining to any other citizens on the basis of age or impediment on the exercise of citizen rights because of a final criminal judgment or a civil ban, pursuant to Article 47 of the Constitution, because according to the above-mentioned principle of unconditional equality of all Nicaraguan citizens: "It is the state's obligation to remove all *de facto* obstacles hampering equality among Nicaraguans and their effective participation in the country's political, economic, and social life." (Article 48 of the Constitution). III. Because the constitutional provisions appearing in Articles 147 and 178 of the Constitution, amended by the Derived Constitutional Convention on the basis of Article 13 of Law No. 192, the Law on Partial Reform of the Political Constitution of the Republic of Nicaragua, published on July 4, 1995, in the New Gazette, creates discrimination and an electoral ban for the President and Vice-President, as well as Mayors and Deputy Mayors, therefore clashing or producing a constitutional contradiction (...).¹²

33. On January 9, 2010, President Daniel Ortega issued Executive Decree 3-2010 extending the terms of office of all state authorities and institutions, including those of the Supreme Electoral Council, on the basis of the following considerations:

On February 2, 2010 the term of office of the judges of the Supreme Electoral Court expires and on March 7 of the present year regional elections are being held on the Caribbean seaboard of the Republic of Nicaragua; nevertheless the National Assembly has not called for elections pertaining to these public offices, which would make it difficult to declare citizens elected in elections in the northern and southern Caribbean regions of the nation. The electoral branch of government would also be without an executive on the first of June of this year, on the eve of the electoral process of the national elections of 2011."¹³

34. On September 29, 2010, the Constitutional Chamber of the Supreme Court of Justice referred the judgment to the plenary of the Supreme Court so that it would uphold it and as a result produce *erga omnes* effects. On the basis of judgment No. 06 of September 30, 2010, the plenary of the Supreme Court of Justice upheld judgment No. 504 in its entirety and declared the nonapplicability *erga omnes* of the constitutional provisions appearing in Articles 147(a) and (b) and 178. In said ruling, the Supreme Court of Justice set forth the following reasoning:

(...) These provisions create an electoral ban on the president and vice-president of the republic and on municipal mayors and deputy mayors, which is a ban that IS NONAPPLICABLE to the other public offices elected by direct universal suffrage. (...) As a result, the constitutional provisions in which that electoral ban appears are solely for the president and vice-president, mayors and deputy mayors and constitute unequal treatment although it is clear there is equality of terms, running counter to the principle of equality and the principle of proportionality (...)

THE PRESENT SUPREME COURT OF JUSTICE deems and ratifies that both the President of the Republic, Commander José Daniel Ortega Saavedra, and the mayors who came under the protection of Judgment No. 504-2009, are eligible to run for office in national and municipal elections in 2011 and 2012, respectively, as well as in subsequent elections, the former as president of the republic and the latter as mayors, because as established in Judgment No. 504-2009 and 67-2010 and we reiterate the wording here: "The principle of the sovereignty of the people and the right to elect and be elected cannot be altered not even by the Derived Constitutional Convention because it is a substantive and essential human right.

(...) IN THE INSTANT CASE THE UNCONSTITUTIONALITY IS UPHELD as declared in the THEREFORE clause of Judgment No. 504 (...) as a result of which: ERGA OMNES NONAPPLICABILITY IS HEREBY DECLARED for the following constitutional provisions: ARTICLE 147 of the Constitution, solely in that part that literally reads, in its entirety, as follows: "The following persons may not run for President or Vice President of the Republic: a) 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 (...)."¹⁴

¹² Judgment No. 504 of the Constitutional Chamber of the Supreme Court of Justice, October 19, 2009.

¹³ Decreto Ejecutivo No. 3-2010, Executive Decree No. 3-2010 adopted on January 9, 2010 by President Daniel Ortega Saavedra.

¹⁴ Judgment No. 6 of the Supreme Court of Justice of Nicaragua, September 30, 2010.

C. Facts of the instant case

35. The alleged victim, Fabio Gadea Mantilla, is a Nicaraguan journalist and politician who has, on two occasions, been a candidate for a seat in the Central American Parliament and, on one occasion, been a candidate as national congressperson.¹⁵ The facts of the present case involve his political participation as candidate running for president of the Republic of Nicaragua in the elections of 2011.

36. According to available information, on October 28, 2010, the Supreme Electoral Council announced elections for president and vice-president of the republic and other public offices, on the basis of the following terms:

It hereby agrees. First: To convene elections to elect the president and vice-president of the republic, and to elect congresspersons to the National Assembly; 20 congresspersons with a national constituency and 70 congresspersons with a departmental constituency; to elect congresspersons to the Central American Parliament; 20 national congresspersons; to be verified on Sunday the sixth of November in the year two thousand eleven.¹⁶

37. On March 9, 2011, the alleged victim submitted his candidacy to the Supreme Electoral Council to run for the office of president of Nicaragua on behalf of the Independent Liberal Party Alliance in the elections that would be held on November 6, 2011.¹⁷ A few days thereafter, President Ortega submitted his candidacy to the Supreme Electoral Council to run for the same public office in the above-mentioned elections.¹⁸

38. On April 6, 2011, the Supreme Electoral Council published the final list of candidates for president and vice-president of the Republic, on which both the alleged victim's registration of his candidacy for the office of president and President Ortega's candidacy on behalf of the Sandinista National Liberation Front Alliance appeared.¹⁹

39. As reported by the petitioner, on April 1, 2011, the alleged victims and various other candidates filed an "appeal to disqualify presidential candidates" regarding the registration of President Ortega's candidacy to run for president,²⁰ arguing that it was registered in flagrant breach of the express wording of Article 147 of the Constitution and that both judgment No. 504 of the Constitutional Chamber of the Supreme Court of Justice and judgment No. 6 issued by the plenary of the Supreme Court of Justice were unlawful.²¹

40. On April 4, 2011, the Supreme Electoral Council dismissed the appeal that had been filed. Regarding this, it argued that:

Considering that it is known that the present Supreme Electoral Council, on the nineteenth of October in the year two thousand nine at seven o'clock in the evening, by virtue of the powers granted to it by the Constitution and the Law on Elections, resolved to ensure compliance with the judgment of the Supreme Court of Justice described in the preamble clauses, it hereby decides, in each and every part, to declare the *erga omnes* nonapplicability of the constitutional provision appearing in Article 147 of the Constitution with reference to subparagraphs (a) and (b).

Therefore

¹⁵ See brief of May 23, 2019 from the state.

¹⁶ Agreement of the Supreme Electoral Council of October 28, 2010 to convene elections. Annex 1 to the brief of observations on the merits of February 24, 2020, from the state.

¹⁷ Annex 1. CSE form to register candidates standing for president and vice-president of the Republic in the general elections of November 2011. Annex 2 to the brief submitted by the state on November 8, 2017.

¹⁸ Brief of observations on the merits submitted by the petitioner on July 14, 2019, p. 6.

¹⁹ Annex 1. CSE form to register candidates standing for president and vice-president of the Republic in the general elections of November 2011. Annex 3 to the brief of November 8, 2017 submitted by the state re de 2011.

²⁰ Brief of observations on the merits submitted by the petitioner on July 14, 2019, p. 6

²¹ Annex 2. Resolution of the Supreme Electoral Council of Nicaragua, dated April 4, 2011. Annex 2 to the brief submitted by the petitioner on April 5, 2011.

