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REPORT No. 60/16
PETITION 1742-13

REPORT ON ADMISSIBILITY

GUSTAVO FRANCISCO PETRO URREGO
COLOMBIA

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Organization of American States

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I. SUMMARY

4. On October 28, 2013, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "Commission," or "IACHR") received a petition lodged by *Colectivo de Abogados José Restrepo* (CCAJAR) and *Asociación para la Promoción Social Alternativa* (MINGA) (hereinafter, "the petitioners") against Colombia (hereinafter, "Colombia" or "the State"). The petition was presented on behalf of Gustavo Francisco Petro Urrego (hereinafter, "the alleged victim" or "Gustavo Petro"), a former mayor of the city of Bogotá, who, in disciplinary proceedings instituted by the Office of the Attorney General (*Procuraduría General de la Nación*) (hereinafter, "PGN"), was punished by dismissal and disqualification from public office.

5. The petitioners claim violations of the rights to a fair trial, to participate in government, to equal protection, to judicial protection, and to humane treatment, as well as an infringement of the duty to adopt provisions under domestic law, all in conjunction with the obligations to respect and ensure rights without discrimination, by reason of the PGN's exercise of its disciplinary powers in a disciplinary proceeding brought against Gustavo Petro, in which he was punished with dismissal and disqualification from holding any position of public office for 15 years. The State, for its part, argues that the petitioners are seeking to use the Commission as a "fourth instance" and that the remedies under domestic law have not been exhausted, since a decision is still pending on an application to vacate and restore rights (*recurso de nulidad y restablecimiento del derecho*).

6. Having examined the positions of the parties and compliance with the requirements set forth in Articles 46 and 47 of the American Convention on Human Rights (hereinafter, the "American Convention" or "Convention"), without prejudging the merits of the complaint, the Commission has decided to declare the petition admissible for the purposes of examining the alleged violations of rights recognized in Articles 8 (right to a fair trial), 24 (right to equal protection), 23 (right to participate in government), and 25 (right to judicial protection) of the American Convention, all in conjunction with the obligations set forth in Articles 1(1) (obligation to respect rights) and 2 (duty to adopt provisions under domestic law) of said treaty. The Commission has further decided to notify the parties of this decision, 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

7. The IACHR received the petition on October 28, 2013, and forwarded a copy of the pertinent portions to the State on March 18, 2014, giving it two months in which to submit observations, in accordance with Article 30 of its Rules of Procedure. The IACHR received the response of the State on July 21, 2014, and forwarded it to the petitioners on July 31, 2014.

8. The petitioners submitted additional observations on October 1, 2014, and May 22, 2015. The State, for its part, submitted additional observations on March 27 and August 14, 2015. Those observations were duly forwarded to the opposing party.

[1] Pursuant to Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Enrique Gil Botero, a Colombian national, did not participate in the discussion or decision in this matter.

9. In view of the subject matter of the petition and of the precautionary measure granted, the Commission decided to give priority to its processing.

Precautionary measures

10. The IACHR registered an application for precautionary measures in connection with this petition due to the fact that the petitioners mentioned in it that a serious situation existed that could cause Gustavo Petro irreparable harm. On March 18, 2014, the IACHR granted precautionary measures on behalf of Gustavo Petro. Since then, both parties have updated the IACHR on the matter on a number of occasions, with the opposing party being apprised of the information received. The IACHR stated that in its analysis of this petition it would take into account the information supplied by both parties during the precautionary measures procedure.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

11. The petitioners say that Gustavo Petro, who was a militant in the April 19 Guerrilla Movement (M-19), has been actively involved in political life since 1981, as a result of having held positions of popular representation, having been a councilor in Zipaquirá, a member of the Chamber of Representatives for the Department of Cundinamarca for the party *Alianza Democrática M-19*, and then for the constituency of Bogotá as a member of the group *Movimiento Vía Alterna*, before being reelected as a member of the *Polo Democrático Independiente* party. They say that in 2006 he was elected senator for *Polo Democrático Alternativo*, and that in that position he was known as a leader of the opposition to the government. They also say that he stood as a candidate for president of the Republic in the 2010 elections and that he founded the *Progresistas* movement. They say that he ran for—and on October 30, 2011, was elected—mayor of Bogotá.

12. By way of additional background, they mention that as a result of being an opposition leader, Gustavo Petro and his family were the targets of harassment and threats from paramilitary groups and agencies of the Colombian State. They also recall that as a result of the above the Commission granted him precautionary measures in 2002.

13. They say that during his administration as mayor he established a public enterprise to provide waste collection services starting from December 18, 2012, which was the expiration date of the concession for those services held by private operators. That led to the implementation of a "zero trash" (*basura cero*) program that also enjoyed the legal backing of the 2012–2016 District Development Plan approved by the Bogotá Council.

