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REPORT No. 123/17
PETITION 1344-07
REPORT ON ADMISSIBILITY

FERNANDO AGUIRRE *ET AL.*
(53 REPRESENTATIVES OUSTED FROM CONGRESS)
ECUADOR

Approved by the Commission at its session No. 2098 held on September 7, 2017
164th Extraordinary Period of Sessions

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REPORT No. 123/17
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 REPORT ON ADMISSIBILITY
 FERNANDO AGUIRRE *ET AL.*
 (53 REPRESENTATIVES OUSTED FROM CONGRESS)
 ECUADOR
 SEPTEMBER 7, 2017

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Gloria Gallardo Zavala, Alfredo Serrano Valladares and Fausto Cobo Montalvo, Luis Fernando Torres, Luis Morales Solís, Alejandro Ponce Villacís, Sylka Sánchez, Esteban Torres Cobo
Alleged victims:	Representatives ousted from Congress ¹
State denounced:	Ecuador
Rights invoked:	Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws), 23 (Participation in Government), 24 (Equal Protection), 25 (Judicial Protection) of the American Convention on Human Rights ²

II. PROCEDURE BEFORE THE IACHR³

Date on which the petition was received:	October 16, 2007
Additional information received at the initial study stage:	October 29 and November 6, 2007; March 18, 2007
Date on which the petition was transmitted to the State:	July 18, 2008
Date of the State's first response:	December 22, 2008
Additional observations from the petitioning party:	July 23, 2008; February 7 and July 7, 2009; May 27, June 9 and August 6, 2014; February 11, 2015; April 27, 2017 ⁴
Additional observations from the State:	April 2, 2009; October 15, 2014; November 13, 2015

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 (the instrument of ratification was deposited on December 28, 1977)

¹ The petition is filed on behalf of fifty-three alleged victims who are individualized in the annex appended hereto.

² Hereinafter "the American Convention," "the Convention" or "the ACHR."

³ The observations presented by each party were duly transmitted to the opposing party.

⁴ Moreover, between 2012 and 2013 the petitioning party several times sent communications requesting that the IACHR rule on the complaint.

IV. ANALYSIS OF 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 5 (Humane Treatment), 8 (Fair Trial), 23 (Participation in Government), 24 (Equal Protection) and 25 (Judicial Protection) of the ACHR, in relation to its Articles 1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; April 23, 2007
Timeliness of the petition:	Yes; October 16, 2007

V. ALLEGED FACTS

1. The petitioners indicate that the alleged victims were ousted from their office as representatives in the National Congress, by the Supreme Electoral Court (hereinafter “the Electoral Court”) in an unconstitutional and arbitrary way. They assert that the facts occurred in the framework of a referendum proposal that the then President, Rafael Correa, submitted to create a National Constituent Assembly, for which he signed Decree No. 002 on January 17, 2007 and transferred it to the Electoral Court for execution. They claim that no procedure in the Constitution allows the creation of a Constituent Assembly to rewrite the Constitution; therefore several lawmakers opposed Rafael Correa’s regime and deemed the referendum unconstitutional, as they believed that the Constitution first had to undergo modifications and include the assembly. Thus, they requested the then President to submit the proposal to Congress –changes to the Constitution also would have to be approved by a referendum–; however, he failed to do so. After the Electoral Court received the proposal, it requested Congress its assessment. As a result, on February 13, 2007 Congress decided to modify the proposal included Decree No. 002. They also claim that on February 28, 2007, as the term for the Electoral Court to convoke a referendum was due, the government again presented a new proposal including what had been approved by Congress plus other changes; this time, however, the Electoral Court failed to submit the changes for Congress’ approval; and on March 1, 2007, the Electoral Court convoked a referendum.

2. The petitioners indicate that on March 2, 2007 Congress ruled that the referendum was unconstitutional, and lawmakers from the opposing party proposed to impeach the Electoral Court’s judges for failing to submit the referendum proposal for Congress’ final approval. In addition, they assert that Congress decided to replace the Electoral Court’s president, who was a judge member of the party opposite to the predominating party in Congress (*Sociedad Patriótica*), for another representative of the party. The petitioners indicate that the removed judge disobeyed the resolution of Congress and warned that those interfering with the election of a constituent assembly would face retaliation.