(...) On the basis of judgment number six, at six o'clock in the evening of the thirtieth of September in the year two thousand ten, issued by the plenary of the Supreme Court of Justice, it is hereby ruled that, **First:** The legal challenges filed by the legal representatives of the political organizations Independent Liberal Party Alliance and the Nicaraguan Liberal Alliance Party are inadmissible, insofar as the decisions and rulings issued by the supreme court of justice of the Republic of Nicaragua are binding and irrevocable. **Second:** As a result, the citizen José Ortega Saavedra's candidacy to the presidency of the republic on behalf of the political organization of the Sandinista National Liberation Front Alliance is hereby duly filed and registered, because he is a citizen eligible to exercise political, constitutional, and electoral rights in order to participate in the election to be held on the sixth of November in the year two thousand eleven. **Third:** Likewise, writs filed past the time-limits are deemed to not have been submitted, for which purpose the Secretariat of Proceedings is authorized to send the correspondence referring to the subject. **Fourth:** The present ruling deals with an electoral matter and is not subject to any appeal and comes into force as of the present date without detriment to its subsequent publication.²²

41. As argued by the petitioner, against this ruling there was no remedy that would be deemed admissible, in view of paragraph 15 of Article 173 of the Constitution, which provides that "the rulings of the Supreme Electoral Council shall not be subject to any appeal, whether ordinary or extraordinary."²³

42. On April 5, 2011, the Supreme Electoral Council published the final list of candidates running for president and vice-president of the Republic in which candidates from five political organizations appeared, including that of President José Daniel Ortega Saavedra on behalf of the Sandinista National Liberation Front Alliance and the alleged victim on behalf of the Independent Liberal Party Alliance.²⁴

43. On November 6, 2011, the presidential elections were held in Nicaragua as a result of which President Ortega was reelected with 62.64% of the ballots, with the alleged victim ranking second. As a result of this ranking, the alleged victim, pursuant to Nicaraguan law, was appointed congressperson of the Republic of Nicaragua.²⁵

D. Report on irregularities in the 2011 elections

44. Various bodies involved in observing Nicaragua's election in 2011 called attention to structural problems in the electoral process. In particular, the European Union deemed the process as lacking neutrality and transparency, since it was managed by an "insufficiently independent and unbiased electoral council that did not comply with its duties regarding transparency and collaboration with all parties involved."²⁶

45. Regarding this, the European Union's Election Observation Mission stated:

The electoral process (...) has been directed by an insufficiently independent and unbiased electoral council that did not comply with its duties regarding transparency and collaboration with all parties involved. The double standard used to accredit the national observation groups, the difficulties experienced by the opposition to accredit their auditors or the absolute power held in the polling stations of one of the coordinators appointed at the last minute, an option not envisaged by law and not subject to oversight by the parties, constitute serious limitations on transparency and notably reduce the capacity to verify the key stages of the process, including the tally of results in the vote tabulation centers.

The CSE has shown great capacity for the management of logistics and organization, which was evident in the process of packing and distributing the balloting materials. Nevertheless, its neutrality and independence have been questioned from the start of the current electoral process, to a large extent because, by virtue of a presidential decree that broadened its mandate in view of the National Assembly's failure to renew the CSE, as the seven magistrates who make up the council are the same who managed the municipal elections of 2008. This extension of their term of office, which is in accordance with the Constitution, increased the perception that the

²² Annex 2. Resolution of the Supreme Electoral Council of Nicaragua of April 4, 2011. Annex 2 to the brief submitted by the petitioner on April 5, 2011.

²³ Brief of observations submitted by the petitioner on March 20, 2018.

²⁴ Annex 3. Certification of the Supreme Electoral Council of April 5, 2011. Annex to the brief of observations submitted by the state on November 8, 2017.

²⁵ Annex 4. Certification of November 15, 2011. Annex to the brief of observations submitted by the state on November 7, 2017.

²⁶ IACHR, Interdisciplinary Group of Independent Experts (GIEI). Nicaragua: Report on the Violence Events between April 18 and May 30, 2018. V. Background and context, pp. 44-45.

CSE is aligned with the ruling party. The composition of the CSE at the lower echelons of the institution, whose limited pluralism has been observed by the EU EOM [European Union's Election Observation Mission], has contributed to increasing this perception.²⁷

46. Said Mission also referred to the misuse of public funds for the campaign of the November 2011 election. Regarding this, it stressed that:

The EU EOM observed a widespread and systematic use of public resources for partisan campaign purposes, a practice prohibited by article 107 of the Law on Elections. In most cases, this abuse was carried out by the FSLN, but the PLC was also observed relying on such practices in Nueva Segovia, RAAS and Estelí.

Practices of misuse of public resources were similar throughout the country and above all consisted of making use of public buildings or institutions, and state-owned vehicles. Many of these campaign events involved the mobilisation of public-sector workers and even schoolchildren during class hours. By using the inauguration of public works or the distribution of public goods or services for partisan campaign purposes, the government blurred the lines between its official duties and the FSLN campaign, a practice that falls beneath international standards for democratic elections. Furthermore, the Citizens Power Councils (*Consejos del Poder Ciudadano—CPCs*), created by presidential decree, undertook significant activities during the FSLN campaign, organizing events with voters for which public goods and services were used.

Unequal access to funds was evident throughout the campaign. This is largely because political party financing is virtually unregulated in Nicaragua: there are no limits on how much may be donated or spent and very few restrictions regarding funding sources.²⁸

47. Furthermore, the European Union Mission underscored that “the monitoring also reveals that many of the norms for the media in electoral campaigns, among which those aimed at guaranteeing equal opportunities for the candidates, have been violated without any consequences for the offenders.” In particular, it stated that:

Article 90 of the Law on Elections, which sets limits for election campaigns in the media, was unanimously ignored by the parties, probably because the time-limits are flagrantly brief: at most three minutes on each television station per day, four and a half minutes on each radio station, and less than half a page in print media for each candidate daily. Regarding this failure to observe the limits, which the EU EOM had already highlighted in 2006, the FSLN is noteworthy as it had more campaigning airtime than all of its rivals put together in almost all the monitored media. This was the case on the television channels 2, 4, 6 and 8, as well as Radio Ya and Radio Nicaragua. The only exceptions were Radio Corporación, where 94% of all campaigning airtime that was examined was granted to PL; Canal 12, where opposition parties together accounted for 55% of campaigning airtime; and Canal 14 and Radio Universidad, which have no airtime for campaigning, at least during monitoring hours.

In addition, state-run media (television Canal 6 and Radio Nicaragua) have not provided the stipulated 30 minutes of airtime on TV and 45 minutes of radio broadcasting which, according to the Law on Elections, the CSE must guarantee to all parties submitting candidates (...).²⁹

48. Regarding the 2011 elections, the Carter Center also indicated the following:

The legal framework for the elections was marred by two important issues. First, the presidential candidacy of incumbent Daniel Ortega was inadmissible under the 1987 constitution because he had already served the maximum two terms (1984-1990; 2006- 2011), and because a reform passed in 1995 banned immediate re-election of the president. The Supreme Court of Justice (CSJ) had ruled in 2009 that these restrictions violated another constitutional principle of individual equality (and therefore the right of Daniel Ortega to run for office), but the partisan make-up of the court and procedural irregularities in that decision called its validity into question. Second, the Supreme Electoral Council (CSE) was composed of members who had overstayed their terms of office, having been authorized to do so by a questionable presidential decree in 2010. The CSE's partisan composition and the dominance of the FSLN within the technical and administrative structure of the electoral branch were

²⁷ European Union, Election Observation Mission Nicaragua 2011. Presidential, legislative and Parlacen elections. Preliminary Statement, Managua, 8 November 2011. A relatively calm election day after a process lacking neutrality and transparency. Main conclusions, p. 4.