14. According to the petitioners, on January 16, 2013, the Disciplinary Division of the PGN ordered a disciplinary inquiry to be opened into Gustavo Petro in his capacity as mayor, to investigate three matters: (1) the signing of Inter-Administrative Agreement 017 October 11, 2012, between *Unidad Administrativa Especial de Servicios Públicos* (UAESP) and *Empresa de Acueducto y Alcantarillado de Bogotá ESP* (EAAB), and the signing of Inter-Administrative Agreement 1-07- 10200-0809-2012 of December 4, 2012, between EAAB and *Empresa de Aguas de Bogotá ESP*; (2) the enactment of Decree 564 of December 10, 2012, which adopted a system for the provision of public waste collection services in the city of Bogotá; and (3) the enactment of Decree 570 of December 14, 2012, which authorized the use of dump trucks "to ensure continuity in the provision of public waste collection services and as a precautionary measure to minimize any potential environmental and health impacts ... [which] possibly committed a very serious violation."[2] The petitioners say that after hearing Gustavo Petro's voluntary statement, the PGN decided to bring charges against him.

[2] Petition brief of October 28, 2013, par. 33, which, in turn, cites the list of charges against Gustavo Petro.

15. The petitioners allege that the proceeding instituted was not reasonable. They say, with respect to the first and second charges, that the mayor behaved in accordance with judgments rendered by the Constitutional Court that ordered a system of short-term goals to be defined for the purpose of formalizing and regulating Bogotá's trash recyclers, which coincided with the government plan that Gustavo Petro had registered before he was elected, implementation of which was mandatory under the law. They say that, therefore, a public enterprise was set up to provide waste collection services from December 18, 2012, when the concession held by private operators expired, as it was determined that unfettered free competition prevented the inclusion of the trash recyclers, who were at a disadvantage vis-á-vis the private operators. With regard to the third charge, they say that the District Environmental Secretariat found in its technical follow-up report on the measures adopted by the new model that no environmental harm was done in terms of air emissions, dumping, or hazardous waste, as the PNG alleged in its list of charges. However, it acknowledged that in some cases, such as in the transportation of waste, there were potential risks but that no harm had materialized. They say that the crisis arose after the former service operators failed to return the waste compactor trucks and other specialized equipment, as required by Article 19 of Law 80 of 1993 (Government Contracting Law).[3]

16. They say that in spite of those explanations, the disciplinary entity argued that the charges amounted to the very serious violations of, respectively, "participating in the pre-contractual stage or in the contractual activity, to the detriment of the public purse, or in violation of the rules governing government contracting and the administrative role envisaged in the Constitution and the law," "exercising the powers afforded him by his position or duties for a purpose other than a legally prescribed one," and "adopting administrative decisions, outside of the performance of his duties, in breach of constitutional or legal provisions governing the protection of the technical and cultural diversity of the nation, natural resources and the environment, creating a serious risk to ethnic groups, indigenous peoples, human health, or the preservation of natural ecosystems or the environment," contained in the Consolidated Disciplinary Code *(Código Disciplinario Único)*.

17. The petitioners also say that councilor Orlando Parada of *Partido Social de Unidad Nacional*, the political party to which the president of the Republic belonged, filed a petition for Gustavo Petro to be stripped of his investiture, "for having been elected a senator despite having been sentenced to 18 months' imprisonment for the crime of illegal possession of firearms in 1985," when he was a member of the April 19 Movement (M-19). They add that on October 8, 2013, the Council of State denied the petition for loss of investiture, among other things, because the sentence served by Gustavo Petro was for a political offense, which the Constitution excludes as a cause for ineligibility for publicly elected office.

18. The petitioners informed that on December 9, 2013, Gustavo Petro was dismissed and disqualified from public offices for 15 years by the Disciplinary Division. He filed an application for reversal but the decision was upheld on January 13, 2014. The petitioners also said that people who voted for the mayor filed various petitions for relief so that the president of the Republic might comply with the precautionary measure ordered in favor of the alleged victim by the Inter-American Commission on March 18, 2014. They said that on April 21, 2014, the Civil Division for Specialized Decisions on Land Restitution of the Superior Court of Justice of Bogotá Judicial District issued a judgment granting injunctive relief that found in favor of the citizen Oscar Augusto Verano and ordered the President of the Republic to abrogate Decree 570 of March 20, 2014, which enforced the single instance ruling of December 9, 2013, that effectively dismissed Gustavo Petro from office. They say that on April 23, 2014, the president of the Republic issued decree 797 complying with the injunction. Furthermore, the petitioners mentioned that on April 1, 2014, Gustavo Petro filed a petition for relief with Section 3, Subsection A of the Administrative Tribunal of Cundinamarca, which was rejected as unfounded on April 24, 2014.

[3] According to the petitioners, that article provides: "In contracts for exploitation or concession of state assets, it shall be agreed that at the conclusion of the exploitation or concession, ownership of the elements and assets directly designated to said exploitation or concession shall transfer to the contracting entity without compensation from the latter."

19. The petition says that on March 28, 2014, Gustavo Petro filed an application to vacate and restore rights against the Nation – PGN with the Administrative Tribunal of Cundinamarca to contest the decisions of December 9, 2013, and January 13, 2014, and requested that, as an urgent precautionary measure, the contested decisions be provisionally suspended. On May 13, 2014, Council of State justice Gerardo Arenas Monsalve ordered the provisional suspension of the legal effects of the decision of December 9, 2013, a ruling that was upheld on May 23, 2014, by Section 2, Subsection B of the Council of State.