3. The petitioners submit that on March 7, 2007 the Electoral Court fired the fifty-seven opposition legislators and suspended their political rights for a year, on the grounds that they hindered holding the referendum, based on the provisions of the Organic Law on Elections. The Electoral Court claimed that the replacement of its president, the call for the impeachment of four of its judges, and the support to an unconstitutionality claim against its resolution to hold the referendum impeded the electoral process. They also indicate that, in the same judgment, the Electoral Court rejected the decision of Congress of replacing Electoral Court’s president. The petitioning party submits that the Electoral Court ousted fifty-seven legislators because fifty-seven were the votes in favor of replacing the Court’s president; however, the voting session was “simple”; *i.e.* the TSE did not know who voted for the replacement, but “chose them,” including representatives that were not in office because they were abroad or on sick-leave or who did not participate at the session. Moreover, the petitioners assert that on March 7, 2007 opposition lawmakers decided to prosecute the Ministry of Economy for speculation in the payment of external debt bonds, and filed the complaint accordingly; on that same day, the representatives who were for the impeachment were ousted.

4. They assert that on March 14, 2007 they lodged a complaint, which was dismissed by the Constitutional Court on April 4, 2007. They claim that the Electoral Court's judgement was enforced through the Police and the support of the president of Congress, before the Constitutional Court ruled on the matter. Moreover, they indicate that an appeal for legal protection was filed before the Civil Court of Rocafuerte, Province of Manabí, to request that the fifty-seven fired lawmakers' political rights be restored to them. They submit that on March 13, 2007 the Fourteenth stand-in Civil Judge of Rocafuerte decided to provisionally suspend the judgment challenged, and ordered the Police to let the ousted legislators enter the Congress, which was disobeyed. They also indicate that on March 16, 2007 the incumbent judge of said Court revoked the appeal for legal protection, on the grounds that the Electoral Court's resolution was a normative procedure because, as the persons affected are legislators, the resolution is of general obligation. They assert that on that same day they lodged an appeal, which was reviewed seventeen days later, even though the law establishes that files must be transmitted within the twenty-four hours following reception. They submit that on April 23, 2007 the Constitutional Court revoked the resolution and granted legal protection, reinstating the legislators to their posts, in view of the fact that the Electoral Court's resolution was not a normative procedure, as it concerned fifty-seven specific and individualized lawmakers in particular.

5. The petitioners indicate that on April 23, 2007 government-supported groups arrived at the Constitutional Court, occupied the building and attacked the judges in light of police officers' inaction. They assert that on the following day, given the new composition of Congress, this body ousted the Constitutional Court's judges and annulled all the judgments issued from January that year. They submit that on May 31 a majority of lawmakers for the government, along with the then President, elected new judges for the Constitutional Court, which, on July 24, 2007, overturned and archived the resolution of April 23 on the grounds that certain procedural formalities had been violated at the resolution's approval. The petitioners claim that never had a final resolution on legal protection been overturned on the pretext of norms of due process not foreseen in the Constitution or the law, but in internal rules of procedure.

6. Furthermore, they indicate that the Supreme Court of Justice rejected a complaint filed by Lucía Burneo, a fired legislator and an alleged victim in this petition, on grounds of lack of jurisdiction, in which she requested that said Court, instead of the Electoral Court, decide on the legislators' electoral infringements in light of the jurisdiction applicable to them. As to this representative, the petitioners also assert that on March 9, 2007 she lodged an appeal for the protection of fundamental rights in view of the resolution of March 7, 2007 –through which the Electoral Court allegedly fired the fifty-seven legislators and which was ruled inadmissible by the First Civil Judge of Pichincha, and which, challenged before the TC, was admitted for processing. They indicate that the judge groundlessly dismissed the evidence submitted, and on April 23, 2007 denied legal protection, thus the aforementioned resolution was confirmed by the Constitutional Court.

7. In addition, the petitioners indicate that remedies were filed for the facts denounced here. They assert that on March 27, 2007, the Fifteenth Judge for Criminal Matters of Guayas recognized the rights of the fired lawmakers through the legal protection granted to national José Miguel Zurita, which annulled the Electoral Court's resolution issued in the Supreme Court's jurisdiction, which applies to legislators. They indicate that on April 16, 2007 the Electoral Court lodged an appeal of "devolutive effect" against that decision and that, nevertheless, the president of Congress did not convoke the fired representatives, and the Police did not let them enter the Congress. They assert that in view of this decision, on March 28, 2007, the Electoral Court issued a second resolution to sanction again the fifty-seven lawmakers, confirm their dismissal and "suspend" their political rights, thus belittling the judge's decision, and requested their criminal prosecution. They indicate that in its inadmissibility judgment on a constitutional appeal lodged by national Bairon Vásquez, the Second Chamber of the Constitutional Court ruled on said appeal and revoked the judge's decision without any grounds because said appeal had been assigned to the First Chamber of the Constitutional Court. They claim that on August 15, 2007 the First Chamber of the Constitutional Court revoked the judge's decision and denied the appeal for legal protection on grounds of ineligibility, as the claimant was not directly harmed, and on grounds of lack of jurisdiction concerning the judge. In addition, the petitioners assert that national Bairon Vásquez, who had a favorable report from the Ombudsman's Office, filed a constitutional complaint against the Electoral Court's resolution that ousted the legislators; and that on July 18, 2007 the Second Chamber of the Constitutional Court dismissed said complaint on the grounds that

