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REPORT No. 41/16
PETITION 142-04
REPORT ON ADMISSIBILITY

JOSE TOMAS TENORIO MORALES AND OTHERS
(ERVIN ABARCA JIMENEZ UNION FOR HIGHER EDUCATION
PROFESSIONALS OF THE NATIONAL ENGINEERING
UNIVERSITY)

NICARAGUA

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ADMISSIBILITY

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(ERVIN ABARCA JIMENEZ UNION FOR HIGHER EDUCATION PROFESSIONALS

OF THE NATIONAL ENGINEERING UNIVERSITY)

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SEPTEMBER 11, 2016

I. SUMMARY

1. On February 27, 2004, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition filed by Mr. Julio Noel Canales (hereinafter “the petitioner”) against the Republic of Nicaragua (hereinafter “Nicaragua” or “the State”). The petition was filed on behalf of a group of 42 members of the Ervin Abarca Jimenez Union for Higher Education Professionals of the National Engineering University (*Sindicato de Profesionales de la Educación Superior “Ervin Abarca Jiménez” de la Universidad Nacional de Ingeniería—SIPRES-UNI-ATD*) (hereinafter “the alleged victims”¹), who claims the State responsibility for its failure to provide effective judicial protection and for the failure of its administrative authorities to ensure the rights of the alleged victims. As a result, the alleged victims have been prevented from exercising their right to freedom of association.

2. The petitioner accounts that, since 2002, the members of the Ervin Abarca Jimenez Union for Higher Education Professionals of the National Engineering University have not been able to exercise their right to freedom of association because the administration of the National Engineering University has been constantly and viciously filing court proceedings aimed at obstructing the legal recognition of the union’s executive committee. In that regard, they allege that, although they had secured administrative and judicial resolutions recognizing the rights of legally elected executive committees, these decisions have never been implemented, requiring the union to constantly file a series of administrative complaints and lawsuits which, in practical terms, have prevented it from independently representing their members. The petitioner claims he has exhausted remedies under domestic law and that both the Office of the Human Rights Ombudsman, and the Committee on Freedom of Association (CFA) of the International Labor Organization (hereinafter “ILO”), have ruled on his favor.

3. As for the State, it points out that the situation indicated by the petitioner actually consisted of an internal conflict between opposing factions within the same union, a situation from which the State must stay on the sidelines so as not to interfere in the internal affairs of a union organization. It also points out that the fact that the courts or administrative authorities ruled against the petitioner’s interests does not entail a violation to the right to judicial protection, or might constitute an impediment to the access of justice. As for admissibility requirements, the State alleges that the legal remedies under domestic law have not been exhausted; and that there is duplication of procedures, because the ILO’s Committee on Freedom of Association had already issued a final report on the same events denounced to the IACHR in the instant case.

¹ In a communication received at the IACHR on March 18, 2005, the petitioner individually identified the following persons: (1) Jose Tomas Tenorio Morales, (2) Germán Lopez Quintana, (3) Rodolfo A. Guerrero, (4) Abelardo A. Barrios, (5) Hector Francisco Doña Miranda, (6) Tina Wawrzinek, (7) Juana Castro, (8) Wilfredo Sevilla Hernandez, (9) Javier Ampie Martinez, (10) Jose Canales Mairena, (11) Edgard Jose Vado Siles, (12) Alfredo J. Sandino, (13) Clementino Solares, (14) Richard Zamora Navarro, (15) Oscar Zamora M., (16) Miguel Hernandez Velasquez, (17) Julio Noel Canales, (18) Manuel Gonzalez Murillo, (19) Osmar Flores Navarrete, (20) Wildghem Ramon Benavidez, (21) Oscar Castillo, (22) Elias Martinez Rayo, (23) Ervin Jose Lezcano, (24) Estela Gonzalez, (25) Carlos Perez Delgadillo, (26) Rodolfo Jaen Serrano, (27) Sergio Gamez G., (28) Roberto Davila Altamirano, (29) Elda Escobar Valdivia, (30) Francisco Ramirez, (31) Marigela Elizondo Navarrete, (32) Melania Solis Miranda, (33) Sergio Alvarez Garcia, (34) Ingrid Castillo Vanegas, (35) Edouard Jacotin, (36) Armando Robledo V., (37) Jorge Orlando Guevara Balladares, (38) Danilo Lopez Valerio, (39) Luis López Lopez, (40) Oscar Suazo Miranda, (41) Erick Murillo, and (42) Horacio Arguello Sovalbarro.

