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REPORT No. 105/20
PETITION 2108-12
REPORT ON INADMISSIBILITY

IVÁN IZCOATL NIETO ZAINOS
MEXICO

Approved by the Commission electronically on April 24, 2020.

Cite as: IACHR, Report No. 105/20, Petition 2108-12. Inadmissibility. Iván Izcoatl Nieto Zainos. Mexico. April 24, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Álan Nieto Cervantes, Angélica Jara Mendoza
Alleged victim:	Iván Izcoatl Nieto Zainos
Respondent State:	Mexico ¹
Rights invoked:	No specific rights are invoked

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	November 19, 2012
Additional information received at the stage of initial review:	October 2, 2013
Notification of the petition to the State:	February 5, 2015
State's first response:	October 14, 2015
Additional observations from the petitioner:	May 22, 2017
Additional observations from the State:	June 13, 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

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	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, as referred to in Section VI
Timeliness of the petition:	Yes, as referred to in Section VI

¹ Pursuant to Article 17(2)(a) of the Rules of Procedure of the IACHR, Commissioner Joel Hernández García, a Mexican national, did not participate in the discussion or decision in this matter

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

V. FACTS ALLEGED

1. Alan Nieto Cervantes (hereinafter "the petitioner") asks the IACHR to request the Mexican State to adopt urgent measures³ with respect to his son, Itzcoatl Nieto Zainos (hereinafter "the alleged victim") due to the Mexican State's failure to comply with and implement the resolution granting the petitioner guardianship and custody of the child, arguing that his son has been the victim of the crime of abduction (in this case, retention) of minors.

2. The petitioner describes how, in 2007, by mutual agreement, he divorced his wife Mrs. Brenda Zainos González, the alleged victim's mother, in a proceeding in the city of Guadalajara, in which guardianship and custody of the child was granted to the mother, with both parents maintaining parental responsibility (*patria potestad*). He states that in August 2010, Mrs. Zainos González asked him as the father to take guardianship and custody of the child since she was undergoing a high-risk pregnancy and could not take on that responsibility. He indicates that he agreed to that request and took the child to live with him in the town of Zacatecas, where he enrolled him at a local school and the child began living his normal life and activities and visited his mother during the weekends. On April 25, 2011, Mrs. Zainos González filed a writ with the Second Family Court Judge in the District of Zacatecas requesting that the petitioner be required to hand over the child to her. The petitioner alleges that he opposed that request because the child had been living with him for several months and was adapting to life in Zacatecas. For that reason, he had filed an incidental plea to change the guardianship and custody agreement and requested provisional measures to keep custody of his son while the case was settled. On May 17, 2011, the Second Family Court Judge issued a resolution granting the petitioner guardianship and custody of the child until the underlying issue was decided. At the same time, prior to that ruling, the petitioner had filed an *amparo* suit on behalf of his son before the First Judge of the Zacatecas State district who, on September 6, 2011, stayed the proceedings as he considered that the child lacked standing for pursuing the case (*carecía de interés jurídico para promover el juicio*).⁴ The petitioner filed an appeal against that decision, which was declared inadmissible by the Collegiate (Appellate) Court in Aguascalientes.⁵ Six months later, the Collegiate Court of the Twenty-Third Circuit declared the appeal for review admissible and revoked the judgment of the First Judge, thereby granting the *amparo* action on behalf of the child and allowing the case to be heard by the Family Court Judge in the District of Zacatecas, setting aside the ruling of April 25, 2011.

3. The petitioner alleges that on July 6, 2011 he reached an agreement with the mother of the child before the Second Family Court Judge of Zacatecas, whereby the child would spend his vacations with his mother and the mother committed to returning the child to the father on August 15, 2011. The petitioner argues that the mother did not keep to that agreement and that, since then, the child had remained with his mother, despite the binding nature of the agreement reached and despite the court's injunctions and admonitions. He adds that in September 2012, the Second Family Court in Zacatecas set October 8 of that year as the date for a hearing at which the child would be presented before the court: an injunction that the mother failed to comply with. He complains that the judge asked that a letter rogatory be remitted to Guadalajara so that the child could be heard there and ordered the petitioner to defray the procedural and other costs of that arrangement, while omitting to pronounce on the protection measures requested by the petitioner.⁶ He adds that when the child did not appear before the Court, the judge repeated the request for the child to appear so that the Court could hear what he had to say, but the mother did not bring him, maintaining that it was very difficult for her to travel since she was pregnant. The petitioner argues that the authorities did nothing about the mother's failure to keep to the agreement, thereby preventing him from living with his son and allowing the mother to practice psychological violence against the child.

