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REPORT No. 77/18
PETITION 727-09
REPORT ON ADMISSIBILITY

FERNANDO TOVAR RODRÍGUEZ
MEXICO

Approved electronically by the Commission on June 27, 2018.

Cite as: IACHR, Report No. 77/18. Petition 727-09. Admissibility. Fernando Tovar Rodríguez. Mexico. June 27, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Fernando Tovar Rodríguez
Alleged victim:	Fernando Tovar Rodríguez
State denounced:	Mexico ¹
Rights invoked:	Articles 8 (fair trial), 9 (freedom from <i>ex post facto</i> laws), 10 (compensation), 11 (privacy) and 25 (judicial protection) of the American Convention on Human Rights, ² in relation to its Article 1 (obligation to respect rights), and Articles 4, 6 and 7 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ³

II. PROCEDURE BEFORE THE IACHR⁴

Filing of the petition:	June 15, 2009
Additional information received at the stage of initial review:	November 3, 2015
Notification of the petition to the State:	November 15, 2016
State's first response:	June 6, 2017
Additional observations from the petitioner:	January 17, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of ratification instrument on March 24, 1981)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible:	Articles 8 (fair trial), 23 (participation in government), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; January 15, 2009
Timeliness of the petition:	Yes; June 15, 2009

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Joel Hernández García, a Mexican national, did not participate in the discussion or the decision on this matter.

² Hereinafter "Convention" or "American Convention."

³ Hereinafter "Protocol of San Salvador."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. Mr. Fernando Tovar Rodríguez (hereinafter “the petitioner” or “the alleged victim”) claims that the State of Mexico must be held internationally responsible for several violations of his labor rights and of due process in view of the arbitrary annulment of his appointment as Numerary Judge of the Superior Court of Baja California. He complains that he was arbitrarily and unfairly removed from office due to the reinstatement of a dismissed judge and that neither his judicial performance nor his lawful appointment was considered.

2. The petitioner indicates that on September 7, 2001, by a decree of the Congress of the State of Baja California, he was appointed Numerary Judge of the Superior Court of Justice of Baja California for an initial term of six years, and that later the Plenary of the State Judiciary Council, by an administrative decision, appointed him to the First Chamber of the Superior Court in replacement for a judge that the Congress of Baja California had not confirmed for the post. He submits that on September 23, 2003 the District First Judge, in ruling on the direct *amparo* proceeding filed by said judge, ordered her reinstatement. He adds that on February 8, 2005, in compliance with that resolution, the State Congress not only reinstated the judge but also groundlessly annulled the petitioner’s appointment as judge. He claims that he filed an appeal of complaint as the injured third party alleging abuse in the execution of the sentence in view of the annulment of the decree of his appointment. He submits that on November 25, 2005 this remedy was rejected by the District First Judge. Additionally, he indicates that, in this context, a smear campaign in the media was set up against him by state agents who, among other things, claimed that his appointment as a judge “destabilized the Judiciary.”

3. The petitioner indicates that on December 6, 2005 he filed another appeal of complaint (“a complaint of a complaint”) before the First Collegiate Court of the Fifteenth Circuit, decided in his favor on February 24, 2006. He asserts that the First Collegiate Court ordered his reinstatement as judge and the restitution of the corresponding emoluments. The court established that the petitioner’s position was not provisional and that it was not contested or analyzed in the *amparo* proceeding leading to his dismissal and that, therefore, the execution of the resolution of the *amparo* proceeding by which the other judge was reinstated in her job could not involve the annulment of the petitioner’s appointment. The petitioner indicates that on March 1, 2007 the Congress of Baja California issued a decree ruling his reinstatement, and that on March 28, 2007 the Plenary of the Judiciary Council ordered his final reinstatement.

4. The petitioner claims that on October 3, 2007 the First Chamber of the National Supreme Court of Justice, in deciding a procedural issue demanding the payment of his emoluments, ordered to annul the resolution of February 24, 2006 on the grounds that the enforcement of an *amparo* judgment does not involve the reinstatement of an injured third party. On October 31, 2007 the Congress, in application of the Supreme Court’s resolution, revoked the decision ruling the petitioner’s reinstatement. The petitioner indicates that on November 5, 2007 he filed an indirect *amparo* appeal against the decree of the Congress by which his reinstatement was annulled, which was dismissed by the District First Judge on January 18, 2008. Consequently, the petitioner filed an appellate review for review before the First Collegiate Court of the Fifteenth Circuit. Afterward, the First Chamber of the Supreme Court of Justice exercised its power to extend jurisdiction to hear the remedy, and on October 29, 2008 it decided not to grant the *amparo* requested by the petitioner, judicial decision that he alleged was notified on January 15, 2009.