4. Without prejudging the merits of the complaint, after examining the position of the parties and in compliance with the requirements stipulated in Articles 46 and 47 of the American Convention on Human Rights (hereinafter the “American Convention” or “Convention”), the Commission decides to declare the petition admissible for the purpose of examining the allegations about the alleged violation of rights enshrined in Article 8 (right to a fair trial), Article 16 (freedom of association), and Article 25 (judicial protection) of the American Convention, in accordance with Article 1(1) of said Treaty, as well as Article 8(1)(a) (trade union rights) of the Additional Protocol to the American convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”. The Commission also decides to notify this decision to the parties, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE IACHR

5. On February 27, 2004, the Commission received the petition and assigned it number 142-04. On October 27, 2005, the Commission forwarded the petition’s relevant parts to the State and requested it to submit its response within two months, in compliance with Article 30(3) of its Rules of Procedures in force at the time. The State submitted its response on January 18, 2006, which was forwarded to the petitioner on February 17, 2006.

6. Furthermore, the IACHR received information from the petitioner by communications received on April 6, 2006, May 12, 2006, September 4, 2008, March 16, 2009, and June 22, 2009. These communications were duly forwarded to the State. The IACHR also received information from the State on November 17, 2008, May 7, 2009, and August 19, 2009. These communications were also forwarded to the petitioner.

7. On February 10, 2014, the Commission requested up-to-date information from the petitioner, who replied to this request on February 13, 2014. This information was also duly forwarded to the State, which submitted its observations on March 25, 2015.

III. POSITION OF THE PARTIES

A. Position of the petitioner

8. Regarding the context and background, the petitioner indicates that the Ervin Abarca Jimenez Union for Higher Education Professionals of the National Engineering University (*Sindicato de Profesionales de la Educación Superior “Ervin Abarca Jiménez” de la Universidad Nacional de Ingeniería—SIPRES-UNI-ATD*) (hereinafter “the union”) was established in February 1993. The term in office of its first executive committee was to last for one year until February 1994; nevertheless, due to the ongoing discussions on the first collective bargaining agreement that would be signed by the union and the employer, the National Engineering University (hereinafter “the university,” which is a government institution), the term in office of this executive committee was extended until negotiations ended in December 1994.

9. Until September 1999, no other executive committee of the union was registered at the Ministry of Labor, because the head of the university managed to control its organization and functioning, to such an extent that, between 1994 and 1999, it was the university’s Registrar (who subsequently was the university’s President when the petition was filed before the IACHR) who “would personally accredit on behalf of the university” the chair of the elected executive committee. As a result, during those years, union leaders had been persons close to or associated with the university’s administration, which according to the petitioner constitutes a violation of the right to freedom of association.

10. By September 1999, the union had managed to regain its independence from the university’s administration by electing executive committees committed to the best interests of the union members, and duly registered before the competent administrative authority, for the terms of 1999-2000, 2000-2001, and 2001-2002. This new union leadership had promoted a series of initiatives aimed at improving the working conditions of faculty, achieving greater transparency in the management of the university’s budget, and

securing more inclusive participation in the university's governing bodies. In that context, in December 2001, the executive committee chaired by Mr. Julio Noel Canales requested the Office of the Comptroller General of the Republic to conduct special audits on the implementation of the university's budget. The Office of the Comptroller General of the Republic approved the holding of these audits, which, according to the petitioner, upset the university's authorities to such an extent that, at the time, unidentified persons broke into the union's headquarters and made anonymous death threat calls to the members of its executive committee. These incidents were reported to the National Police; however, no investigation on this matter was carried out. The petitioner provided a copy of the above-mentioned reports.

11. In February 2002, the union requested the Conciliation Department of the Ministry of Labor to negotiate a new collective bargaining agreement. Nevertheless, the university's President and the Administrative Vice-President had used their influence in the Conciliation Department of the Ministry of Labor to delay negotiations, so that after the term in office of the executive committee chaired by the petitioner had expired, the board could be replaced by those supporting the interests of the university's administration.

12. To address this strategy of delays promoted by the employer, and based on the Labor Code, the union's executive committee requested the Department of Trade Union Associations to extend its term in office for an additional six months. The Director of Trade Union Associations turned down the request at first; then the union filed an appeal to the higher administrative body, the General Labor Inspection Office, which by resolution No. 178-02 of September 3, 2002 ordered the Department of Trade Union Associations to register the formal effectiveness of the executive committee chaired by Mr. Julio Noel Canales for the period of September 5, 2002 to March 4, 2003. This order was implemented by the Department of the Trade Union Associations by means of resolution No. 001-02 of September 11, 2002. As a result, said executive committee was legally empowered to act on behalf of the union at the collective agreement bargaining sessions. The petitioner states that according to Article 214 of the Labor Code, the registration of the executive committee has third-party effects.

