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REPORT No. 61/20
PETITION 1039-10
REPORT ON ADMISSIBILITY

DIEGO ROJAS GIRÓN
COLOMBIA

Approved electronically by the Commission on April 25, 2020.

Cite as: IACHR, Report No. 61/20, Petition 1039-10. Admissibility. Diego Rojas Girón. Colombia.
April 25, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Diego Rojas Girón
Alleged victim:	Diego Rojas Girón
Respondent State:	Colombia
Rights invoked:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (right to a fair trial), 11 (privacy), 23 (political rights), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights, ¹ in conjunction with Article 1.1 thereof (obligation to respect rights)

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	July 10, 2010
Additional information received at the stage of initial review:	December 22, 2010; December 5, 2011; January 31, 2013; January 16, 2014; August 4, 2015; March 7, 2016; and August 16, 2016
Notification of the petition to the State:	December 23, 2016
State's first response:	March 14, 2018
Additional observations from the petitioner:	February 6, 2017; April 28, 2017; July 18, 2017; and September 13, 2017

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 (instrument of ratification deposited on July 31, 1973)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible:	Articles 7 (personal liberty), 8 (right to a fair trial), 23 (political rights), and 25 (judicial protection) of the American Convention, in conjunction with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exception in ACHR Article 46.2.a applies
Timeliness of the petition:	Yes, under the term of Section VI

V. FACTS ALLEGED

1. Mr. Diego Rojas Girón, the petitioner and alleged victim, alleges that as a result of performing his duties as the Sectional Director of Prosecutors' Offices in Santiago de Cali, he was convicted of the crime of perverting the course of justice, in single-instance criminal proceedings that violated his right to a fair trial.

¹ Hereinafter, "the American Convention" or "the Convention."

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

2. The petitioner states that on August 30, 2001, he took office as Sectional Director and that, in discharging the duties of that position, between April and July 2002 he issued a series of resolutions intended to reduce the backlog of preliminary investigations opened prior to December 31, 2001. Those resolutions ordered the prosecutors in charge of those investigations to refrain from adopting decisions in connection with them and to assign competence for the backlogged cases to a special commission of prosecutors appointed for the purpose. He stresses that the investigations covered by the program had been completely abandoned, some of them since 1992.

3. He further explains that in February 2004 a series of news stories were published in *Revista Cambio* alleging that private citizens were making illegal payments to prosecution service officials. In response to those publications, the Public Prosecution Service began a preliminary investigation into various corruption offenses against him and a group of other officials involved with the backlog program. As the immediate background to the incident, the petitioner indicates that prior to the publication of the news stories, the Deputy Prosecutor had opened an investigation into the resolutions he issued as Sectional Director, but it was archived by means of a prosecution dismissal on January 27, 2004.

4. He states that on May 26, 2004, the prosecutor in charge of the investigation declared him a fugitive, without giving grounds for that decision or specifying any crime; and that it was not until September 21, 2004, that he was informed he was under investigation for the crime of perverting the course of justice for issuing the resolutions in question. In that context, he reports that on October 6, 2004, the prosecution service revoked the prosecution dismissal of January 27, 2004, without following the established procedure, and ordered that investigation to be combined with the new investigation. He states that on October 11, 2004, an order was issued for his preventive custody; that he was arrested on January 24, 2005; and that on May 23 of that year the prosecution service formally charged him with the crime of perverting the course of justice. He also notes that his preventive custody order was revoked and he was allowed to remain at liberty provided he reported to the authorities when so required in connection with the case.

5. On July 7, 2008, the Criminal Cassation Chamber of the Supreme Court, in single-instance proceedings, found the petitioner guilty of the crime of perverting the course of justice and gave him a 59-month custodial sentence, imposed a fine, and disqualified him from public functions for a period of 77 months. The Chamber concluded that as Sectional Director, he had neither the legal or regulatory authority to suspend the investigations covered by the backlog reduction program and to deprive the competent prosecutors of their duty of investigating. The petitioner contends that issuing this decision by means of a single-instance procedure was improper, since his position was a strictly administrative post and not that of a senior public official. In addition, he claims that the actions for which he was punished did not constitute a crime and that in parallel, in 2005 and 2006, the Office of the Attorney General of the Nation shelved two additional disciplinary investigations opened against him for the same facts which, in his opinion, indicates that his rights were violated.