20. The petition describes the regulatory framework underpinning the disciplinary authority of the PGN over public officials, including those elected by universal suffrage. They mentioned that Article 277 (6) of the Constitution provides that the Attorney General supervises the official conduct of those who hold public office, including those elected by popular ballot, and that he has disciplinary authority. They add that the Consolidated Disciplinary Code grants the PGN preference in exercising disciplinary power and that in that respect, the PGN has the authority to dismiss, disqualify, and suspend civil servants following a disciplinary proceeding in the event of disciplinary violations.[4]

21. The petitioners allege a violation of Articles 2 and 23 of the Convention by virtue of the fact that the disciplinary proceeding instituted by an administrative authority restricted the political rights of Mr. Petro without offering due guarantees. They argue that the proceeding also violated the right of the citizenry to elect someone of their choosing and participate in the conduct of public affairs through representative democracy, given that the disqualification by an administrative decision of an official elected by popular ballot curtailed their aspirations for participation in the country's political life. In that regard, they mentioned that the Inter-American Court of Human Rights has held that one of the requirements for the restrictions contemplated in Article 23(2) of the Convention is that the sentencing be by a competent court in criminal proceedings.

22. They add that in Colombia, civil servants, irrespective of whether they are appointed or elected by universal suffrage, may be the subject of disciplinary and criminal proceedings simultaneously, and those proceedings are conducted in relation to the same charges, with separate weighing of the evidence. Furthermore, evidence may be accepted in one proceeding that is deemed invalid in the other. They say that in the case of publicly elected officials, although two proceedings may occur simultaneously with different objectives, which is incompatible with the Convention, the disciplinary inquiry is conducted by an administrative official, not a judicial one.

23. With respect to criminal proceedings, in their response to a request for information in the precautionary measures procedure, the petitioners informed the Commission on February 6, 2014, that an investigation being carried out by the Deputy Prosecutor General of the Nation—specially designated to do so by the Prosecutor General of the Nation—was at the preliminary inquiry stage, and was aimed at determining whether Colombia's criminal laws were violated with the implementation of the new waste collection system. They said that a decision against the mayor has not yet been taken. They also said there are four ongoing cases—unconnected with his dismissal or disqualification—all at the preliminary inquiry stage, concerning activities that he carried out in the exercise of his duties as mayor. However, the prosecutor's office has yet to determine if the complained-of conduct warrants investigation.

24. The petitioners question the lack of congruence between the Disciplinary Code (Law 734 of 2002) and Article 23 of the Convention, as well as the enforcement of that Code, which materially affected the alleged victim's case. They argue that the origin of the disqualifying authority of the Attorney General, recognized at Article 45 of the Consolidated Disciplinary Code, is a law, not the Constitution. At the same time, they argue that Article 278 of the Constitution grants the Attorney General the power to remove officials from their posts directly; in other words, it is a nondelegable power. With regard to the latter, they point out that, despite that, the proceeding and dismissal were overseen and imposed by the Disciplinary Division, which

[4] The petitioners mentioned that among the penalties envisaged for civil servants in Article 44(1) of the Consolidated Disciplinary Code are "dismissal and general disqualification from public office for very serious violations committed with intent or gross negligence."

comprises delegated government attorneys. Moreover, they hold that delegated government attorneys serve at the pleasure of the Attorney General and, therefore, do not meet the requirement of being independent. In addition, on the subject of impartiality, the Attorney General has made statements regarding Gustavo Petro that denote animosity toward him. Furthermore, they say that the Commission should examine the overall regime governing civil servants, under which they may be liable to criminal, disciplinary, fiscal, and other investigations for the same conduct.

25. The petitioners also allege violations of rights enshrined in Articles 8, 24, and 25 of the Convention. They say that the proceeding instituted against the alleged victim is not impartial and the fact that the attorney general is investigating the mayor for administrative acts reveals an authoritarian bent and clearly shows that both the charges and the proceeding itself are eminently political and subjective in nature. Furthermore, they argue that the right to presumption of innocence was violated by the fact that the list of charges contains assertions that undermine the presumption of his innocence. In addition, they say that he did not enjoy equal protection of the law as it has been verified that the Attorney General behaves with bias against civil servants whose political leanings differ from his own and that, conversely, he is lax when it comes to other officials who have links to the so-called *parapolítica.* (The *parapolítica* scandal revealed that the government had ties to paramilitary groups).

26. The petitioners also say that Article 5 of the Convention was violated on the grounds that the harassment and attacks against Gustavo Petro could harm both his physical and emotional integrity, given that he could become the target of a variety of threats as results of statements by the PGN against his administrative decisions.

27. As to the admissibility of the petition, they argue that the IACHR has *ratione materiae, loci, personae* and *temporis* competence to examine the matter. They also say that there is no duplication of proceedings.

28. As regards exhaustion of domestic remedies, the petitioners hold that the Colombian Constitutional Court found in Judgment C-028 of 2006 that the rules that empower the Attorney General to impose the punishment of dismissal and disqualification from public service are constitutional. They say that the Constitutional Court ruled that Article 23 of the American Convention, interpreted systematically with other international instruments, does not oppose states adopting other equally punitive measures, though not deprivation of liberty.