13. Despite the above, the university's President and Registrar *de facto* ignored the validity of the executive committee, by arbitrarily refusing to continue with the collective bargaining; by withholding quota contributions paid by the union's members and placing them without a court order in escrow with the Second Labor Court of Managua; and by preventing the union from being represented before the university's governing bodies. This situation was corroborated by the Departmental Labor Inspection Office of the Ministry of Labor by means of a special inspection order drawn up on September 6, 2002. On the basis of this inspection and other prior ones where the Ministry of Labor noted the adverse conduct of the employer against the union, the Departmental Labor Inspection Office of Managua, by means of the resolution issued in October 8, 2002, fined the university's President C\$. 10,000 (equivalent to US\$697.00 at the time of the incidents).

14. On October 23, 2002, Mr. Julio Noel Canales filed an appeal on constitutional grounds (*acción de amparo*) with the Second Civil Court of the Court of Appeals of Managua against the above-mentioned actions taken by the university's President. On May 13, 2003, this appeal on constitutional grounds was dismissed by the Constitutional Chamber of the Supreme Court of Justice, because the petitioner had not submitted his legal arguments in due time. The petitioner deemed that this ruling was absurd because, for this submittal, the Supreme Court took into account the deadline of December 9, 2003, a national holiday when all court offices were closed. According to available information, the petitioner submitted his observations on December 10, 2003.

15. Despite the above, the university's administration managed to pressure a group of faculty affiliated to the union to agree to illegally convene a General Assembly in order to elect a parallel executive committee. As a result of this process, Mr. Silvio Joel Araica, who held a managerial position at the university, was elected chair of this new executive committee. Nevertheless, the Department of Trade Union Associations of the Ministry of Labor, by means of resolution No. 002-02 of October 8, 2002, turned down the request for registration of this parallel executive committee because it did not meet the requirements for elections set

forth in the union's bylaws and the regulations of trade union associations, and because a legally established executive committee already existed with a valid term in office up to March 4, 2003.

16. Faced with this refusal by the Ministry of Labor, Mr. Silvio Joel Araica called upon the Second Labor District Court of Managua to declare the executive committee chaired by Mr. Canales null and void. On November 20, 2002, this court issued a one-page precautionary ruling ordering that, until the merits of the case was decided upon: (a) the university's President should suspend the accreditation of the executive committee; (b) the quota contributions paid by those affiliated to the union should be withheld by the university and placed in escrow with that court; and (c) the Department of Individual Conciliation and Collective Bargaining of the Ministry of Labor should temporarily suspend bargaining over the list of demands made by the executive committee chaired by Mr. Julio Noel Canales. The petitioner indicates, as a key matter, that this legal ruling was arbitrary; that the law did not provide for any "call for the annulment of the executive committee"; that the judge who issued it overstepped his authority by encroaching upon the jurisdiction of the administrative authority that had already empowered the union to operate; and that it was precisely this decision that led to a series of legal and administrative proceedings which, in fact, have been for years preventing the union from exercising the legal status which had been granted to it from the start.

17. The above-mentioned ruling was appealed to the Second Labor District Court in Managua, proceedings which suspended the effects of the appealed ruling by means of an order issued on November 25, 2002. Then, the Labor Chamber of the Court of Appeals of Managua reviewed the proceedings for a final decision on the appeal. As a result, on January 30, 2003, the university's Vice-President, acting as replacement for the President who was absent at the time, ordered the Registrar to proceed with the accreditation of the union's executive committee chaired by Mr. Julio Noel Canales. The Vice-President considered that the suspension of the effects of the appealed ruling turned groundless the denial of the accreditation of the said executive committee.

18. On February 3, 2003, the union held elections, and the executive committee chaired by Mr. Julio Noel Canales was elected to represent the union for the following year. Nevertheless, the Department of Trade Union Associations refrained from proceeding with the registration of the said executive committee. According to the petitioner, this was at the behest of the Minister of Labor himself. In view of this refusal, the petitioner filed an administrative appeal to the General Labor Inspection Office, which ordered, by means of resolution No. 051-03 of March 5, 2003, the Department of Trade Union Associations to proceed with the registration of the new executive committee elected by the union, regardless of the ongoing litigation. The Labor Inspection Office based its decision on the fact that there are independent processes involved and that the exercise of the right to freedom of association should not be indefinitely suspended while waiting for the finalization of parallel court proceedings. The Labor Inspection Office also deemed that refusing the registration constituted a violation of the union's rights. It also established that, in accordance with the labor laws in force at the time, labor court judges only had the jurisdiction to hear cases involving the dissolution of unions, whereas any other dispute came under the exclusive jurisdiction of the corresponding administrative authorities. As a result, it ordered the Department of Trade Union Associations to proceed with the registration of the executive committee elected on February 3, 2003.