the Electoral Court's ruling was not an administrative procedure but an electoral ruling "not subject to any type of challenge" as it was a final resolution.

8. Moreover, the petitioners claim that on April 12, 2007 representatives close to the government who entered Congress as stand-in legislators filed a complaint against twenty-four of the dismissed representatives before the Prosecutor's Office of Pichincha for holding a meeting at a hotel in public and with the press in order to question the government's actions and to defend their rights. They indicate that the day after the Constitutional Court granted their first legal protection appeal, the Prosecutor's Office for Miscellaneous Offenses filed an investigation for sedition and requested the pre-trial detention of the Eighteenth Judge for Criminal Matters of Pichincha. As a result of this, some of the former legislators fled Ecuador, seeking possible political asylum in Colombia. They assert that the judge did not hear the case, as among the accused were two colonels on leave who were under the High Court's jurisdiction. They submit that the First Chamber of the High Court of Quito returned the investigation files to the Prosecution's Office for Miscellaneous Offenses so that it would make the claimants recognize their signatures. The petitioners claim that although said Office failed to fulfil the above requirement, it insisted that the High Court of Quito process the investigation; and that for several months the twenty-four accused were unable to defend themselves, as the processing was suspended.

9. In light of the facts described, the petitioners allege violations of the right to a fair trial, the right to legislative immunity in relation to the principle of freedom from ex post facto laws, political rights, equal protection, judicial protection and the obligation to respect rights and to adopt domestic measures to give effect to said rights or freedoms. In addition, they allege violations of the right to life and physical integrity in view of several acts of violence to which they were subjected, such as an attack by a group of individuals on motorcycles, as a result of which several people, including assistants to the abovementioned legislators, had gunshot wounds, as well as other serious attacks by mobs on the ousted lawmakers.

10. As to the exhaustion of domestic remedies, they indicate that they exhausted the domestic remedies but had no appropriate or effective remedies to ensure their rights. They assert that the petition was lodged less than three months following the new Constitutional Court's annulment of the former Constitutional Court's grant of legal protection; and thus it was filed within a reasonable period.

11. Finally, the petitioners submit that in October 2007 the 117th General Assembly of the Inter-Parliamentary Union, concerned for the above facts, heard the report by the Human Rights Committee of said body and recommended their reinstatement to their posts.

12. The State, for its part, claims that the Electoral Court decided to hold the referendum requested by the President for April 15, 2007; however, during the electoral process, fifty-seven representatives adopted a resolution in which they invoked an inexistent concept (replacement) to remove the Electoral Court's President and hence obstruct the process' normal development. The State claims that the reason why they hindered the referendum was that their offices would be negatively affected, since the majority of Ecuadorians wanted them out of Congress in view of the body's poor reputation. It also indicates that the only body competent to decide on electoral matters and referenda was the Electoral Court, and that parliamentary immunity is applicable to protect representatives from actions that may result from issues proper to the congressional function, which does not apply to this case, as the legislators exceeded their functions.

13. The State claims that the domestic remedies have not been exhausted. It asserts that the appeal for legal protection aims at avoiding an irreparable damage or ceasing the consequences of an unconstitutional act by state agents, and does not seek the reparation of subjective rights, as stated in the petition; and that there are other remedies, like the subjective remedy, which the alleged victims failed to lodge. It also indicates that the facts were denounced before several courts by means of several constitutional appeals, the first of which were lodged on the grounds that the dismissals affected different geographical districts where the voters of the fired congressmen were. In this regard, it submits that the Law on Constitutional Control prohibited the filing of more than one constitutional appeal concerning the same matter, which in this case was infringed. The State indicates that the Electoral Court's resolution to dismiss