²⁸ European Union, Election Observation Mission Nicaragua 2011. Presidential, legislative and Parlacen elections. Preliminary statement, Managua, 8 November 2011. A relatively calm election day after a process lacking neutrality and transparency. Election campaign, p. 6.

²⁹ European Union, Election Observation Mission Nicaragua 2011. Presidential, legislative and Parlacen elections. Preliminary Statement, Managua, 8 November 2011. A relatively calm election day after a process lacking neutrality and transparency. Media, p. 7.

additional cause for concern, especially given that the same CSE magistrates had presided over municipal elections in 2008 in which opposition parties and domestic organizations presented significant evidence of fraud to the benefit of the governing party.³⁰

49. As for the OAS Electoral Accompaniment Mission, it underscored the following:

[T]he regulatory framework in which the elections took place contains procedures beset with structural flaws that have existed since 1996. Mention was made of this structure and its flaws in the 2006 OAS Electoral Observation Mission Report. (...)

[A] faction from one political party filed a motion with the courts. There were motions for constitutional relief (amparo) filed by three factions of the Independent Liberal Party (PLI). None of these motions had been settled as of the date of this report. In this a context, we hope that the Supreme Court of Justice rules on said matter as soon as possible, and puts an end to the current state of uncertainty. If the Court were to issue a decision preventing a deputy elect from taking office after his or her nomination had been accepted by the Supreme Electoral Council, then that would amount to a serious breach of the will of the people. (...)

As a fifth aspect, the rule in place establishing the party composition of polling stations is in response to a political reality of the past and is currently not justified. The current composition only guarantees the dominance of board members from two political parties and creates a lesser presence for other political forces. The disadvantage of this is that it distorts the role of board members, who in practice end up assuming control functions that are specific to party agents. In practice, this kind of rule left the Independent Liberal Party with almost no presence at the polling stations.³¹

IV. DETERMINATIONS OF LAW

A. Political rights³²

1. General standards on the right to political participation on equal terms

50. The Commission recalls that “representative democracy is one of the pillars of the system that the Convention forms part of, and constitutes a principle reaffirmed by the States of the Americas in the OAS Charter”³³ as an indispensable condition for the stability, peace, and development of the region.³⁴ The IACHR has stressed that only by means of the effective exercise of democracy can the observance of human rights be fully guaranteed.³⁵

51. The Inter-American Democratic Charter stipulates that: “Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”³⁶

52. Article 23 of the American Convention recognizes political rights and protects political participation through the right to active suffrage, as well as the right to passive suffrage, the latter understood as running for

³⁰ The Carter Center, The November 2011 Elections in Nicaragua: A Study Mission Report, p. 4.

³¹ OAS, Electoral Accompaniment Mission Report, General Elections in the Republic of Nicaragua, November 6, 2011, p. 10.

³² Article 23 of the American Convention provides that: 1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

³³ I/A Court H.R. Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 5, 2015. Series C No. 302, para. 149.

³⁴ Preamble, OAS Charter.

³⁵ IACHR, Annual Report of the Inter-American Commission on Human Rights 1985-1986, OEA/Ser. L/V/II, 68. Doc. 8, Rev. 1, September 26, 1986, and Report on the Right to Truth in the Americas, OEA/Ser.L/V/II. 152, August 13, 2014.

³⁶ Inter-American Democratic Charter, Article 3.

publicly elected office, as well as the right to equal access to a country's public service.³⁷ This article not only provides that its beneficiaries must enjoy rights, it also adds the word opportunities. The latter entails the obligation of guaranteeing, on the basis of positive measures, that every person who is formally a holder of political rights must enjoy real opportunities for exercising them.³⁸

53. The Inter-American Court has stressed that instituting and applying requirements for exercising political rights is not, *per se*, an undue restriction of political rights. These rights are not absolute and may be subject to limitations. Their regulation should respect the principles of legality, legitimate purpose, suitability, necessity, and proportionality.³⁹ In particular, the Inter-American Court has emphasized that:

The right and opportunity to vote and to be elected embodied in Article 23(1)(b) of the American Convention is exercised regularly in genuine periodic elections by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters. Over and above these characteristics of the electoral process (genuine periodic elections) and of the principles of the suffrage (universal, equal, secret, that reflect the free expression of the will of the people), the American Convention does not establish a specific mechanism or a particular electoral system by which the right to vote and to be elected must be exercised (...). The Convention merely establishes certain standards within which the States legitimately may and must regulate political rights, provided that these regulations comply with the requirements of legality, are designed to fulfill a legitimate purpose, and are necessary and proportionate; that is, they are reasonable according to the principles of representative democracy.

Lastly, the right to have access to public office in general conditions of equality protects access to a direct form of participation in the design, development and execution of State policies through public office. It is understood that these general conditions of equality refer to both access to public office by popular election, and to appointment or designation.⁴⁰

54. The Commission has recognized that “the exercise of political rights is an essential element of representative democracy” and has stated the need to hold “authentic and free” elections, indicating that there is “a direct link between this electoral mechanism and the system of representative democracy.” According to the Commission, as part of the authenticity of the elections referred to in Article 23(2) of the American Convention, in the positive sense, there must be consistency between the will of the voters and the result of the election, but “[i]n the negative sense, the characteristic implies an absence of coercion which distorts the will of the citizens.”⁴¹

55. Specifically the Commission has shown that the “authenticity of the elections covers two different categories of phenomena”:⁴² on the one hand, those referring to the general conditions in which the electoral process is carried out and, on the other hand, phenomena linked to the legal and institutional system that organizes elections and which implements activities linked to the electoral act, that is, everything related in an immediate and direct way to the casting of the vote.⁴³

56. As to the “general conditions in which the electoral contest takes place,” the Commission has indicated that from that characteristic, it can be deduced that:

³⁷ IACHR, Report No. 92/09, Case 12.668, Merits, Leopoldo López Mendoza, Venezuela, August 8, 2009, para. 64.

³⁸ I/A Court H.R. Case of Castañeda Gutman v. United Mexican States. Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008. Series C no. 184, para. 145.

³⁹ Among others, see I/A Court H.R. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, para. 206.

⁴⁰ I/A Court H.R. Case of Castañeda Gutman v. United Mexican States. Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008. Series C No. 184, paras. 149-150. See also IACHR, Report on Cuba 1983, Chapter II, paras. 2 and 3.

⁴¹ IACHR, Resolution No. 01/90, Cases 9768, 9780, and 9820 (Mexico), September 29, 1990, paras. 43, 44, and 47.

⁴² IACHR, Resolution No. 01/90, Cases 9768, 9780, and 9820 (Mexico), September 29, 1990, para. 48.

⁴³ IACHR, Resolution No. 01/90 Cases 9768, 9780, and 9820 (Mexico), September 29, 1990, para. 48.

[T]hey must allow the different political groups to participate in the electoral process under equal conditions, that is, that they all have similar basic conditions for conducting their campaign. In negative terms, this characteristic implies an absence of direct coercion of undue advantages for one of the participants in the electoral contest.⁴⁴

57. As for the Inter-American Court, it has stated that:

[O]pposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society. Hence, in a democratic society States must guarantee the effective participation of opposition individuals, groups and political parties by means of appropriate laws, regulations and practices that enable them to have real and effective access to the different deliberative mechanisms on equal terms, but also by the adoption of the required measures to guarantee its full exercise, taking into consideration the situation of vulnerability of the members of some social groups or sectors.⁴⁵

58. The Inter-American Court has also indicated that: “It is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination” and that “instituting and applying requirements for exercising political rights is not, *per se*, an undue restriction of political rights.”⁴⁶ Their regulation must observe the principles of legality, be designed to fulfill a legitimate purpose, and be necessary and proportionate, that is, they must be reasonable according to the principles of representative democracy.⁴⁷

59. On the basis of the above, the Commission understands that, for elections to meet the requirements laid out in Article 23 of the American Convention, it is essential for states to adopt measures that make it possible to ensure general conditions that are adequate for the electoral contest, as well as during the organization of the election and its implementation. The Commission considers that this encompasses both the state’s adoption of certain positive measures and its abstention from favoring any candidate or political group. Likewise, as indicated, the Commission recognizes that, precisely when fulfilling the obligations that make it possible to guarantee the authenticity of elections, not only is the state fulfilling the obligations stemming from political rights on the basis of an active approach, but also from a passive approach, by ensuring equity in the electoral contest, it contributes to the observance of the right to participate on an equal footing.