19. The petitioner indicates that, despite resolution No. 051-03, the new head of the General Labor Inspection Office ignored it at the behest of the Minister of Labor himself; although resolution No. 051-03 was final and in force, it was also issued according to law and uncontested by anybody. In view of this refusal, the petitioner filed an appeal on constitutional grounds (*acción de amparo*) on May 6, 2003 against the Minister of Labor and the new Labor Inspector General, for the basic purpose of dismantling any hindrance to the implementation of resolution No. 051-03 of March 5, 2003. This appeal was turned down by Civil Chamber No. 2 of the Court of Appeals of Managua, on the basis of a ruling of July 3, 2003, because it considered that there was no provision, writ, or resolution that was violating constitutional rights. Furthermore, the petitioner filed a complaint with the Administrative Dispute Chamber of the Supreme Court of Justice, which was dismissed on September 18, 2003 on grounds of lack of competence. Finally, the petitioner alleges that on October 31, 2003, the General Department of Labor Relations issued a resolution ordering the Department of Trade Union Associations to comply with resolution No. 051-03, which had no effect whatsoever.

20. On January 16, 2004, the union requested the Department of Trade Union Associations to grant an extension to the term of the executive committee; however there was no response on the part of the government. In view of this implicit denial, the union repeated its request on February 18 and May 17, 2004; and then filed a complaint before the General Department for Labor Relations on June 4, 2004.

21. On October 26, 2004, the petitioner filed a complaint before the ILO's Committee on Freedom of Association, alleging the violation of union rights, which was registered in this body as Case No. 2394.

22. The petitioner indicates that, in addition to the administrative steps taken for the purpose of securing registration of the executive committee he was chairing, the union started a civil lawsuit seeking the release of the quota contributions paid by its members since the end of 2002. After three years of litigation, on August 25, 2005, the First Civil District Court issued a judgment recognizing the validity of the representation of the executive committee chaired by Mr. Julio Noel Canales, and ordering the amounts to be put in escrow at the disposal of the union. Nevertheless, the petitioner claims that the Supreme Court of Justice refused to provide the corresponding funds, arguing that the funds had never been put in escrow with the Second Labor Court. As a result, the petitioner deemed that the university's President had committed a crime of misappropriation of funds.

23. The judgment issued by the First Civil District Court on August 25, 2005 was appealed by Mr. Silvio Joel Araica in the Labor Chamber of the Court of Appeals of Managua. This legal action extended over time the litigation over the funds from quota payments made by the union's members.

24. In March 2006, the ILO's Committee on Freedom of Association issued its final report regarding the complaint filed by the union. The petitioner stresses that, this report's conclusions indicates that "cases brought before the courts by the administrative authorities involving a challenge to the results of the trade union elections should not —pending the final outcome of the proceedings— have the effect of paralyzing the operations of trade unions." It also indicates that the Committee on Freedom of Association deplored the administrative delays that had taken place to the detriment of the union and the failure to comply with the resolutions of the Labor Inspector General. It also urges the government to implement the judgment issued on August 25, 2005 by the First Civil District Court.

25. The petitioner indicates that, on April 10, 2006, the Human Rights Ombudsman's Office issued a ruling about the complaints filed by the union (case files Nos. 64 and 354-2005). In its ruling, this authority indicates, *inter alia*, that "[a]fter examining resolution No. 051-03 issued by the General Labor Inspection Office, the present Ombudsman's Office fully agrees with its legal and logical arguments [...] and the failure to implement it has incontrovertibly breached the labor rights and right to association of the members of the union [...] chaired by Mr. Julio Noel Canales." According to the petitioner, the Ombudsman's resolution highlights that the incidents reported constitute violations of the basic rights of the executive committee and other members of the union, perpetrated by various authorities of the Ministry of Labor, including the Minister himself, and the President of the university.

26. As a result of the appeal filed by the petitioner against the precautionary ruling issued on November 20, 2002 by the Second Labor District Court, the Civil Chamber of the Supreme Court of Justice decided the matter by its judgment No. 93 of November 1, 2006. Regarding the refusal to register the executive committee chaired by the petitioner, the Civil Chamber ruled that only the administrative authority, specifically the Department of Trade Union Associations, is competent to register or deny the registration of the executive committees elected by unions. Thus, the Second Labor District Court had no jurisdiction to hear and process the request for declaring the annulment of the union's executive committee, which had been filed from the start by Mr. Julio Noel Araica. The petitioner also stresses that the legal arguments of the Civil Chamber in its judgment No. 93 concurs with those rendered by the General Labor Inspection Office in its resolution No. 051-03.

27. The petitioner indicates that, on the basis of this judgment issued by the Civil Chamber of the Supreme Court of Justice, the remedies available under domestic law had been definitively exhausted,

because the court ruled on the very issue that obstructed from the start the registration of the executive committee of which he was the chair. He also indicates that it was a final ruling over which no further appeal could be filed.