the fifty-seven representatives is of administrative nature. It asserts that, therefore, the appropriate remedy to challenge it and have it annulled is a complaint before the administrative law court, particularly, the filing of a full jurisdiction or subjective remedy,⁵ so that the competent court will declare the nullity or the illegality of said administrative ruling –which is impossible though an appeal for legal protection. Based on the foregoing, it considers that the alleged victims filed an inappropriate remedy to challenge the resolution and thus did not exhaust the appropriate domestic remedies. It also indicates that, under Article No. 272 of the Constitution, the Constitution will prevail over any other legal norm; and that its Article 196 foresees that the administrative actions carried out by any officer connected with the State's other functions and institutions may be impugned before the corresponding bodies; and since pursuant to the Constitution's Article 118, the Electoral Court is a State institution, it is clear that any administrative action can be impugned before the corresponding body, in this case, the administrative law court.

14. Likewise, it submits that by virtue of the principle of subsidiarity of the Inter-American Human Rights System in relation to the “fourth instance,” international protection assists or complements protection provided by the domestic legal framework; therefore, the IACHR is not entitled to review judgments of domestic courts acting within their jurisdiction and which ensure the corresponding legal safeguards, except when there is a violation of the Convention. As a result, the State claims that the petitioners' disconformity with the domestic courts' rulings does not entitle the IACHR to review said decisions. It indicates that, in this case, the courts, in issuing their resolutions, did protect all the legal safeguards, and the decisions did not violate due process of law or conventional rights.

15. The State moreover indicates that the facts do not establish violations of the rights enshrined in the ACHR. It asserts that the President's three executive orders and the Electoral Court judges' resolutions to convoke the referendum and to dismiss the fifty-seven legislators are justified and well-grounded acts within the powers attributed to said state officers, pursuant to lawful and constitutional procedures, without prejudice to the rights protected by the ACHR. With respect to this, the State indicates that the Electoral Court was competent regarding this case, since after analyzing the facts, the nature of the case does not correspond to the criminal jurisdiction of the infringement and sanction attributed to the lawmakers.

16. Furthermore, as to the subsequent inclusion of Carlos Larreátegui as an alleged victim, the State submits that Article 26 of the IACHR Rules of Procedure must be read as a legal content establishing a preliminary study that finishes when the admissibility processing begins. It also indicates that the initial review and the observations submitted by the parties at the admissibility stage are two different stages; therefore, the groundless inclusion of an alleged victim leads to an irregular situation; consequently, the facts and the rights that were not part of the initial study must be excluded from this petition.

17. Likewise, it asserts that the alleged political retaliation measures are not effective, and that several of the representatives were able to hold their university chairs, performed executive functions and even are assembly members now; and that the petitioners' argument on the alleged damage to their life projects is consequently out of order. It claims that in this case the petition must be analyzed in the light of the criterion of abuse of the right to petition, a concept included in the European Convention on Human Rights and which the European Court of Human Rights has developed as jurisprudence, which the Inter-American System on Human Rights should also apply.

18. It concludes that the legal and constitutional powers of the Electoral Court then entitled it to hold electoral processes and rule on infringements concerning elections; therefore, it was lawfully entitled to impose electoral sanctions on those who directly or indirectly interfered in an electoral process, the electoral body's own functioning or the holding of a referendum. It indicates that, in said framework, the Electoral Court decided to hold a referendum pursuant to the President of the Republic's request, and declared that the electoral term extended from February 15 to May 15, 2007. The State claims that within that period fifty-

⁵ It indicates that Article 3 of the Law on the Administrative Law Jurisdiction establishes as follows: “The remedy of full jurisdiction, or subjective remedy, protects a claimant's subjective right that was purportedly completely or partially denied or not recognized through the administrative act at issue.”

seven Congress representatives undertook several measures that the Electoral Court considered as obstacles for the above electoral process, thus the Law on Elections in force was applied.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

19. The petitioners claim that the alleged victims resorted to several remedies to be reinstated to their offices and that the domestic remedies were exhausted; nevertheless, they assert that they did not have appropriate or effective remedies to protect their rights. They also indicate that under Article 6 of the Law on the Administrative Law Jurisdiction, actions adopted by electoral bodies are excluded from the administrative law jurisdiction;⁶ consequently the Electoral Court's decisions were not subject to the administrative law jurisdiction through the filing of a remedy of full jurisdiction or subjective remedy. For its part, the State indicates that the domestic remedies have not been exhausted because the alleged victims did not file a full jurisdiction or subjective remedy.