2. Factors linked to possible advantages in general conditions, as well as the election’s organization and implementation

60. The Commission, in several of its rulings, has referred to circumstances in which both the general conditions of an electoral process and the aspects linked to its organization and implementation lead to undue advantages for participants and can undermine the equity of the electoral contest.

61. Thus, the Commission has referred to circumstances that include the fear or persecution of opposition leaders, the absence of an electoral registry or the registration of a very low number of voters, the declaration of a state of emergency during the elections or very close to the holding of the elections, practical disadvantages in the access of opposition sectors to media or direct or indirect control of the media, and the use of public resources to favor a candidacy.⁴⁸

⁴⁴IACHR, Resolution No. 01/90, Cases 9768, 9780, and 9820 (Mexico), September 29, 1990, para. 49. In this regard, see Annual Report of the Inter-American Commission on Human Rights 1990-1991, III. Human rights, political rights, and representative democracy in the inter-American system, OEA/Ser.L/V/II.79. rev.1 Doc. 12, February 22, 1991. See also Report 30/93, Case 10.804, José Efraín Ríos Montt, Guatemala, October 12, 1993.

⁴⁵I/A Court H.R. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of May 26, 2010. Series C no. 213, para. 173.

⁴⁶I/A Court H.R. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, paras. 195 and 206.

⁴⁷I/A Court H.R. Case of Castañeda Gutman v. United Mexican States. Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008. Series C No. 184, para. 149.

⁴⁸IACHR, Resolution No. 01/90, Cases 9768, 9780, and 9820 (Mexico), September 29, 1990. Likewise, Annual Report of the Inter-American Commission on Human Rights 1990-1991, III. Human rights, political rights, and representative democracy in the inter-American system, OEA/Ser.L/V/II.79.rev.1 Doc. 12, February 22, 1991.

62. The Commission has referred to the adverse impact stemming from the dominance of a political party at the helm of government when its leaders interfere decisively in operating the mechanisms for selecting candidates to hold elected office or when, in general, the organization in charge of conducting elections does not provide guarantees of impartiality of the bodies in charge of implementing the actions required to hold an election. In this context, the Commission has also ruled about how a government might use resources enabling it to transmit messages for its benefit and to constrain the possibility of opponents to transmit their own messages. In addition, the Commission has referred to the mandatory participation of government employees in marches, as well as acts of violence, against the opposition and to intimidate voters. The Commission has also taken into account those aspects related to establishing polling stations, the electoral court and its powers, as well as the availability of voting ballots that are understandable and devoid of bias swaying the voter.⁴⁹

63. In one case, the IACHR also examined the legal status of senators-for-life and appointed senators that was in force in Chile, in the light of the principles of representative democracy, and highlighted the following:

65. (...) [I]n the case of the senators with life tenure, while this institution has been incorporated in some member states (see, for example, Article 148 of the Venezuelan Constitution and Article 189 of the Paraguayan Constitution), in Chile, the institution of having senate posts with life tenure was imposed by a *de facto* regime, which was tantamount to self-designation of the head-of-state of Chile at the time, General Augusto Pinochet. In effect, while all the other countries of the Americas that have this institution provide that the position can only be occupied by former presidents who have been democratically elected—with which one could accept that there is an indirect sort of popular legitimation—in Chile it has been applied to give a Senate seat to a former head-of-state not elected by fair, free, secret and universal suffrage, in accordance with universally accepted standards. In this sense, it is contradictory that the first democratically elected president in Chile under the 1980 Constitution, Patricio Aylwin, was not able to join the Senate as a senator-for-life, since he did not fall within the Constitutional requirement of having exercised power for six continuous years, while General Augusto Pinochet, who was head-of-state during a *de facto* regime without any popular election, was made a senator-for-life under this provision.

66. This situation, which, moreover, is foreign to Chile's democratic constitutional tradition, cannot be legitimated by the argument that the institution of designated senators or senators-for-life was approved by the majority of the Chilean people in the plebiscite approving the 1980 Constitution, for, apart from what was noted above on the lack of guarantees in that election—the majority cannot diminish or eliminate a right as fundamental as the opportunity to effectively elect their representatives to the legislative branch. There is a limit on the limitations that majorities can place on those rights of minorities that are protected by human rights. Otherwise, the majorities would seriously endanger the rights of the minorities, in open defiance of the democratic rule of law. In this respect, the decision of the U.S. Supreme Court in which it declared the unconstitutionality of a referendum in the state of Colorado, in which the voters had approved a federal plan, instead of the rule of “one person one vote” is very enlightening. That court ratified the principle according to which: “An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate.”

67. In the instant case, as petitioners have argued, the institution of designated senators compromises the very legitimacy of the rule of law, on taking from the sovereign people the ability to elect a significant number (20.83% to date) of its representatives. This situation notably diminishes the likelihood of the necessary representativity between the people and their representatives. This Commission considers that in practice the effects of this institution constitute an authoritarian enclave that has prevented culmination of the transition to full representative democracy.

97. The Commission understands that the above-cited rights to political equality prohibit the states parties to the American Convention from giving unreasonable distinct or unequal treatment to their citizens in the election of their representatives. Therefore, these rights imply that the states parties cannot reduce or water down the effective opportunity for the citizens to elect their representatives, giving greater weight to the votes cast by certain members of society, even if they are representatives of the people.⁵⁰

64. The Commission observes that several international organizations, as well as domestic courts, have referred to circumstances in which the concentration or use of power by an incumbent administration in an

⁴⁹ IACHR, Resolution No. 01/90, Cases 9768, 9780 and 9820 (Mexico), September 29, 1990. Likewise, Annual Report of the Inter-American Commission on Human Rights 1990-1991, III. Human rights, political rights, and representative democracy in the inter-American system, OEA/Ser.L/V/II.79.rev.1 Doc. 12, February 22, 1991.

⁵⁰ IACHR, Report 137/99, Case 11.863, Andrés Aylwin Azócar et al., Chile, December 27, 1999.

election may provide advantages that undermine the right of other candidates to participate on equal terms in an electoral race.

65. For example, in the case of *Gitonas and others v. Greece*, the *European Court of Human Rights* ruled that the annulment of the election of five congresspersons for having held public office that established grounds for disqualification for more than three months in the three years preceding the elections did not breach Article 3 of Protocol No. 1 of the European Convention on Human Rights, which refers to the right to free elections. The Court stated as follows:

The Court notes that paragraph 3 of Article 56 of the Constitution, which was applied in the applicants' case, establishes grounds for disqualification that are both relative and final in that certain categories of holders of public office—including salaried public servants and members of staff of public-law entities and public undertakings—are precluded from standing for election and being elected in any constituency where they have performed their duties for more than three months in the three years preceding the elections; the disqualification will moreover stand notwithstanding a candidate's prior resignation (...)