28. Furthermore, the petitioner submitted judgment No. 93 of the Civil Chamber of the Supreme Court of Justice as the grounds for a *res judicata* preliminary objection in the civil case regarding the retention of the quota contributions made by the union's members, which was filed initially because of the precautionary ruling of November 20, 2002 by the Second Labor District Court. Nevertheless, the Labor Chamber of the Court of Appeals of Managua continued the proceedings on the case on the union's quota contributions.

29. As a consequence of judgment No. 93 of the Supreme Court of Justice, on June 10, 2007, the Department of Trade Union Associations of the Ministry of Labor proceeded to duly register the executive committee chaired by the petitioner. However, Mr. Silvio Noel Araica once again opposed the registration of this union leadership by filing an appeal on constitutional grounds (*acción de amparo*) against the resolution of the Department of Trade Union Associations. This appeal was admitted and processed by Civil Chamber No. 1 of the Court of Appeals of Managua, which in addition, by means of the August 24, 2007 writ, decreed that registration of the executive committee chaired by the petitioner be suspended and declared without legal effect until the merits of the appeal on constitutional grounds were ruled upon.

30. On June 3, 2008, the union held a new extraordinary general assembly and once again elected an executive committee chaired by the petitioner, Mr. Julio Noel Canales, which was registered with the Department of Trade Union Associations on June 10. Nevertheless, on June 30, the judiciary sent a formal communication to the Department of Trade Union Associations upholding the ruling issued on August 24, 2007 by Civil Chamber No. 1 of the Court of Appeals of Managua. As a result, the administrative authority annulled the registration of this last executive committee by means of an official writ on July 8, 2008.

31. In his last communication, in February 2014, the petitioner states that the reasons that led to filing the petition persist and that the union and its members are completely powerless, since they have been unable to negotiate a collective bargaining agreement or to advocate for any improvement in working conditions for workers and because they are not represented in the university's governing bodies. Furthermore, the university's administration had unduly appropriated the quota contributions paid by the union's members. The petitioner asserted: "We are where we started ten years ago." In this regard he claims that the supposed dispute as alleged by the State had been settled since 2002 by the Department of Trade Union Associations itself, when, on the basis of resolution No. 002-02, it turned down the request for registering the parallel executive committee comprised by individuals loyal to the university's administration.

32. On the basis of the above, the petitioner alleges that the Nicaraguan State has violated, to the detriment of the persons identified as the alleged victims in the present report, the rights enshrined in Articles 3, 5, 8, 10, 16, 24, and 25 of the American Convention.

B. Position of the State

33. The State alleges that the petition did not provide facts that constitute violations of rights protected under the American Convention; and that, in Nicaragua trade union rights have legal and constitutional protection. It deems that the main issue in the present case consists of a problem involving two opposing factions within the same union, where both parties resorted to all the legal remedies available in both the administrative and judicial spheres. As a result, since it involved a dispute arising from internal discrepancies of a union organization, it did not constitute the State's violation of Article 16 of the American Convention. The State indicated, as a key issue, that it could not interfere in a union's internal affairs to resolve the source of internal discrepancies.

34. The State argues that it has guaranteed access to justice, as well as the necessary and effective remedies to exercise this right; and, that it has provided equal opportunities to the parties in conflict. Nevertheless, it could not be held responsible under international law if the parties did not adequately use

the legal remedies and proceedings provided by law. It states that the alleged victims had effective and adequate remedies available, although it did not necessarily mean that the administrative or judicial decisions arising from these remedies were always going to be favorable to their claims. It points out that many of the appeals filed by Mr. Julio Noel Canales were dismissed or were unsuccessful because they were inadmissible, which was the petitioner's responsibility. In addition, the fact that there were many interested parties to the above-mentioned dispute led to their own filing of petitions in the administrative, labor, criminal, and civil courts, as well as various complaints, which had made settlement of the dispute more difficult, leading to delays in the proceedings, which ultimately affected the parties involved themselves.

35. The State explains that the refusal to legally register the union's executive committee stemmed from the precautionary ruling by the Second Labor Court on November 20, 2002, which ordered the Ministry of Labor to refrain from carrying out this registration. The State recognizes that this protective decision "went beyond what had been requested by the interested parties;" nevertheless, it claims that it was issued "for the purpose of safeguarding the interests of the workers (...) whether or not this protection had been requested." It also emphatically denies that there had been any kind of "peddling of influence" or collusion between government authorities and the university's management to violate the rights of the alleged victims.