29. The petitioners argue that the Constitutional Court has the authority to eject any rule from the domestic system of laws that runs counter to the Constitution and, therefore, is contrary to the Convention. They say that in this case, the Constitutional Court ruled that the norm that allows the PGN to restrict political rights is constitutional, precluding the possibility of protecting the violated rights by means of domestic remedies. In that connection, they argue that Constitutional Court Judgment C-028 of 2006 implies that there are no judicial remedies under domestic law to counter the authority of the Attorney General of the Nation to limit the political rights of citizens who hold a position in the civil service, despite the fact that said official is not a judicial authority, much less a criminal judge who imposes penalties in accordance with the rules of legal due process. They add that Article 243 of the Constitution provides unequivocally that the decisions adopted by the Court in exercising constitutional control are final.

30. They argue that during the petition's processing by the Commission the State has not indicated the suitable recourse against the decision of the Constitutional Court in Judgment C-028 of 2006, and that the decision of the Council of State on the application to vacate and restore rights filed by Gustavo Petro and currently awaiting a decision, cannot undermine the Constitutional Court's finding. They say that should it prevail, that decision would be based on the violations of due process and other legal precepts, but would leave the powers of the Attorney General intact. They also hold that the Constitutional Court of Colombia has been consistent in its jurisprudence in the sense that a petition for relief *(acción de tutela)* is not, as a rule, admissible against decisions of the Attorney General of the Nation that impose disciplinary penalties because it is a subsidiary remedy and in the case of those administrative acts the administrative jurisdiction is where they should be appropriately decided.

31. The petitioners also posit that the application to vacate and restore rights provided for in the administrative jurisdiction in Colombia is a remedy that may take five or more years to decide and, therefore, is not suitable promptly and effectively to restore the abridged rights.

32. In addition, they say that the rule found at Article 36(3)(a) of the Commission's Rules of Procedure, that the "exception to the requirement of exhaustion of domestic remedies would be inextricably tied to the merits of the matter" applies in this case and, therefore, that the examination of admissibility in this case is closely intertwined with the analysis of merits.

33. Based on the foregoing, the petitioners allege that the State has violated the rights of Gustavo Petro under Articles 1(1), 2, 5, 8, 23, 24, and 25 of the American Convention.

B. Position of the State

34. According to the State, as result of the public waste collection service in Bogotá, in December 2012, the Office of the Attorney General received multiple disciplinary complaints against Gustavo Petro as Mayor of Bogotá. It says that, in accordance with the applicable regulations and based on the complaints and a "Final Report on Preventive Monitoring of the Waste Collection Service in the City of Bogotá," on January 11, 2013, the Attorney General instructed the Disciplinary Division of the PGN (hereinafter, the "Disciplinary Division") to investigate the mayor.

35. The State says that on January 16, 2013, the Disciplinary Division ordered a disciplinary inquiry into Gustavo Petro and, after gathering evidence as requested by the order to open the investigation, declared the inquiry closed on April 24, 2013. The State adds that that decision was challenged by a motion for reversal, which was decided on May 8, 2013, in a ruling that stated that Gustavo Petro had the possibility to appoint counsel for his defense and exercise the right to answer the charges and mount a defense, and that the evidence requested and obtained was known to the parties in the proceeding.

36. The State says that on December 9, 2013, the Disciplinary Division issued a single-instance ruling, in which it found that Gustavo Petro bore disciplinary responsibility with intent with respect to the first two charges brought, and with gross negligence with regard to the third, and punished him with dismissal and disqualification from public office for 15 years.

37. The State adds that the defense filed motions to recuse the members of the Disciplinary Division, the Attorney General, and all other staff of the Attorney General's office with knowledge of the proceedings, as well as presenting a brief requesting evidence together with an application for reversal against the decision. It says that the motions to recuse were rejected. The State says that in a decision dated January 13, 2014, the Secretariat of the Disciplinary Division rejected the requests for evidence presented, confirmed the single-instance decision, and denied the subsidiary petition to refrain from imposing disciplinary penalties. It says that the president of the Republic was notified of that decision so that he might to carry out the penalty imposed.

38. The State says that several applications for relief were filed against the penalty that were decided at first instance by the Administrative Tribunal of Cundinamarca and the Sectional Council of the Judicature, and that in the appeal against those decisions, on March 18, 2014, the President of the Council of State announced the approval of the majority of the decision overturning 23 writs of relief in favor of Gustavo Petro.

39. It says that on March 20, 2014, the president of the Republic, by Decree 570, enforced the dismissal and appointed a new mayor. It adds that on April 21, 2014, in the context of a proceeding instituted by a citizen against the Office of the President of the Republic and the PGN, the Civil–Land Restitution Division of the Superior Court of Justice of Bogotá Judicial District issued a judgment ordering the President of the Republic to abrogate Decree 570 and adopt such decisions as might be necessary to comply with the decision on precautionary measures PM 374-13 adopted by the Inter-American Commission. It says that that decision was complied with by Decree 797.