Such disqualification, for which equivalent provisions exist in several member States of the Council of Europe, serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many—and sometimes important—decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced

The Court cannot reach any other conclusion; there is nothing in the judgments of the Special Supreme Court to suggest that the annulments were contrary to Greek legislation, arbitrary or disproportionate, or thwarted “the free expression of the opinion of the people in the choice of the legislature.” (...) Consequently, there has been no violation of Article 3 of Protocol No. 1 (P1-3).⁵¹

66. As for the *Constitutional Court of Germany*, it issued a ruling in a case in which the federal state had violated the right of a person to participate in an election on an equal footing. Regarding this, it made the following observations:

(...) Democratic equality means that the ruling majority at a given time and the opposition minority must benefit, on principle, from the same opportunities in the election to secure votes. The guarantee of equity in the electoral contest and campaigns is an indispensable element in the free and open formative process of the people's orientation and will, as enshrined in Basic Law.

The right of political parties to equity in the electoral race was recognized so that it could be exercised during the election. Its application was gradually extended to pre-campaign activities. It is also applicable for electoral campaigns in a democracy of the masses, as long as they are influenced by public authorities (...). That right is breached when state bodies are biased in favor of a political party or candidate in elections or interfere to the detriment to any one of them.

The limit imposed by the Basic Law to public relations activities and electoral campaigning can also be infringed if the federal government's official publications, although they are confined to providing objective information to the citizenry, that is, without identifying their contents or presentation as campaigning measures, serve to benefit their own objective of having a given political party staying in power, because that is done in the pre-election period. This type of information does not appear on the political stage because it can only be viewed in the context of finding consistency in clear situations. The fact that the government is periodically informing the citizenry of its achievements and successes on the basis of public relations activities, has impacts whose consequence also involves favoring political parties that are part of the government. This is not unconstitutional as long as the publication concerned is not directly related to the pre-election period and therefore exerts a limited influence as campaigning in elections. Nevertheless, the federal government would infringe its ban on interfering in the election's outcome by the citizenry for the benefit of a given political party or promoting its continued power, if it were to publish, during the pre-electoral period, material that would, because of its contents or presentation, be banned, especially if it appeared, ostentatiously and in large amounts, in the form of reports relative to the

⁵¹ European Court of Human Rights, Case of *Gitonas and others v. Greece*. Judgment of July 1, 1997.

administration, productivity, and achievements or that it did not prevent its distribution for purposes of campaigning during the elections.

When this limit is overstepped, the probable influence exerted by said publications on shaping the voters' political opinion can no longer be justified by the Constitution, but exactly when the boundary is crossed cannot be ascertained in general. It depends, above all, on the number and scope of the measures, the proximity to the election period, and the intensity of the electoral campaign. The closer the publications are to the start of the "hot phase" of the campaigning, the fewer are the possibilities of dismissing their impacts on the outcome of the election. Because of that, here the government's duty and competence of providing citizens with objective information on past political facts, events, and achievements must be confined, to the extent possible, to supporting the duty to continue shaping the people's will for the elections without state intrusion. The federal government's obligation to refrain from exerting any partisan influence in the elections must ultimately lead to the utmost moderation and the banning of any work of transparency on the basis of the state's assets in the shape of so-called working reports, performance reports, or results reports. In the "hot phase of the electoral campaign," this type of publication generally acquires the character of partisan means of advertising in the electoral contest, which the government is forbidden to engage in, according to the Constitution (...)

Which also might indicate that there is a partisan intrusion in the electoral campaign if the federal government publicly states its intent to "remain in office," because it is providing positive reports about what it has fulfilled and achieved during its administration, and thus it is assuring that it is the only one that can offer guarantees for a safe future and it is doing that during the pre-election period. (...) In the period prior to the elections, using government funds in the amount of 10 million German marks, the federal government made a series of large-scale announcements in newspapers and magazines, violating the principle of neutrality, which exerted a partisan impact on the federal elections.⁵²

67. The *Constitutional Court of Guatemala*, in one case, also declared that the former spouse of the President in office at the time, could not participate as a candidate to the presidency, as Article 186(c) of the Constitution establishes that no kin up to the fourth degree of consanguinity and second degree of affinity to the president or vice-president of the Republic when he or she is currently in office can stand as a candidate for the office of president or vice-president of the Republic. In said ruling, it made observations that are relevant to the instant case:

(...) since the middle of the past century until now, there has been a ban on those who are next of kin of the president of the republic to stand for election to this office. It is also relevant here to infer that the drafters of those texts intended to prevent dynastic succession or nepotism regarding the office of president of the republic and to thus uphold the principle of political rotation for the above-mentioned office. Contemporary world history and modern trends in history have been advocating the above-mentioned principle, so as to prevent undue prolongations in the exercise of power, which of course foster the emergence of dictatorships in which the right to live in an authentic democracy is notoriously constrained, and the same holds true for basic rights the adequate enjoyment of which is to be guaranteed in a democratic regime.

(...) When applying this method of interpretation (purposive) to the contents of subparagraph (c) of Article 186 of the Constitution, the same conclusion was reached as the one drawn by the Constitutional Court on the same principle in the advisory opinion of the sixteenth of November nineteen hundred eighty nine (case file 212-89), which deals with the ban contained in this subparagraph which the constitutional lawmaker instituted for the purpose of preventing the dynastic or nepotism-based transmission of power and preventing a candidate who is standing for an elected office by universal suffrage from participating in an election under conditions of superiority compared to other candidates, with a clear breach of the principle of equality adopted by the democratic system.⁵³

68. Furthermore, in connection with presidential reelection, the IACHR notes that it has been regulated in various ways by states in the region, with the establishment of absolute bans in certain systems, relative bans on continuous or consecutive reelection in others, allowing one or two reelections at the most in others, and allowing presidential reelections without any limits in yet other systems.⁵⁴ The IACHR underscores that, in the present case, there is no need to conduct an abstract review of each system and its compatibility with the

⁵² Federal Constitutional Court of Germany, [Judgment BVerfGE 44, 125, V-1](#).

⁵³ Constitutional Court, Appeal for Judgment of Amparo. Case File 2906-2011, August 8, 2011.

⁵⁴ See European Commission for Democracy through law (Venice Commission), [The Limitation of Consecutive Terms in Elected Office, Comparative Table](#), 19 July 2012.

American Convention, but rather to examine the reasons and conditions for which the electoral process might lead to a breach of the right of a candidate to participate on equal terms. Regarding this, reference has been made to various national bodies and courts, on the basis of the terms indicated below.

69. Regarding this, the *Venice Commission*, in its report on term-limits for presidents, stated the following:

83. (...) [I]t seems that the circumstances that generated the most common restriction to the right to stand for office (for example, the need to prevent incumbents from taking advantage of their position in order to remain in power or abuse state's resources, persist in most contemporary democracies.

85. At any rate, as long as there is no theoretical, international or constitutional foundation to recognize re-election as a human right, it should be conceived as an autonomous clause, linked with the right to political participation and of the right to stand for election. In any case, term limits or other limitations of the right to run for office in different ways, for example, prohibiting re-election of political officers, restricting the number of consecutive terms an official can serve or forbidding consecutive re-election of any public official, impose restrictions on the human right to political participation. As such, they must be justified by a legitimate aim, be necessary in a democratic society, and be reasonable.

127. Presidential term limits are entrenched in the Constitution; a constitutional amendment is therefore required to modify them. Only the people who have lawful sovereign power can modify the scope of authority which they gave to the president. A decision to alter or remove presidential term limits should be subject to thorough public scrutiny and debate, and should fully respect the relevant constitutional and legal procedures.