20. As to the aforementioned, the IACHR notes that among the several remedies filed by the alleged victims, an appeal for legal protection was lodged, which was rejected on March 16, 2007. In second instance, on April 23, 2007, the Constitutional Court revoked said denial, granting the appeal and ordering their reinstatement to their posts. The petitioners indicate that on July 24, 2007 the new members of the Constitutional Court ruled on a settled matter and overturned the judgment of April 23, 2007, thus revoking the constitutional appeal granted. In light of the foregoing, after analyzing the merits of said remedy, which was granted and subsequently annulled by the same Constitutional Court but with a different composition, the Commission concludes that the alleged victims pursued the appropriate domestic remedies as applicable, which were exhausted through the judgment of April 23, 2007 that ruled on their complaint, pursuant to Article 46.1.a of the Convention and to Article 31.1 of the Rules. In view of the fact that the complaint was submitted on October 16, 2006, the petition meets the requirement set forth in Article 46.1.b of the Convention and in Article 32.1 of the Rules.

VII. COLORABLE CLAIM

21. In light of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the IACHR believes that if the facts concerning the lack of dismissal proceedings before a competent court and in accordance with the corresponding safeguards are proved –dismissals were allegedly decided based on political views–, they could establish possible violations of Articles 8, 23, 24 and 25 of the American Convention, in connection with its Articles 1.1 and 2, to the detriment of the alleged victims. Moreover, as to the allegations concerning the different aggressions that some of the alleged victims were subjected to, the IACHR will analyze in the merits stage if Article 5 is applicable to this matter.

22. Furthermore, as to the alleged violations of Article 9 of the Convention in view of the purported application of the Law on Elections in disregard for the alleged victims' parliamentary immunity, the Commission notes that the petitioners do not submit arguments or evidence to prove said alleged violation; therefore, said claim is found inadmissible.

23. Lastly, as to the allegations submitted by the State as regards the inclusion of Carlos Larreátegui as an alleged victim, the Commission and the Inter-American Court on Human Rights⁷ have established that it is for the Commission to identify the alleged victims with precision and in the due procedural stage, noting that legal certainty requires that the identification of victims be made in the merits stage generally. As to this matter, the Commission notes that the State has been able to comment on the facts concerning said alleged victim; therefore, his inclusion has not prevented the State from commenting or submitting its observations, hence its arguments regarding this aspect are dismissed.

⁶ The petitioners assert that Article 6 establishes as follows: "The following are not under the administrative law jurisdiction: d) Resolutions issued by electoral bodies."

⁷ See for instance, I/A Court H.R. Case of J. v. Peru. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, par. 23.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 23, 24 and 25 of the American Convention, in connection with its Articles 1.1 and 2;
2. To find the instant petition inadmissible in relation to Article 9 of the American Convention;
3. To notify the parties of this decision;
4. To continue with the analysis on the merits; 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 in the city of México, on the 7 day of the month of September, 2017. (Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.

Annex

List of alleged victims

1. Fernando Aguirre
2. Antonio Álvarez
3. Fernando Alarcón
4. Nelly Macías
5. Raúl Auquilla
6. Eliseo Azuero
7. Eduardo Bautista
8. Ricardo Borja
9. Shirley Borja
10. Freddy Bravo
11. Lucia Burneo
12. Henry Carrascal
13. Leonel Cedeño
14. Edison Chávez
15. Lenin Chica
16. Fausto Cobo
17. Soledad Diab
18. Jorge Durán
19. Edgar Espín
20. Luis Fernández
21. Paco Fierro
22. Oswaldo Flores
23. Gloria Gallardo
24. Marco Granizo
25. Alfonso Harb
26. Orlando Ibarra
27. José Iturralde
28. Fernando Jalil
29. Carlos Larreátegui Nardi
30. Carlos López
31. Guadalupe Marcillo
32. Marielisa Márquez
33. Rodolfo Maya
34. Jorge Mejía
35. Eduardo Montaña
36. Luis Morales
37. Teófilo Moscol
38. Luzmila Nicolalde
39. Antonio Noboa
40. Ximena Nuñez
41. Germán Obaco
42. Mauricio Ponce
43. Hugo Romero
44. Fernando Romo
45. Gioconda Saltos
46. Gissela Saltos
47. María Sánchez
48. Sylka Sánchez
49. Alfredo Serrano
50. Luis Tapia
51. Luis Fernando Torres Torres

- 52. Washington Vallejo
- 53. Natalie Viteri