40. The state says that on March 28, 2014, Gustavo Petro filed an application to vacate and restore rights against the Nation – PGN with the Administrative Tribunal of Cundinamarca to contest the decisions of December 9, 2013, and January 13, 2014, and requested that, as an urgent precautionary measure, the contested decisions be provisionally suspended. It mentions that on March 31, 2014, the record of the proceedings was referred to the Council of State because of lack of jurisdiction. It adds that on May 13, 2014, the provisional suspension was ordered of the legal effects of the decision of December 9, 2013. It says that following an application for reversal submitted by the respondents, on May 23, 2014, the Second Section, Subsection B of the Council of State decided not to reverse said decision.

41. The State says that, in keeping with the precautionary measure adopted by the Administrative Division of the Second Section, Subsection B of the Council of State, Gustavo Petro was reinstated as mayor of Bogotá, which reinstatement was given immediate effect by Decree 797 of April 23, 2014.

42. In addition, in the context of a request for information addressed to the State in the precautionary measure, the State reported on February 7, 2014, that in response to various complaints filed by members of the public, the Office of the Prosecutor General of the Nation had seven criminal investigations underway against Gustavo Petro and that, given the public importance of the cases, by decisions dated December 6, 2013, and January 20, 2014, the Prosecutor General specifically assigned those investigations to the Deputy Prosecutor General. The State says that one of the complaints has to do with alleged irregularities in the waste collection system that the mayor implemented. In addition, in a written communication dated February 24, 2014, the State said with respect to the criminal proceedings referred to by the petitioners that they were inaccurate in their assertions that "the prosecutor's office has not determined if the complained-of conduct warrants investigation," given that motives and circumstantial evidence have been presented that suggest the possibility that a criminal offense was committed. The State also said with respect to the four investigations for other matters mentioned by the petitioners, that one of them is not against Gustavo Petro but is a complaint that he himself brought against other parties.

43. In its first observations brief, the State mentioned that the Constitution grants the PGN preferential disciplinary authority over civil servants, including those elected by popular ballot. With respect to those powers, it added that the Constitutional Court has stated that the PGN may discipline "the conduct of civil servants, whether they belong to the legislative branch or the public administration, or even the judiciary" (Judgment C-417 of 1993). It says that that preferential authority allows the PGN to take over disciplinary investigations initiated by internal control offices in order to impose penalties directly. The State adds that, in accordance with the constitutional precepts governing that authority, the material and procedural aspects of the disciplinary regime in force are mainly set out in Law 734 of February 5, 2002, which enacted the Consolidated Disciplinary Code.

44. The State says that the disciplinary action taken against the alleged victim has a broad legal basis that includes constitutional clauses, legal and regulatory developments, modulation by means of constitutional control and recourse to constitutional relief, as well as references to, and the integration, of international norms and standards via the Constitution. According to the State, that legal framework satisfies the need of assurance that the administration comply correctly with its duties and obligations and is linked as part of the concept of due process.

45. As regards the petition's admissibility, the State says that the petitioners seek to use the organs of the inter-American system for protection of human rights as a "court of appeal" by submitting for the Commission's review judgments on constitutionality that have endorsed the authority of the Attorney General to impose disciplinary penalties on publicly elected leaders. It adds that underpinning those decisions is Constitutional Court Judgment C-028 of 2006, which, having confirmed their consistency with the Convention, ruled that Articles 44(1) and 45 of Law 734 of 2002 were "enforceable."

46. The State holds that the international protection afforded by the supervisory organs of the Convention is eminently subsidiary, supplementary, and adjuvant in nature, and that a decision on constitutionality is not one of the circumstances that grants the IACHR jurisdiction.

47. The State says that in Judgment C-028 of 2006, the Constitutional Court verified the constitutionality of the rule that allows dismissal in Law 734, as well as general disqualification from public office for very serious violations committed with intent or gross negligence. The State says that that decision specifically found that general disqualification from public office is not unconstitutional to the extent that it does not infringe the provision contained in Article 23 of the American Convention that limits the power to restrict the right to participate in government. It also says that Consolidated Judgment SU-712 of 2013 revisits certain elements examined in Judgment C-028 of 2006.

48. The State mentions that in Constitutionality Judgment C-500 of June 16, 2014, the Constitutional Court addressed issues concerning the power assigned to the PGN and disciplinary authorities to impose the punishment of general disqualification from public office and whether or not that power was compatible with Articles 2, 23, 25, and 29 of the Convention. The State analyzes the line of arguments on the matters at issue and says that the Constitutional Court concluded that the power of the PGN to impose the penalty of general disqualification from public office does not violate Article 25 of the Convention because of the legal nature of the decisions of the disciplinary authority and the existence of sufficient judicial mechanisms to challenge such decisions in the administrative jurisdiction. It also adds that, in special cases an application for relief may also be invoked against such decisions. Furthermore, with respect to Article 23 of the Convention, the Constitutional Court concluded that the principle of constitutional *res judicata* was applicable as a result of Judgments C-028 of 2006 and SU-712 of 2013, and reiterated the compatibility of the provisions with Article 23(2) of the Convention. Moreover, the State indicates that in Judgment SU-712 of 2013, the Constitutional Court found that the basis of the decision on which Judgment C-028 of 2006 was founded was wholly applicable in the exercise of control.