128. To the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent.

130. As regards the possible role of Constitutional or Supreme courts, they should intervene after the relevant amendment has been adopted by the constitutional legislator pursuant to the relevant, special constitutional requirements. The possibility for the Court to carry out a substantive a posteriori review that the amendment adopted is not in breach of "unamendable" provisions or principles should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator.⁵⁵

70. As for the *Constitutional Court of Colombia*, in its judgment *C 141-2010*, it ruled that convening a constitutional referendum proposing an amendment to the Constitution which would read as follows was unconstitutional: "whoever has been elected to be the president of the republic for two constitutional terms of office can only be elected for one other term of office." Regarding this the Court underscored the risks to democracy stemming from prolonged reelections, especially in those cases where the President has the authority to appoint officials in monitoring bodies and the judicial branch of government. It also highlighted the advantageous position that arises from holding a public office and participating in an electoral contest on the basis of the following terms:

(...) if the president were reelected for a second time, his or her term of office would extend for four more years, for a total number of twelve years, a lapse of time which, in addition to widely exceeding the limits that, according to institutional practice and history in Colombia, has been the longest attempted in a presidential system subject to rules that prevent its deterioration, would have an impact on the institutional balance achieved by coordinating the president's term of office with those of other senior state officials, as well as on the renewal of the political model and on the principle of rotation in office.

(...) the eventual lengthening of the president's term of office up to twelve years entails upsetting the equilibrium between the figure of the head of state with the relevant powers vested in him or her by the presidential system of government, whose powers to appoint are reinforced and whose term of office coincides with those of the officials of various monitoring and judicial bodies that he or she appointed or were elected from short lists proposed by him or her, with regard to the role that these monitoring bodies in charge of ensuring the system of

⁵⁵ Study No. 908/2017, Strasbourg, March 20, 2018. Report on Term-Limits, Part I – Presidents. Adopted by the Venice Commission at its 114th plenary session (Venice, 16-17 March 2018), para. 99.

checks and balances for the presidential power would perform. As such, a president who is a member of a political party who has secured a majority in congress would manage to control not only the executive and legislative branches of government, but also the judicial branch and autonomous and independent institutions such as the Bank of the Republic and the National Television Commission, precisely by virtue of the authority to appoint described above.

(...) The second immediate reelection would also have direct consequences for the relationship between the executive branch and the legislative branch because congress is renewed in its entirety every four years, whereas the president would be able to stay in power for twelve years. It is clear that, owing to the presidential system of government adopted by the 1991 Constitution, a president elected by universal suffrage can exert a decisive influence on the structure of the legislative branch, so that political parties that pledge their support to the president may obtain significant majorities in congress.

(...) The prolonged permanence of the president in office implies a similar permanence of the political party, movement, or coalition supporting the presidency, so that the continuation of persons or ideologies favorable to the state would thereby be consolidated. This continuation entails a high risk of installing a hegemony, characterized specifically in the practical instatement of a system interested in ensuring the self-preservation of the model being advocated and the perpetuation of a regime which, over time, tends to augment the decision-making role of the leader and the glorification of his or her individual qualities, to the point of increasingly creating a kind of charismatic legitimacy supported by a prevailing majority and teams established to perform government tasks.

(...) Suffice it to add that, along with equality of treatment and within the set of conditions that have been observed during the presidential campaign, equality of opportunities also plays a noteworthy role, because of which an attempt is made to ensure that all candidates start off on a level playing field and that, in the electoral contest, their own specific capacities are taken into account to transmit their message to the voters, without the presence of unfair advantages that place some of them in a privileged or more favorable situation than that enjoyed by the other candidates.

(...) Among the factors with a high potential for unduly interfering with the electoral process and undermining the equality of opportunities which must help the candidates, there is the superiority enjoyed by those who are holding a public office. Indeed, the eventual wielding of power to influence voters is a mechanism of abuse that the legal system tries to avoid by requiring those at the helm of government to be neutral in the election or by preventing causes of disqualification which, because of their specific situation, would prevent certain persons from submitting their names to the consideration of voters.⁵⁶

71. By means of Legislative Action 2 of 2015, Colombia eliminated the presidential reelection clause and confined the head of state's constitutional administration to one single four-year term of office. In 2016, the Constitutional Court, in its judgment *C 230-2016*, dismissed a claim on constitutional grounds against said provision that amended the Constitution and provided that a citizen who, on the basis of any standing, had held the office of the presidency would not be able to be elected to be president of the republic. The ban on reelection could only be amended or repealed by means of a referendum convened by a people's initiative or a constitutional convention. Regarding this, it provided the following reasoning:

Although the complaint observes the formal structure of a judgment on the substitution of the Constitution, identifying one major premise (model of constitutional rigidity), a minor premise (constraint on the authority of Congress to amend the Constitution), and a conclusion (substituting the inherent element of constitutional rigidity and, correlatively, affecting the validity of the democratic principle), it does not explain why establishing that amending the ban on reelection can only be done by means of a referendum convened by a people's initiative or a Constitutional Convention is tantamount to substituting the Constitution and therefore, the resulting constitution would involve a jurisdictional error that would lead to the nonapplicability of the provision being charged as contained in Article 9 of Legislative Action 2 of 2015.

Compounding the above, in the wording of the minor premise, the complainants are actually proposing material control over the constitutional amendment, based on comparing Article 197 above and Articles 113 and 114 of the Political Constitution, without explaining precisely and clearly what the substitution of the semi-rigid model, which was supposedly enshrined by the 1991 Constitution, would consist of and why that model would not be

⁵⁶ Judgment of the Constitutional Court of Colombia C -141-2010 of February 26, 2010.

subject to amendment. Under these conditions, the Court could not undertake an examination of the matter or rule on its merits.⁵⁷

72. The Commission notes that six judges submitted clarifications on the vote in said case. One judge stated that:

From my standpoint, this constitutional amendment does not breach the Constitution, because it is not undermining any of its key pillars as asserted by the complainant, but rather it is consolidating constitutional democracy, preventing constitutional amendments being processed in Congress from attempting to eliminate the principles that strengthen the so-called constitutional democracy. Because of that, I believe that, although on this occasion, the complaint did not meet the minimum requirements to undertake a study of constitutionality, this does not mean that, if said requirements had been met, it would have been possible for the complaint to prosper (...)

In my opinion, this type of practice [attempting to extend the term of office of rulers beyond the terms literally set in the Constitution] jeopardizes constitutional democracy, understood as a democracy that guarantees the rights of minorities and the democratic rules of the game on the basis of safeguards such as deliberation and rotation in office. The regulations of international law also have that same mandate, and Colombia adheres to them as in, for example, the Inter-American Democratic Charter of the OAS, which provides in its Article 3 that: "Essential elements of representative democracy include respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people."⁵⁸

73. As for the *Constitutional Court of Peru*, in 2018 it ruled to dismiss an appeal on constitutional grounds against Law 30305, which amended Article 194 of the Constitution and provided for the banning of the immediate reelection of mayors, with observations that are relevant to the present case. The Court stressed that:

As can be appreciated, there is no constitutional or treaty-based parameter that might lead us to ignore that the right to elect and the right to be elected involve limits, as well as allowing us to infer that there is a supposed right to be reelected.

(...) Furthermore, it must be noted that the ban on the reelection of mayors is associated with the principle of rotation in office. In any case, it must be corroborated whether the scope of what is currently provided in our constitutional system is favorable to the succession of various elected officials for each municipal term of office.

(...) In that regard, it must be stressed that the Peruvian state identifies with the republican form of government, with a decentralized unitary state, and the separation of the branches of government, among other guiding principles that were referred to herein. These principles, of course, are not being undermined by the amendment to the third paragraph of Article 194 of our Constitution, which the constitutional law amendment that is being challenged has introduced.