36. The State has upheld the position that the above-mentioned internal dispute in the union shall not be settled until a final court judgment is handed down by the Constitutional Chamber of the Supreme Court of Justice. In its last communication, on March 18, 2015, the State pointed out that, after judgment No. 93 was issued by the Civil Chamber of the Supreme Court of Justice on November 1, 2006, the Department of Trade Union Associations of the Ministry of Labor, by means of official writ of May 21, 2007, proceeded to register the union's executive committee chaired by the petitioner. Nevertheless, Mr. Silvio Joel Araica, exercising his constitutional rights, filed appeal on constitutional (*acción de amparo*) grounds against this registration. As a result, the Supreme Court of Justice, by means of a ruling dated June 30, 2008, ordered the suspension of the executive committee's registration until the case was decided on the merits. In light of the foregoing, the State claims that the petition did not meet the requirement of exhausting remedies under domestic law according to the terms of Article 46(1)(a) of the Convention.

37. The State also argues that the petition does not meet the requirement set forth in Article 46(1)(c) of the American Convention, because Mr. Julio Noel Canales had filed a complaint before the ILO's Committee on Freedom of Association, case No. 2394, which had set forth the same facts, legal claims, and demands as those in petition P-124-04 filed to the IACHR.

38. Furthermore, it alleges that the petitioner mistakenly claims the violation of Article 5 of the American Convention, which refers to the right to personal integrity; since, they have never provided facts or arguments in that respect. Therefore, there are no grounds for invoking such article of the Convention.

39. In short, the State contends that the claims presented by the petitioner do not constitute violations of the rights protected under the American Convention and that the petition should be dismissed since it did not meet the requirements of exhaustion of remedies under domestic law, and the requirement of duplication of procedures. Therefore, it requests the IACHR to rule the petition inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

40. The petitioner is entitled under Article 44 of the American Convention to file petitions before the Inter-American Commission on Human Rights. The petition names as alleged victims individuals respect of whom the Nicaraguan State undertook to respect and ensure the rights enshrined in the American Convention and the Protocol of San Salvador. Regarding the State, Nicaragua is a State party to the American Convention since September 25, 1979, when it deposited its instrument of ratification; and the Protocol of San Salvador, since March 5, 2010, when it deposited the instrument of ratification of this treaty. Therefore, the Commission is competent *ratione personae* to hear the petition. Likewise, the Commission is competent

ratione loci to hear the petition, as it alleges violations to rights protected under the American Convention that took place in the territory of Nicaragua, which is a State party to said treaty.

41. The Commission is also competent *ratione temporis* because the obligations to respect and ensure the rights protected under the American Convention were already in force for the State at the time the incidents alleged in the petition took place. Likewise, the IACHR has competence *ratione temporis* over those incidents that happened after the entry into force of the Protocol of San Salvador, and with regard to the consequences of events when they extended after the entry into force of the said treaty. Finally, the Commission is competent *ratione materiae*, because the petition refers to the alleged violations to human rights protected under the American Convention, as well as under Article 8(1)(a) of the Protocol of San Salvador.

B. Admissibility requirements

1. Exhaustion of remedies under domestic law

42. In order for a petition alleging violations of the provisions of the American Convention to be admissible, it must comply with the requirements established in Article 46(1) of that international instrument. Article 46(1)(a) of the Convention states that to determine the admissibility of a petition or communication lodged in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. For its part, Article 46(2) provides that the requirement of prior exhaustion of domestic remedies is not applicable when: (a) domestic law does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. This rule has the purpose of allowing for national authorities to learn about the alleged violation of a protected right and, when necessary, to resolve the situation in accordance with domestic law before it reaches an international human rights body.

43. The petitioner alleges that, for many years, he filed and exhausted several remedies before the judiciary and administrative authorities; and, that the final ruling that put an end to the dispute was the judgment issued by the Civil Chamber of the Supreme Court of Justice on November 1, 2006. As for the State, it contended that the remedies under domestic law were not exhausted; because the Constitutional Chamber of the Supreme Court of Justice has not delivered a final judgment on the appeal on constitutional grounds (*acción de amparo*) filed by Mr. Silvio Joel Araica against the resolution of May 21, 2007 issued by the Department of Trade Union Associations of the Ministry of Labor.

44. In this regard, after examining the allegations and information provided by the parties, the Commission observes that the claims presented by the petitioner have their roots in the alleged *de facto* failure of the President and Registrar of the University to recognize the executive committee chaired by the petitioner since the end of 2002. This ruling was appealed in due time by the petitioner; thus, the Civil Chamber of the Supreme Court of Justice decided, by means of its judgment No. 93 of November 1, 2006, that the labor jurisdiction was not competent to decide upon matters involving the elections of union executive committees; hence, such competence falls exclusively under the jurisdiction of the administrative authorities of the Ministry of Labor.