49. The State also argues that in Judgment C-500 of 2014, the Constitutional Court established the exceptional possibility of reopening a matter previously examined by the Constitutional Court, taking into account superseding interpretations by the Inter-American Court of human rights in its case-law, from which it may be surmised that the decisions of the latter organ are not immovable or outdated relative to the evolution of inter-American standards for protecting and safeguarding human rights. In connection with the foregoing, the State said that when the Constitutional Court has had cause to pronounce on the compatibility of a measure with the Convention (Judgments C-028 2006, SU-712 of 2013, and C-500 of 2014), it has taken into account the inter-American precedent and, using an interpretation based on the principle of sufficient reason, has ruled that the abridgment of political rights (right to participate in government) by administrative authorities does not run counter to the Convention if it is done in accordance with the rules of due process.

50. It argues that since the petitioners do not provide evidence to invalidate the lawfulness of the proceedings in question, but merely disagree with the interpretation made by the Constitutional Court, by virtue of the subsidiarity principle, the petition should be declared inadmissible under Article 47(b) of the Convention.

51. The State also argues that the petitioners have not exhausted domestic remedies, since an administrative proceeding on an application to vacate and restore rights is ongoing before the Council of State that could annul the decision adopted by the Office of the Attorney General. The State holds that the application to vacate and restore rights is an adequate and effective recourse to control the penalty imposed.

52. It says that the Council of State, as the highest authority for administrative matters, has pronounced on the control that it exercises over administrative decisions adopted by the public administration or the PGN and found said control to be thorough, comprehensive and conducted in accordance with the Constitution and the law. The State says that when protection of a fundamental right is invoked, the principle of *rogatividad* (rule that the provision violated be identified and an explanation given as to how it was violated) is observed in full, which is sufficient reason to find that the control of legality of the adjudicator at first instance involves a review of the guarantees of due process envisaged in the disciplinary code.

53. It says that no punitive act by the administration is devoid of judicial control, in which a final pronouncement is made with the effect of *res judicata* on the legitimacy of the penalty, and that while that

proceeding is in progress the complainants may request the provisional suspension of the disputed act. Thus, it mentions that on May 13, the order was given provisionally to suspend the legal effects of the penalty imposed by the Disciplinary Division, which interlocutory order was confirmed on May 23, 2014, when it rejected an application for reversal filed by the respondents. The State says that, finally, by its decision of March 17, 2015, the Full Chamber of the Council of State definitively confirmed the precautionary measures with a ruling on an application for reconsideration presented by the Office of the Attorney General. The State adds that the suspension allowed Mr. Petro to continue his term of office as mayor until a decision on merits could be adopted.

54. The State informed that on June 24, 2015, the full chamber for administrative matters decided to take up the case and issue a consolidated judgment, in view of its "legal importance," in accordance with Article 111(3) of the Code of Administrative Procedure. It says that this implies recognition of the complexity of the matter under examination and ensures that the Full Chamber decides the case.

55. In conclusion, it argues that the application to vacate and restore rights is the suitable and effective remedy under the law for protecting rights in the context of disciplinary proceedings, and therefore the submissions concerning the alleged violations of Mr. Petro's rights should be taken up in the domestic proceeding currently in progress, which has constituted an effective judicial protection given the immediacy of the provisional suspension.

56. Furthermore, as regards the request of the petitioners to join the procedural stages, it argues that in this case the exceptional circumstance envisaged in Article 36(3)(a) of the Commission's Rules of Procedure for deferring treatment of admissibility until the debate and decision on the merits of the dispute does not exist, as it has not been shown that the two stages are inextricable linked. It further argues that separate treatment of the procedural stages allows the subsidiarity principle to be rigorously applied; the procedural conduct of the parties to be directed; maximum observance of the right of the State to mount a defense; and the proceedings to be imbued with legal certainty. Finally, on this point, it contends that the arguments of the petitioners do not succeed in demonstrating the link between a hypothetical exception to the requirement to exhaust domestic remedies and the supposed violations alleged in the petition.

57. In conclusion, the State argues that inasmuch as the IACHR lacks jurisdiction to function as a fourth instance or appellate tribunal, and bearing in mind the failure to exhaust domestic remedies, the petition is inadmissible under Articles 46(1)(a) and 47 (a) and (c) of the Convention, and it requests that the IACHR declare as much.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

58. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the Commission. The petition alleges the violation of rights enshrined in the American Convention to the detriment of an individual in respect of whom the Colombian State undertook to respect and ensure those rights from the date on which it deposited its instrument of ratification of the aforementioned treaty. Therefore, the Commission is competent *ratione personae* to examine the petition.

59. Colombia has been a party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. The Commission is competent *ratione loci* to examine the petition because it alleges violations of rights protected in the American Convention that are purported to have occurred within the territory of Colombia, a state party to said treaty.

60. The Commission is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date the events alleged in the petition are said to have occurred. Finally, the Commission is competent *ratione materiae*, because the petitioners allege violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

61. Article 46(1)(a) of the American Convention requires prior exhaustion of remedies available under domestic law in accordance with generally recognized principles of international law, as a prerequisite for admitting claims regarding alleged violation of the Convention. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve the situation before it is taken up in an international proceeding. 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.