And the fact is that neither the republic, nor decentralization, nor the separation of powers depend on whether or not certain public officials, such as mayors, for example, are reelected immediately. As a result, the present complaint must be dismissed because the constitutional reform law that is being challenged is not contravening key parameters of the configuration of our Constitution, in terms of either jurisdiction, procedures, or contents.⁵⁹

74. In the ruling indicated above, one judge issued a concurring vote on the basis of the following terms:

(...) the constitutional reform that is the focus of review in the instant case contributes to the broader observance of the principle of rotation in government office on the basis of the following: It discourages the detrimental differentiation between politicians (commonly referred to as the "political establishment") and ordinary citizens, in the sense that it prevents a situation in which only a few individuals effectively participate in the decision-making process and the steering of public affairs in the context of local government because of their access to public office by universal suffrage and the corresponding "specialization" that this entails;

⁵⁷ Judgment of the Constitutional Court of Colombia C-230-2016 of May 11, 2016.

⁵⁸ Judgment of the Constitutional Court of Colombia C-230-2016 of May 11, 2016. Explanation of vote by Jorge Iván Palacio Palacio.

⁵⁹ Judgment of the Constitutional Court of Peru, Case of the Law of Constitutional Reform on banning the reelection of mayors v. Congress of the Republic, October 4, 2018.

- As a result of this, citizens, regardless of their political experience or background in terms of direct participation in public affairs, can become increasingly involved in the latter, so as to foster and promote the renewal of authorities in public service, which in turn appears as an imperative call made to political parties participating in electoral contests, so that they can initiate or continue with the above-mentioned effort of renewing high-ranking party members and the democratic participation of the rank and file without the same candidates as always, which in turn strengthens these parties because it imposes real limits on the power of leaders who tend to keep for themselves the spaces of power inside political parties; and

- It also promotes scrutiny of the outgoing administration by the new incoming administration, which in turn acts as an institutional mechanism for disclosure and monitoring of possible concealed practices, which are usually not uncommon among many of the municipal administrations in our country, which is consistent with the consideration whereby, as referred to by this Constitutional Court, “combating all forms of corruption is protected by the constitution, as evident in Articles 39 and 41 of the Constitution, as well as by democratic law and order as provided for in Article 43 of the Constitution” (STC 00017-2011-PI/TC, FJ 16). 15. As a result, I note that the constitutional reform that is being challenged in the instant case does not entail any impact on the supremacy of the constitution for mayors who are being targeted by this reform, to the extent that our legal system has not recognized the right to be reelected, let alone to be reelected immediately, and which, on the contrary, contributes to full realization of the above.⁶⁰

75. As for the *Supreme Court of Justice of the Nation of Argentina*, in 1999 it dismissed an extraordinary appeal aimed at having the Court disqualify the ninth transitory clause of the Constitution and to authorize the presidential reelection of Carlos Menem. In his vote, Minister Petracchi stressed:

(..) that Article 90 of the National Constitution provides that “the president and the vice-president remain in office for four years and may be reelected or mutually succeed each other for a single consecutive term of office. If they have been reelected or have mutually succeeded one another they cannot be elected to either of both offices, unless the interval of one term of office has elapsed. The ninth transitory clause establishes that “the term of office of the incumbent president when this amendment was being enacted shall be deemed to be his or her first term of office.”

(...) the republican form of government—liable, in and of itself, to a wide range of alternatives justified on the basis of social, cultural, institutional, etc. reasons—does not necessarily require recognition of the right of rulers to be elected again (...). What underlies the clause being examined when authorizing a six-year term of office to be succeeded by two four-year terms, is an assessment of what is deemed excessive for a republican system.

(...) standards that impose limits on reelecting those who perform executive roles does not breach any of the principles of the National Constitution (...) precisely because one of the essential pillars (if not the most essential) of the democratic system adopted in our Constitution is the limit on the duration of presidential functions.⁶¹

3. Analysis of the instant case

76. In the instant case, it must be examined whether or not the alleged victim’s right to participate on equal terms in the 2011 presidential elections was breached because of the participation of President José Daniel Ortega Saavedra in said electoral contest. The Commission recalls that said right entails participating in the process under conditions that are equivalent, that is, under basic conditions that are similar, without undue advantages for one of the participants in the electoral process.

77. The Commission recalls that, by the year 2011, President Ortega had been in office as president from 1985 to 1990 and was, at the time, the incumbent president since 2006 and up to 2011. During the latter term of office as president, the IACHR confirmed that a general context of concentration of power in the hands of the executive branch prevailed, leading to complaints about the absence of independence and impartiality of the Supreme Court of Justice and the Supreme Electoral Council, as well as the appointments of persons close to the executive to several monitoring bodies. The IACHR also recalls that, although Article 147 of the Constitution

⁶⁰ Judgment of the Constitutional Court of Peru, Case of the Law of Constitutional Reform on banning the reelection of mayors v. Congress of the Republic, October 4, 2018, concurring vote of Judge Ledezma Narváez.

⁶¹ Ortiz Almonacid, Juan Carlos without filing an appeal for protection on constitutional grounds. Judgment of March 16, 1999.

banned the reelection of a president if he or she has held two terms of office in the presidency, in October 2009, in response to an appeal for protection on constitutional grounds filed by the President and other persons, the Constitutional Chamber of the Supreme Court of Justice ruled that said article was nonapplicable because it violated the principle of equality, and the plenary of the same judicial body ruled that said constitutional norm was inapplicable *erga omnes*.

78. Although, in the present case, it is not the Commission's role to determine whether or not reelection is a human right, the Commission stresses that indefinite reelection or extensive presidential terms of office held by one single person in certain contexts where there are no adequate safeguards or guarantees may entail certain risks for representative democracy, which is a key pillar of the inter-American system. To the extent that the incumbent government has the authority to appoint officials to monitoring bodies and other branches of government, their prolonged or indefinite permanence in government may lead to a concentration of power that renders illusory the institutional equilibrium secured through the system of checks and balances and may end up undermining the foundations of democracy such as rotation in office and access to power as a guarantee of pluralism.

79. In the instant case, the Commission observes that, apart from the general context of concentration of power and the undermining of institutions described, which proved that the President of Nicaragua did participate under advantageous conditions compared to the situation of other candidates in the electoral process of 2011, the IACHR underscores that the electoral observation reports refer to a series of elements that created undue advantages for the incumbent president. In particular:

- It was confirmed that public resources were used to support President Ortega's electoral campaign. Specifically, public works were inaugurated and public goods were distributed for partisan campaigning purposes. Furthermore, the Citizens Power Councils, created by presidential decree, undertook electoral campaigning for the benefit of the president and organized events with voters in which public goods and services were used.
- In the media it was observed that the ruling party benefited from more campaign advertising than all of its rivals put together in almost all the media. Furthermore, the state-owned media did not provide the thirty minutes that rightfully belonged to the other political parties pursuant to the law on elections.
- The IACHR recalls, regarding this, the context of media concentration as documented by the IACHR Special Rapporteurship for Freedom of Expression, according to which most of the audiovisual media in Nicaragua were under the political control of the President's family and or an affiliated businessperson. In 2011, the Rapporteurship documented the broadcasting of many presidential messages on all cable television channels, which even included partisan contents.
- Various sources complained that the Supreme Electoral Council failed to be independent in the framework of said process and that it was perceived as aligned with the ruling party. Regarding this, one organization pointed out that the Council's membership was composed of party supporters and that the ruling party prevailed in the technical and administrative structure of the electoral branch of government, which is cause for great concern, because it was the same Council that presided over the municipal elections of 2008 for which there was evidence of electoral fraud for the benefit of the ruling party.