4. In addition, on November 10, 2011, the petitioner filed a criminal lawsuit with the Guarantees Judge and Oral Hearings Tribunal (*Juez de Garantías y Tribunal de Juicio Oral*) of Zacatecas against Mrs. Zainos

³ While the purpose of the writ from the petitioner was to request precautionary measures, the Commission considered that parts of it constituted a petition and proceeded accordingly.

⁴ The petitioner calls the judge's ruling "incredible" (*inverosímil*).

⁵ The Zacatecas Court recused itself because the petitioner had worked for it.

⁶ The petitioner argues that the protection measures were necessary because his son was showing signs of suffering from "parental alienation syndrome."

González for the crime of abduction of minors, because of her holding on to the child. That judge imposed precautionary measures on the mother but said he would not pronounce on the status of the child since he considered that a matter for family court jurisdiction. The petitioner adds that he asked for his son to be separated from his mother, since she had been charged with an act of aggression against the child (separating him from his family environment). However, the judge did not authorize that measure since he considered that there were no data indicating that the child was suffering in the company of his mother. The petitioner considers that this position is unfounded, since the abduction of the child evidently constituted a form of aggression. He points out that later he and the Public Prosecutors' Office (*Ministerio Público*) requested a hearing for restoration of the status quo (return of the child to his father) prior to commission of the illicit act; but the judge again referred the matter to the family court judge.⁷ The petitioner adds that on April 27, 2012, he once again requested a hearing for protection measures to be issued and the restitution of his child's rights, which resulted in the judge again ruling that the dispute be settled by a family court.

5. He goes on to say that, on July 9, 2012, a resolution was handed down suspending the proceedings on a trial basis (*suspensión del proceso a prueba*) and ordering the accused to comply with various obligations, including returning the child to its father, which she failed to comply with. Subsequently, a hearing was held to review compliance with the terms and conditions of the suspension of the proceedings under way and the judge was asked to resume oral proceedings, given that the accused had not met her obligations. On November 6, 2012, a hearing was requested to review measures within the criminal proceedings, but it did not take place given that a resolution was still pending regarding a complaint filed by the petitioner regarding deficient implementation by the Second Family Court Judge of the *amparo* granted on behalf of his son.

6. For all of the above reasons, the petitioner complains that, despite all the occasions on which he asked the judicial authorities to issue protection measures for the alleged victim, they failed to respond. He adds that the Second Criminal Chamber of the Higher Court of Justice of Zacatecas resolved his appeal against the Guarantees Judge's failure to order protection measures, stating that the victim was not entitled to that defense measure until the hearing prior to the trial and that minors should be with their mother, an argument that the petitioner regards as a form of discrimination against him as a man.⁸

7. The State, for its part, argues that the petition is inadmissible by reason of failure to exhaust domestic remedies. It points out that the incidental plea to amend the guardianship and custody agreement with respect to the petitioner's son was resolved by an interlocutory judgment on February 5, 2015, which was appealed and then confirmed by a second instance court on February 25, 2016. The petitioner then filed an action for protection of a constitutional right (*amparo*) against the ruling of the second instance court, which was resolved on May 27, 2016 without the petitioner being granted either *amparo* or protection, so that guardianship and custody of the child remained with the mother. The State points out that the petitioner could have filed an appeal for a review of that resolution, but did not. The State further underscores that when the petitioner resorted to the (Inter-American) Commission, a first instance ruling had not yet been handed down.

8. The State further holds that the petition should not be admitted because the facts alleged do not constitute human rights violations. With regard to the proceedings before the family court, the State maintains that its decision was not based on a preconception in favor of the mother. It stresses that the child's opinion was borne in mind throughout the process and care taken to ensure his best interests. In a hearing held on January 11, 2013 before the Eighth Family Court Judge in Guadalajara, the child stated that he wished to live with his mother and only visit his father at weekends. As regards the criminal proceedings, the State points out that on July 9, 2012, as an alternative, authorization was given for a trial suspension of the proceedings, in which the accused was required to pay reparation for the harm done and arrange for and establish the terms on which the petitioner could live with his son. The State stresses that on August 25, 2014, the petitioner submitted a writ requesting dismissal of the proceedings and reporting that "the reparation payment had been

⁷ The petitioner argues that that judge based his decision, inadmissibly, on an *amparo* granted to the mother, which did not restrict the judge's scope of action, since it established that the child must not be delivered or assigned to other persons or another place, "unless in fulfillment of a family court order or as a security measure ordered by the representative of the Public Prosecutors' Office responsible for conducting an investigation into an illicit act.."