62. The petitioners say that the Constitutional Court ruled that the norm that allows the PGN to restrict political rights is constitutional, precluding the possibility of protecting the violated rights by means of domestic remedies. In that connection, they argue that Constitutional Court Judgment C-028 implies that there are no judicial remedies to counter the authority of the Attorney General of the Nation to limit the political rights of those in civil service positions, since the Constitution categorically establishes that its rulings in exercising constitutional control are final. The petitioners also say that the remedy identified by the State as awaiting exhaustion is neither suitable nor effective to rectify the situation that allegedly violates Article 23 and other provisions of the Convention, as it does not afford the possibility of questioning whether or not the Attorney General has the authority to restrict or limit political rights.

63. For its part, the State indicates that the application to vacate and restore rights is the suitable and effective remedy available under the law for protecting rights in the context of disciplinary proceedings, that said remedy is pending at the domestic level, and that it has constituted an effective judicial protection given the provisional suspension ordered in the framework of that proceeding, which has allowed the alleged victim to continue his term of office.

64. Based on the information before it, the Commission finds that Gustavo Petro was punished on December 9, 2013, and that said decision was confirmed on January 13, 2014. Furthermore, on April 21, 2014, the Civil Division for Specialized Decisions on Land Restitution of the Superior Court of Justice of Bogotá Judicial District issued a judgment granting injunctive relief and ordered the President of the Republic to abrogate Decree 570 of March 20, 2014, which order was complied with by Decree 797 of April 23, 2014, which reinstated Gustavo Petro. In addition, Gustavo Petro filed an application to vacate and restore rights to contest the decisions of December 9, 2013, and January 13, 2014, and requested that, as an urgent precautionary measure, the contested decisions be provisionally suspended. On May 13, 2014, the provisional suspension was ordered of the legal effects of the decision of December 9, 2014, which order was confirmed on May 23, 2014.

65. Bearing in mind the information provided by both parties, the Commission observes that the effects of the punishment imposed by the PGN on Gustavo Petro were suspended and that the alleged victim continued to carry out his duties until December 31, 2015, when his term of office as mayor of Bogotá came to an end. However, appears that since March 28, 2014, a decision has been pending on an application to vacate and restore rights.

66. In the instant case the Commission finds that the debate over exhaustion of domestic remedies mainly centers on the alleged lack of a simple, prompt, effective remedy to protect the rights enshrined in Article 23 of the Convention and the other rights allegedly violated, and to examine the authority of the Attorney General of the Nation to impose the penalty of disqualification from public office and dismiss civil servants elected by universal suffrage.

67. It is argued that the punitive powers of the PGN cannot be questioned, bearing in mind the provisions of Article 243 of the Constitution, which states that the decisions of the Constitutional Court are binding. In that connection, the petitioners say that the Constitutional Court has previously pronounced on the punitive provisions that empower the PGN, which were considered compatible with the Convention. Thus, the issue arises as to whether or not the application to vacate and restore rights, which was invoked to challenge the penalty imposed by the Disciplinary Division in the ruling rendered on December 9, 2013, is suitable and if the alleged victim has any recourse available to challenge the denounced acts.

68. Article 46(2) of the American Convention, by its nature and purpose, is a self-contained provision vis á vis the substantive provisions contained in the Convention. Therefore, the determination as to whether the exceptions to the rule on the exhaustion of domestic remedies stipulated in that provision apply in this case should be made separately, and prior to the examination on the merits, since it depends upon a standard of judgment distinct from that used to determine the violation of Articles 8 and 25 of the Convention.

69. In that regard, the Commission considers that while the State argues that the application to vacate and restore rights has yet to be exhausted, a key element of exhaustion and characterization, is the possibility afforded by said application to analyze in depth the power of dismissal and disqualification in the framework of disciplinary proceedings vis-á-vis the rights to participate in government, to a fair trial, and to judicial protection allegedly violated, bearing in mind the decisions of the Constitutional Court and the constitutional and legal norms in force with respect to disciplinary matters. The Commission finds that the penalty imposed in the disciplinary proceeding was effectively enforced for a time prior to the relief ruling that ordered the annulment of the presidential decree, and that, while the alleged victim invoked special remedies to overturn the punishment, he did not have the legal possibility to challenge the punishment before it became final. In that regard, the Commission reiterates that while in some cases extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies.[5] In light of the foregoing, the Commission finds that the alleged victim was not afforded suitable recourse to challenge the imposition of the penalty by an administrative authority or the imposition of the penalty without judicial review before it became final. Even if the pending application to vacate offers the possibility of disputing the penalty imposed, it does not appear to offer the possibility of questioning the legal framework under which it was imposed. In that connection, the State confirms that the authority to impose such penalties and the procedure for doing so have already been the subject of constitutional review, and therefore it does not argue that other suitable remedies exist with regard to these elements of the petition.

70. In light of the foregoing, the Commission concludes that the exception to the rule of prior exhaustion of domestic remedies envisaged at Article 46(2)(a) of the American Convention applies in this case.