45. The Commission notes that alleged victims continued with a sequence of judicial and administrative remedies throughout the following years, which last step has been the appeal on constitutional grounds (*acción de amparo*) filed in 2007, and yet not decided by the Supreme Court. According to the petitioner, the delay in the decision over this appeal constitutes an obstacle for the functioning of the executive committee chaired by him; and allows for the continuation of the denounced situation as a whole. According to the available information, the lapse between the filing of the appeal on constitutional grounds in 2007, and the drafting this report, constitutes an unjustified delay on the part of the State in delivering a final decision on the domestic remedies with respect to the analysis on admissibility in the instant case.

46. Therefore, in the present case the Commission deems applicable the exception for the rule of the exhaustion of domestic remedies set forth in Article 46(2)(c) of the American Convention.

2. Timeliness of the petition

47. Article 46(1)(b) of the American Convention establishes that, for a petition to be deemed admissible by the Commission, it must be lodged within six months after the date that the alleged victim has been notified of the final judgment. In the instant case, the IACHR has determined the application of exception to the requirement of exhaustion of domestic remedies as set forth in Article 46(2)(c) of the American Convention. In this respect, Article 32(2) of the Rules of Procedure prescribes that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

48. In the present case, the petition was received in the IACHR on February 27, 2004, the alleged facts denounced therein have occurred from 2002 on, and their effects has extended until the present. Thus, in light of the context and the particularities of the instant case, the Commission deems that the petition was filed within a reasonable period of time for the purposes of Article 46(1)(b) of the American Convention.

3. Duplication of procedures and international *res judicata*

49. Article 46(1)(c) of the Convention provides that admitting a petition is subject to the requirement that the matter “is not pending in another international proceeding for settlement,” and in Article 47(d) of the Convention, it is stipulated that the Commission shall not admit a petition that substantially reproduces a previous petition or communication already examined by the Commission or another international body.

50. Regarding the petitioner’s compliance with this requirement, the State asserts that the petition must be deemed inadmissible, since it describes “the same facts, claims and demands” set forth in a complaint he previously submitted to the ILO on October 26, 2004. This complaint was registered by the ILO as case No. 2394.

51. As for the petitioner, he recognizes that he filed a complaint before the ILO’s Committee on Freedom of Association, specifically with respect to the alleged violation of the right to freedom of association. Nevertheless, he claims that it does not constitute a duplication of international procedures; because the petition filed before the Inter-American Commission is aimed at ensuring those human rights protected under the American Convention, whereas the complaint filed before the ILO refers to those union and labor rights as provided for in ILO conventions ratified by the State.

52. With respect to the review of the possible duplication of procedures in international bodies, the Inter-American Commission has ruled that “[...] a prohibited instance of duplication involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.”² When applying this reasoning, the Inter-American Commission observes that, in the present case:

a) The respondent State being called upon is the same, Nicaragua. The complainant filing the complaint before the Committee on Freedom of Association was the Ervin Abarca Jimenez Union for Higher Education Professionals of the National Engineering University for the benefit of all of its

² IACHR, Report No. 15/15, Admissibility, Petition 374-05, *Workers of the Workers Union of the National Federation of Coffee Growers of Colombia, Colombia*, paras. 42-50; IACHR, Report No. 96/98 Case 11.827, Inadmissibility, *Peter Blaine, Jamaica*, December 17, 1998, para. 43. See also IACHR, Report No. 14/97, Admissibility, Case 11.381, *Milton García Fajardo et al., Nicaragua*, paras. 35-47. As for the Inter-American Court, it has conducted this review in the context of the *Case of Baena Ricardo et al. v. Panama*. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, para. 53 & ss.

members. The petition before the IACHR, was filed by Mr. Julio Noel Canales as petitioner, representing 42 of the union's members, duly identified individually.

b) As for the purpose of the petitions, they are partially identical in both proceedings. Although the facts reported are basically the same, the Committee on Freedom of Association was unable to examine those incidents subsequent to the date of its final report, which was issued in March 2006. In that respect, it is relevant to observe that the petitioner's principal allegations regarding the State's failure to provide judicial protection took place in the period subsequent to that date.

c) As for the legal arguments, they are not identical either, because the petition filed with the IACHR reports the violation of a series of rights set forth in the American Convention on Human Rights, including aspects such as judicial guarantees and judicial protection, which go beyond the right to freedom of association. As for the complaint filed before the ILO's Committee on Freedom of Association, it was based on violations of Convention 87 (Convention concerning Freedom of Association and Protection of the Right to Organize) and Convention 98 (Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively) of the ILO.