6. The petitioner indicates that on account of his inability to appeal that judgment, he lodged an action for constitutional relief that was dismissed by the Supreme Court's Civil Cassation Chamber on October 23, 2008. That decision maintained that single-instance convictions could not be appealed through constitutional relief, since they represented the decision of the final venue of regular jurisdiction. Following that unfavorable ruling, he lodged an action for constitutional relief with the Disciplinary Chamber of the Sectional Council of the Judicature in Valle del Cauca which, in a decision of November 14, 2008, ruled his action inadmissible and referred the proceedings back to the Supreme Court of Justice, which it maintained was the competent authority for resolving the matter. Accordingly, on December 12, 2008, the Civil Cassation Chamber reiterated the remedy's inadmissibility. In response, the petitioner took his case to the Disciplinary Jurisdictional Chamber of the Sectional Council of the Judicature in Cundinamarca which, on January 14, 2009, admitted his action for constitutional relief; on January 23, 2009, that collegiate body ruled the remedy inadmissible and referred the matter to the Supreme Court of Justice. Then, on April 3, 2009, the plenary of the Supreme Court resolved not to admit the petitioner's protective action for the third time and ordered the proceedings returned to the Disciplinary Chamber of the Sectional Council of the Judicature in Cundinamarca; following which, according to the petitioner's narrative, the Disciplinary Chamber finally admitted his protective action by means of a resolution of June 3, 2009.

7. On June 19, 2009, the Disciplinary Chamber of the Superior Council of the Judicature in Cundinamarca ruled the application out of order on the grounds that it was untimely. The petitioner challenged that ruling on July 6, 2009, and, on September 10, the Disciplinary Jurisdictional Chamber of the Judicature Council upheld the dismissal of the action. This time the Chamber did not challenge the timeliness of the action but instead ruled on the merits of the case, finding that the criminal conviction had followed constitutional and legal principles in its analysis of the evidence.

8. Finally, on February 19, 2010, the Selection Chamber of the Constitutional Court disqualified the case file from review and informed the petitioner of that decision on April 20, 2010.

9. Mr. Rojas Girón claims that on October 29, 2014, the Constitutional Court of Colombia issued judgment C-792 of 2014, ruling unconstitutional the language used in several articles of the New Code of Criminal Procedure (Law 906 of 2004) that disallowed the possibility of challenging convictions handed down by second-instance courts. He states that under that precedent, he appealed against his conviction on April 29, 2016. On June 29, 2016, however, the Criminal Chamber of the Supreme Court of Justice ruled his filing out of order.

10. The State, in turn, contends that the proceedings in which the alleged victim was involved were carried out in compliance with the applicable legal and constitutional framework and with full respect for judicial guarantees and due process. It requests that the petition be ruled inadmissible under Article 47.b of the American Convention in that it believes that the petitioner's intent is for the Commission to act as a court of appeal, in contradiction to its complementary nature.

11. Colombia notes that criminal law clearly establishes the competence of the Supreme Court of Justice to try, in single-instance proceedings, sectional directors of the prosecution service and other senior public officials. It also explains that the alleged precedent set by judgment C-792 of 2014 did not establish that convictions handed down in single-instance proceedings were to admit appeals through regular remedies, but rather ensured that that guarantee was made available for convictions issued for the first time by a second-instance court. It adds that the aforesaid decision of the Constitutional Court applied only to the provisions of the New Code of Criminal Procedure (Law 906 of 2004) and that the alleged victim was tried under the provisions of Law 600 of 2000 (the Code of Criminal Procedure). It therefore concludes that the precedent was not applicable to the petitioner's case.

12. The State adds that single-instance criminal proceedings for senior public officials respect the judicial guarantees of due process and comply with the applicable international standards. It indicates that people convicted under those provisions can file an action for constitutional relief, which is a proper and effective mechanism for reviewing the factual and legal deficiencies of final criminal convictions. In the case at hand, it contends that the conviction handed down against the alleged victim was duly grounded and that the proceedings respected all judicial guarantees. It therefore maintains that the decisions rejecting the action for constitutional relief filings lodged by the alleged victim reviewed that decision and concluded that the evidence was assessed in accordance with the applicable legal and constitutional principles, and so there was no violation of due process.