5. The petitioner claims that the Supreme Court of Justice abused its power by ruling on an issue beyond its jurisdiction and other than the matter brought to its attention and, thus, invalidating a final resolution and infringing the judicial safeguards that involve respect of the principle of *res judicata* and freedom from *ex post facto* laws. He alleges that all the violations occurred in the framework of a procedure where the right to a hearing is not foreseen and that, as a result, he was dismissed without prior analysis of or questioning over his appointment or his performance as a judge.

6. For its part, the State affirms that the petition must be declared inadmissible because there were no violations of the petitioner’s human rights. It indicates that the competent authorities annulled the petitioner’s appointment because he had been appointed to a post considered available in view of a non-

confirmation and that if the non-confirmation has been found unconstitutional, the vacancy is no longer available; but that this is a situation that must be regarded as a procedural issue that does not involve a violation of the petitioner's human rights on the part of the State.

7. Moreover, it indicates that the petition must be dismissed because the State of Mexico assured the petitioner's access to different legal remedies, settled in a reasoned and timely manner. Therefore, it requests the Inter-American Commission to rule the instant petition inadmissible because the petitioner seeks that the IACHR review the judgments lawfully issued by Mexican courts, which would lead to a fourth instance.

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

8. Based on the available information, on November 5, 2007 the petitioner filed an *amparo* appeal against the decree of the Congress by which his appointment was annulled, which was rejected the District First Court on January 18, 2008. As a result, the petitioner lodged an appeal for review that was rejected by the First Chamber of the Supreme Court of Justice on October 29, 2008 and notified to him on January 15, 2009. The State, for its part, does not submit any observations on the requirement of exhaustion of domestic remedies. Therefore, the Commission notes that the petitioner exhausted the judicial remedies available in the domestic framework, thus the petition meets the requirement established in Article 46.1.a of the Convention.

9. Moreover, the Commission notes that from the information submitted there is nothing to indicate that the alleged smear campaign and its effects were reported by the alleged victim to the domestic authorities. As a result, in regard to the rights protected by Article 11 of the American Convention, the Commission concludes that the petition does not meet the requirement set forth in Article 46.1.a of the Convention.⁵

10. As to the requirement of timely presentation, the Commission notes that the final resolution that exhausted the domestic remedies was notified on January 15, 2009 and that the petition before the IACHR was presented on June 15, 2009. Thus, the petition meets the requirement set forth in Article 46.1.b of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

11. Based on the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the alleged victim's alleged arbitrary removal as Numerary Judge before the end of his term as well as the consequent violation of the minimum safeguards of labor stability and due process applicable to any judge⁶ could establish possible violations of the rights protected by Articles 8 (fair trial), 23 (participation in government),⁷ 25 (judicial protection) and 26 (economic, social and cultural rights) of the Convention, in relation to the general obligations foreseen in its Articles 1.1 and 2.

12. Considering that Article 26 of the Convention broadly refers to economic, social and cultural rights, and that these must be determined in relation to the OAS Charter, the Commission believes that when a possible violation of said article is established, the instruments to be used in the merits stage are those applicable to the state concerned, such as the Protocol of San Salvador. In regard to the allegations concerning Articles 4, 6 and 7 of the Protocol of San Salvador, the Commission notes that the power foreseen in Article

⁵ IACHR, Report No. 104/17, Petition 1281-07. Admissibility. Mirta Cármen Torres Nieto. Argentina, September 7, 2017, par. 10.

⁶ IACHR, Report No. 38/06, Petition 549-06. Admissibility. Mercedes Chocrón Chocrón. Bolivarian Republic of Venezuela, March 15, 2006, par. 40.

⁷ IACHR, Report No. 60/06, Petition 406-05, Admissibility. María Cristina Reverón Trujillo. Bolivarian Republic of Venezuela, July 20, 2006, par. 32.

19.6 thereof to rule in the framework of an individual case is limited to Articles 8 and 13 thereof. In regard to said article, the Commission may consider it for the interpretation or the application of the American Convention, based on Article 29 of the Convention.

13. As to the petitioner's claims regarding the violation of the right enshrined in Article 9 (freedom from *ex post facto* laws) of the Convention, the Commission notes that the petitioner did not submit evidence for a *prima facie* consideration of the possible violation. In regard to the claim concerning the alleged violation of Article 10 (compensation) of the American Convention, the Commission is of the opinion that the petition must be declared inadmissible because said provision refers to compensation in the event of a sentence through a miscarriage of justice.

14. Finally, as to the State's claim about the establishment of a body of fourth instance, the Commission notes that by declaring this petition admissible it does not seek to replace the domestic authorities' power. The Commission will analyze in the merits stage whether the domestic judicial proceedings conformed to the rights of due process and judicial protection and ensured the alleged victim's right of access to justice under the terms of the American Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 23, 25 and 26 of the American Convention, in connection with its Articles 1.1 and 2;

2. To find the instant petition inadmissible in relation to Articles 9, 10 and 11 of the American Convention, and Articles 4, 6 and 7 of the Protocol of San Salvador; and

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 27th day of the month of June, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Antonia Urrejola, and Flávia Piovesan, Commissioners.