53. In addition, the possibilities of an "international settlement," referred to in Article 46(1)(c) of the Convention, provided by proceedings with the Committee on Freedom of Association, are not equivalent to those provided by the Inter-American System of Human Rights. Among other reasons, because, as established by the IACHR, a recommendation by the Committee on Freedom of Association "does not entail any binding effect, either pecuniary or restorative, or indemnitory, on the Nicaraguan State."³ Moreover, a decision rendered by the ILO's Committee on Freedom of Association does not refer to the possible breach of other rights that do not come under the jurisdiction of that body but over which the bodies of the Inter-American System do have jurisdiction.

54. In light of the foregoing, the Commission hereby decides that there is no duplication of procedures in the present case, according to the terms of Articles 46(1)(c) and 47(d) of the American Convention.

4. Colorable claim

55. For the purposes of admissibility, the Commission must decide if any of the alleged facts tend to establish a violation of rights, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or is "obviously out of order," in line with Article 47(c) of the American Convention. The criterion to examine admissibility differs from the one used for a review of the merits of a petition, since the Commission only has to conduct a *prima facie* evaluation to determine whether or not the petitions establish the apparent or possible violation of a right guaranteed by the American Convention. It involves a cursory review that does not imply any prejudgment or prior opinion about the merits of the case.

56. Likewise, neither the American Convention nor the Rules of Procedure of the IACHR require the petitioner to identify the specific rights that have been allegedly violated by the State in the case submitted to the Commission, although the petitioner are entitled to do so. It does pertain to the Commission, on the basis of the System's jurisprudence, to establish in its admissibility reports what provision of the relevant Inter-American instruments is applicable and could tend to establish its violation if the alleged facts were proven to be true on the basis of sufficient evidence.

57. The petitioner is basically complaining that, since 2002, the members of the Ervin Abarca Jimenez Union of Higher Education Professionals of the National Engineering University have not been able to exercise their rights to freedom of association autonomously and freely. He also contends that, since that year, when he requested an extension in order to make progress in bargaining for a collective agreement, they have not been able to pick up negotiations again for a new collective labor contract or secure other

³ IACHR, Report No. 14/97, Admissibility, Case 11.381, *Milton García Fajardo et al., Nicaragua*, para. 47.

improvements in the working conditions of their members. Although their rights were recognized in both administrative and judicial bodies, the State has not provided effective judicial protection that would have enabled the alleged victims to ensure this recognition. In that respect, they stress that, after eight years, the Constitutional Chamber of the Supreme Court of Justice has not yet ruled on the last appeal on constitutional grounds (*acción de amparo*) against the union's executive committee, which they deem to be especially severe because said appeal was admitted with suspensive effects. He States that these actions against the union, spearheaded by the university's management in collusion with certain authorities, actually stem from the fact that the union had been reporting acts of corruption perpetrated by the university's management.

58. As for the State, it indicates that, at the root of the situation, there is an internal dispute between two rival factions in the same union and that the parties involved have had at their disposal the corresponding judicial and administrative remedies and that, if the final settlement has extended over a period of several years, it was precisely because of the many appeals and proceedings filed by the parties. In addition, the refusal of administrative authorities to proceed with the registration of the executive committee chaired by the petitioner was in response to court rulings that led to the suspension of said registration as a precautionary measure during the proceedings.

59. In view of the elements of fact and law submitted by the parties and the nature of the case submitted to its consideration, the IACHR deems that, if proven, the alleged facts could establish possible violations of the rights protected in Articles 8, 16, and 25 of the American Convention, pursuant to Article 1(1) of said treaty, to the detriment of the persons identified as the alleged victims in the present report. In the merits stage of the present case, the Inter-American Commission shall examine whether or not the State's actions as a whole led to its international responsibility for the alleged breach of the alleged victims' right to freedom of association. Likewise, the Commission shall consider the application of Article 8(1)(a) of the Protocol of San Salvador regarding those allegations in connection with the events that took place or whose effects extended until after the entry into force of this treaty for Nicaragua, in the framework of the general context of denying justice as alleged by the petitioner and the resulting impossibility for them to conduct their union activities up to the present date.

60. As for the petitioner's complaint about the alleged violation of Articles 3, 5, 10, and 24 of the American Convention, the Commission observes that the petitioner did not provide any allegations or substantive support for their alleged violation, as a result of which it is not for the Commission to admit this claim.

V. CONCLUSIONS

61. On the basis of the considerations of fact and law described above, the Inter-American Commission concludes that the present petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible in connection with Articles 8, 16, and 25 of the American Convention with respect to the obligations set forth in Article 1(1) of the same instrument, as well as Article 8(1)(a) of the Protocol of San Salvador.
2. To declare the present petition inadmissible with respect to Articles 3, 5, 10, and 24 of the American Convention;
3. To notify the parties of the present decision;
4. To continue examining the merits of the case; and

5. 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 11th day of the month of September, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.