⁸ The petitioner provides a copy of an article reporting that in Mexico women are disproportionately favored in judicial disputes regarding the custody of children.

made in its entirety and that the accused had complied with the conditions established." Thus, it was at the behest of the petitioner himself that criminal proceedings against the mother of his child were dismissed. The State further indicates that the precautionary measure on behalf of the petitioner's child could not be executed because the petitioner did not appear at hearings at which his presence was indispensable.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. Regarding the requirement that domestic remedies be exhausted, the Commission once again points out that current practice with respect to changes in the positions adopted by the parties is to consider them as a whole, assigning more weight to their most recent communications. Therefore, since the admissibility report is the cut-off point at which the Commission verifies compliance with admissibility requirements, both parties, that is to say the State and the petitioners, have until then to present updated information and arguments relating to the requirements for the petition to be admitted.

10. With respect to the incidental plea to amend the agreement on the guardianship and custody of the petitioner's son, the State argued that that the petitioner did not exhaust domestic remedies because he did not file for a review of the judgment denying the amparo sought against the second instance court's -- for him adverse -- judgment. The petitioner has not presented arguments or evidence indicating that the review remedy was exhausted nor does it appear from the file that it would not have been a suitable means of remedying the situation he described. For that reason, the Commission notes that the petition turns out not to be admissible in respect of the final decision adopted regarding this agreement, because it does not meet the requirements established in Article 46.1.a of the American Convention.

11. As for the alleged failure to comply with the precautionary measures ordered by the Family Court system on behalf of the petitioner's son, the Commission considers that the failure to implement them within a reasonable period of time could trigger the exception to exhaustion of domestic remedies provided for in Article 46.2.c of the American Convention. However, the State pointed out that they could not be implemented because the petitioner failed to appear at hearings in which his presence was indispensable. Accordingly, the Commission reiterates that petitioners must exhaust domestic remedies in accordance with their domestic procedural laws and that the Commission cannot consider that the petitioner duly complied with the requirement to first exhaust domestic remedies if those remedies were denied on reasonable non arbitrary procedural grounds. The petitioner has not submitted arguments or evidence contesting the allegation that the reason why the precautionary measure was not executed was his failure to attend hearings. The petitioner has also not provided elements supporting that the requirement for him to attend those hearings was unreasonable or arbitrary, nor do those elements arise from the case file. Therefore, the Commission considers that this component of the petition is inadmissible because it fails to meet the requirements of Article 46.1.a of the American Convention.

12. As for the criminal proceedings against the mother of the petitioner's child, the State pointed out that they were dismissed at the request of the petitioner himself. The State made no reference to additional domestic remedies that were not exhausted that could have allowed the claims made by the petitioner regarding the criminal proceedings to be addressed at the domestic level. For that reason, and because the request for dismissal was submitted on August 25, 2014, the Commission considers that this aspect of the petition does meet the requirements of Article 46.1.a and b. of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

13. The Commission observes that, with regard to the criminal proceedings instigated against the mother of the petitioner's child for abduction of minors, the present petition contains allegations that the criminal court judge violated the petitioner's right by refusing to order protection measures on behalf of his son on the pretext that only a family litigation court was competent to order them.

14. With respect to those considerations, and after examining the matters of fact and law presented by the parties, the Commission considers that, although States are obliged to guarantee effective remedies to protect the right of a family to live together (*convivencia familiar*), it is up to domestic law to

determine the competent authorities to hear those remedies and the procedures applicable to them. In the instant case, the petitioner did not submit arguments or evidence indicating that family court jurisdiction was not appropriate for protecting either his rights or those of his child in the matter at hand. Nor did he contest the State's argument that the reason why the family court's rulings could not be implemented was his failure to attend hearings at which his presence was indispensable. Under these circumstances, the Commission finds that there are insufficient grounds to conclude, *prima facie*, that the criminal court judge's refusal to hear the applications for a protection measure filed by the petitioner might constitute violations of the American Convention.

15. The Commission will not conduct an analysis of colorable claim regarding those aspects of the petition that, in Section VI of the present report, it concluded were inadmissible.

VIII. DECISION

1. To declare the present petition inadmissible; and
2. To notify the parties of this decision; 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 24th day of the month of April, 2020. (Signed): Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.