80. The Commission deems that the general context of concentration of power in the hands of the executive branch of government, as confirmed by the IACHR at the time of the 2011 elections, including the absence of independence of the judicial branch and the Supreme Electoral Council in charge of overseeing the entire process, as well as the irregularities indicated in the previous paragraph, which brought advantages as a result of the use of additional public resources and media for President Ortega's campaign, greater campaigning for his benefit in the media, and the shutting of airtime on state channels for the other political parties, make it possible to confirm that the incumbent president participated in the process on the basis an advantageous or

superior position. This undermined the alleged victim's right to participate in said process on equal terms and without any unlawful advantage compared to other candidates.

81. Furthermore the Commission cannot help noting that breaching the right to participate on equal terms in an electoral contest may undermine not only the individual rights of the person concerned but also the collective dimension of political rights, that is, the will of the voters, through universal suffrage, because said breach can prevent the ground rules of democracy from being observed⁶² by creating undue advantages for certain candidates over the remaining participants who present their candidacy in a popular election.

82. In view of the above, the Commission concludes that the state is responsible for violating the right to equal access to public service in his country, as provided for in Article 23.1(c) of the American Convention in connection with Article 1.1 of the same instrument, to the detriment of Fabio Gadea Mantilla.

83. As for the allegations of violation of the principle of equality and non-discrimination under Article 24 of the American Convention filed by the alleged victim, the IACHR considers that the analysis of said claim is included in the determinations regarding Article 23.1(c) of the American Convention, which was referred to above.

B. The right to judicial protection⁶³

84. The IACHR recalls that the state has the general obligation of providing effective judicial remedies to persons alleging to be victims of human rights violations (Article 25), which must be substantiated in accordance with the rules of due process of law (Article 8.1). For an effective recourse to exist, it is not enough that it is established in the law, it must be truly appropriate to establish whether or not there has been a human rights violation and to promote what is needed to remedy it.⁶⁴

85. The Commission recalls that, according to the facts of the instant case, on March 9, 2011 the alleged victim registered his candidacy with the Supreme Electoral Council for the office of President and, on April 6, 2011, said body published the final list of candidates on which both the alleged victim and President Ortega appeared. Because the alleged victim and other candidates deemed that President Ortega's registration was unlawful, they filed an appeal challenging said registration with the Supreme Electoral Court, but the appeal was dismissed on April 4, 2011. The alleged victim was unable to file a remedy to secure a judicial review of said ruling, because paragraph 15 of Article 173 of Constitution provided that "No appeal, ordinary or extraordinary, shall lie against the decisions taken by the Supreme Council on electoral matters."⁶⁵ Likewise, in the same ruling, it was stated that "the present ruling is an electoral matter and no remedy is admissible."

86. In the case of *Yatama v. Nicaragua*, the Inter-American Court examined paragraph 15 of Article 173 of the Constitution in the light of the American Convention and concluded that said legal framework did not protect the right to judicial protection. Specifically in that case, the Court emphasized the following:

173. There was no judicial remedy against the resolution of the Supreme Electoral Council of August 15, 2000 (*supra* para. 124(51)), so this could not be revised, even if it had been adopted without respecting the guarantees of the electoral procedure established in the Electoral Act or the minimum guarantees established in Article 8(1) of the Convention, applicable to the process.

⁶² European Court of Human Rights (ECHR), Case of *Hirst v. The United Kingdom*, Grand Chamber, October 6, 2005, para. 62; see also Article 3 of the Inter-American Democratic Charter; see also IACHR, Report on the situation of human rights in Peru, 2000.

⁶³ Article 25.1 of the American Convention provides that 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.

⁶⁴ I/A Court H.R. Case of the Dismissed Congressional Employees (*Aguado Alfaro et al.*). Judgment on preliminary objections, merits, reparations, and costs. Judgment of November 24, 2006. Series C No. 158, para. 125; I/A Court H.R. Case of the *Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, para. 61; I/A Court H.R. Case of "Five Pensioners" v. Peru. Judgment of February 28, 2003. Series C No. 98, para. 136.

⁶⁵ Brief of observations of March 20, 2018 from the petitioner.

174. Even though the Nicaraguan Constitution has established that the resolutions of the Supreme Electoral Council on electoral matters are not subject to ordinary or special recourses, this does not mean that this Council should not be subject to judicial controls, as are the other branches of government. The requirements arising from the principle of the independence of the powers of the State are not incompatible with the need to establish recourses or mechanisms to protect human rights.

175. Irrespective of the regulations that each State establishes for its supreme electoral body, the latter must be subject to some form of jurisdictional control that allows it to be determined whether its acts have been adopted respecting the minimum guarantees and rights established in the American Convention, and those established in its own laws; this is not incompatible with regard for the functions inherent in this body concerning electoral matters. This control is essential when the supreme electoral bodies such as the Supreme Electoral Council in Nicaragua, have broad powers, which exceed administrative faculties and which could be used, without an adequate control, to favor determined partisan objectives. In this sphere, this recourse must be simple and prompt, taking into account the characteristics of the electoral process (*supra* para. 150).⁶⁶

87. When monitoring compliance in the case of Yatama of 2015, the Inter-American Court reiterated that “the state has not complied with the following reparations ordered in the judgment: (...) b) to adopt, within a reasonable period of time, the necessary legislative measures to establish a simple, prompt, and effective legal remedy to monitor the decisions of the Supreme Electoral Council affecting human rights, such as political rights, with the observance of the respective legal and treaty-based guarantees, and to repeal the regulations that prevent filing that remedy.”⁶⁷

88. The Commission deems that the possibility to legally challenge the ruling of the Supreme Electoral Council of April 4, 2011 was especially important in the instant case taking into account, among other aspects, the text of the Constitution whereby it would have been concluded that President Ortega was banned from participating in the electoral race, the allegations of failure to ensure the Supreme Electoral Council’s impartiality as described in the section on context, and the position held by the alleged victim in the electoral process. The IACHR recalls that, according to Article 25 of the American Convention, states must provide judicial remedies to those persons who allege being victims of human rights violations.

89. By virtue of the above, the Commission concludes that the Nicaraguan state is responsible for the violation of the right to judicial protection as established in Article 25.1 of the American Convention in connection with Articles 1.1 and 2 of the same instrument, to the detriment of Fabio Gadea Mantilla.

V. CONCLUSIONS AND RECOMMENDATIONS

90. The Commission concludes that the Nicaraguan state is responsible for the violation of the rights set forth in Article 23.1(c) (political rights) and Article 25.1 (judicial protection) of the American Convention on Human Rights, in connection with the obligations laid out in Articles 1.1 and 2 of the same instrument.

91. On the basis of the analysis and conclusions of the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE FOLLOWING TO THE STATE OF NICARAGUA:

1. To provide comprehensive reparations for the violations of the rights stated in the present report, including the payment of compensation for the violation of the right to have equal access to the country’s public service.
2. To adopt the measures of non-repetition to guarantee the equality of all participants in the presidential electoral process. In particular: 1) to provide the necessary measures so that the regulatory framework for elections and its application shall guarantee the equality of all candidates in an electoral contest and prevent

⁶⁶ I/A Court H.R. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127.

⁶⁷ Order of the Inter-American Court of Human Rights, November 20, 2015. Case of Yatama v. Nicaragua. Monitoring Compliance with Judgment, p. 7.

the incumbent administration from failing in its duty to be neutral in the process and from securing undue advantages by using public resources or the media, 2) to take the necessary measures to strengthen and guarantee the independence of the Supreme Electoral Council; and 3) to provide legislative, administrative, and any other kind of measures that might be needed to create an effective and simple remedy for challenging the resolutions of the Supreme Electoral Council, without limitations regarding the matter being appealed.