2. Timeliness of the petition

71. Article 46(1)(b) of the American Convention provides that for a petition to be admissible, it must be presented within six months of the date on which the party alleging violation of rights was notified of the final judgment. In the complaint under review the IACHR has determined that the exception to the rule of exhaustion of domestic remedies pursuant to Article 46(2)(a) of the American Convention is applicable. In that regard, Article 32(2) of the Commission's Rules of Procedure establishes that in cases in which the exceptions to the prior exhaustion of domestic remedies are applicable, the petition must be submitted within

[5]In that connection, see: IACHR, Report 40/08 (Admissibility), Petition 270-07, I.V. Bolivia, July 23, 2008, par. 73; IACHR, Report 69/08 (Admissibility), Petition 681-00, Guillermo Patricio Lynn, Argentina, October 16, 2008, par. 41; IACHR, Report 51/03 (Admissibility), Petition 11.819, Christian Daniel Domínguez Domenichetti, Argentina, October 24, 2003, par. 45.

a reasonable period of time, in the judgment of the Commission. For this purpose, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances in each case.

72. The IACHR received the petition on October 28, 2013, while the facts with which the petition is concerned reportedly began when the investigation was opened and their reputed effects continue at present. Therefore, in light of the context and characteristics of this case, the Commission considers that the petition was lodged within a reasonable time and that the admissibility requirement regarding the timeliness of its presentation must be deemed met.

3 Duplication of proceedings and international *res judicata*

73. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by this or any other international organization. Therefore, the causes for inadmissibility set down in Articles 46(1)(c) and 47(d) of the Convention do not apply.

4. Colorable Claim

74. For the purposes of admissibility, the IACHR must decide, pursuant to Article 47(b) of the American Convention, whether the facts alleged, if proven, could characterize a violation of rights, or whether, pursuant to paragraph (c) of the same article, the petition is "manifestly groundless" or "obviously out of order." The standard by which admissibility is assessed is different from the one needed to decide the merits of a petition since the Commission must perform a *prima facie* evaluation to determine whether the petition provides grounds for an apparent or potential violation of a right guaranteed by the American Convention. This examination is a summary analysis that does not imply a prejudgment or preliminary opinion on the merits of the matter.

75. Furthermore, neither the American Convention nor the Rules of Procedure of the IACHR require that the petition identify the specific rights allegedly violated by the State in a matter submitted to the Commission, though the petitioners may do so. It is up to the Commission, based on the case-law of the system, to determine in its admissibility reports which provision of the relevant inter-American instruments is applicable or could be established as having been violated, if the facts alleged are sufficiently proven.

76. The petitioners say that Gustavo Petro was deprived of his right to participate in government by an administrative decision adopted by the PGN that dismissed the former mayor and disqualified him from holding public office for 15 years, based on a series of supposed irregularities that he is said to have committed upon changing the waste collection system in the city of Bogotá in December 2012. They argue that the foregoing violated several rights under the Convention and, in particular, restricted not only *his* right to participate in government, but also that of the voters who elected him mayor.

77. The State, in turn, says that the matter at issue should be taken up in the domestic jurisdiction where a decision remains pending on remedy invoked by the alleged victim, and that the petitioners seek to use the Commission as a fourth-instance tribunal. It contends that the issue regarding the authority of the Attorney General to impose disciplinary penalties on state officials has been extensively studied by the Constitutional Court, which in various judgments has determined the system to be valid in the light of domestic and international law. Furthermore, the State argues that, in any event, the alleged victim had remedies available to him in the administrative jurisdiction to challenge the penalty, in addition to the possibility of filing an application for relief, as an exceptional recourse, and therefore the matter should still be examined in the domestic jurisdiction

78. The Commission takes into account that, as regards the right to participate in government, Article 23(2) of the American Convention provides:

> The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

79. The Commission finds that the alleged victim was punished with dismissal and disqualification from public office on December 9, 2013, in a single-instance decision rendered by the Disciplinary Division of the PGN, which decision was upheld by the PGN on January 13, 2014. In that regard, the petition states that the penalty was imposed by an administrative body in a single-instance decision that, according to the petitioners, brooks no possibility of review at second instance by an organ other than the one that dealt with the matter at first instance. It is also stated that the Constitutional Court has already analyzed the validity of the provisions that govern the punitive authority of the PGN and that, therefore, any remedy invoked would be ineffective in terms of countermanding its power to impose penalties.

80. In light of the factual and legal arguments put forward by the parties and the nature of the matter before it, the Commission finds that, if proven, the allegations could tend to establish possible violations of the rights to a fair trial (Article 8), participate in government (Article 23), equal protection (Article 24), and judicial protection (Article 25) of the American Convention, taken in conjunction with the obligation to adopt provisions under domestic law (Article 2) and the obligation to respect rights (Article 1) set forth in that treaty.

81. As regards the petitioners' claim of an alleged violation of Article 5 of the American Convention, the Commission finds that the petitioners advance no arguments or elements to substantiate its supposed violation, and therefore declares said claim inadmissible.

V. CONCLUSIONS

82. Based on the arguments of fact and law set forth above, the Commission concludes that the petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention and, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible in relation to Articles 8, 23, 24, and 25 of the American Convention, in conjunction with the obligations contained in Articles 1(1) and 2 of that instrument;

2. To declare this petition inadmissible in relation to Article 5 of the American Convention;

3. To notify the parties of this decision;

4. To proceed with its analysis of merits in the matter; and

5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Panama, Panama, on the 6th day of the month of December, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and Esmeralda E. Arosemena Bernal de Troitiño Commissioners.