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

13. The petitioner claims that he was unable to appeal against the conviction handed down against him by the Criminal Cassation Chamber on July 7, 2008. He explains that Colombian law does not provide an appeal remedy in the prosecution of senior authorities. Nevertheless, he states that he filed for action for constitutional relief which, after being ruled inadmissible on several occasions, was rejected by the Disciplinary Chamber of the Superior Council of the Judicature in Cundinamarca on June 19, 2009, which found the application out of order. Subsequently, on February 19, 2010, the Constitutional Court's Selection Chamber disqualified the case file from review. In turn, the State maintains that the petitioner used the action for constitutional relief filing to challenge his conviction, and that it was the proper and effective mechanism for asserting his right to appeal the judgment.

14. In this regard, the Commission believes that the State has not met the obligation of demonstrating the existence and availability of suitable and effective domestic remedies that the petitioner failed to exhaust. Due protection of the right of appeal enshrined in Article 8.2.h of the American Convention requires the provision of accessible and effective regular judicial remedies: in other words, remedies that represent no great complexity and that assure the comprehensive examination of the challenged decision by analyzing the facts, evidence, and legal considerations.³ In this regard, the Commission notes that the action for constitutional relief cited by the State is a special remedy, one that in the alleged victim's case was ruled inadmissible on multiple occasions because of a lack of clarity among the courts for resolving the issue raised. It further notes that the action for constitutional relief decisions solely analyzed the Criminal Cassation Chamber's appraisal of the evidence in order to identify a possible violation of due process, and so they do not represent a suitable resource for ensuring that a conviction is reviewed or twice upheld before it is made final. Consequently, the State did not afford the alleged victim a remedy for protecting the allegedly violated rights and this, under Article 46.2.a of the American Convention and Article 31.2.a of the Rules of Procedure, is one of the grounds for an exception to the rule requiring the exhaustion of domestic remedies. The IACHR therefore concludes that in the case at hand, that exception is applicable.

15. It must be noted that by its very nature and purpose, Article 46.2 is a provision with autonomous content vis-à-vis the Convention's substantive precepts. Consequently, whether or not the Convention's exceptions to the rule requiring the prior exhaustion of domestic remedies are applicable in the case at hand must be decided prior to and in isolation from the analysis of the merits of the case, and that is because it depends on a standard of appreciation that is different from the one used to determine whether or not Articles 8 and 25 of the Convention have been violated.⁴

16. Finally, as regards the timeliness requirement, the Commission notes that the criminal investigation against the petitioner began in 2004; that he was convicted in the single-instance proceedings in 2008; that because of the absence of a suitable remedy against that conviction, he lodged several actions for constitutional relief, none of which bore fruit; that he was notified of the final decision in 2010; and that, in addition, the effects of the claimed lack of a second criminal instance extend into the present. The Commission therefore concludes that the petition was lodged within a reasonable time in accordance with the terms of Article 32.2 of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

17. In light of those considerations, and after examining the elements of fact and law set out by the parties, the Commission believes that the petitioner's claims regarding the absence of a second criminal instance and their consequences on him as a public servant in the judicial branch are not manifestly groundless and warrant a study of the merits.⁵ If the alleged facts are determined to be true, they could tend to establish violations of Articles 7 (personal liberty), 8 (right to a fair trial), 23 (political rights),⁶ and 25 (judicial protection) of the American Convention, in conjunction with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

18. Regarding the State's claims relating to the fourth instance formula, the Commission acknowledges that it does not have the competence to review judgments handed down by domestic courts acting within the scope of their competence and in accordance with due process and the right to a fair trial. Nevertheless, it reiterates that within the framework of its mandate it is competent to rule a petition admissible

³ IACHR, Report No. 33/14, Case 12.820, Merits, Manfred Amrhein and others, Costa Rica, April 4, 2014, para. 188; I/A Court H. R., *Case of Liakat Ali Alibux v. Suriname*, Preliminary Objections, Merits, and Reparations, Judgment of January 30, 2014, Series C No. 276, para. 86; and *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 165.

⁴ IACHR, Report No. 62/16, Petition 4449/02, Admissibility, Saulo Arboleda Gómez, Colombia, December 6, 2016, para. 30.

⁵ This analysis of the colorable claim is consistent, as regards establishing the rights deemed both admissible and inadmissible, with the decision reached by the IACHR in Report on Admissibility 62/16, in which the main substance of the petition was another single-instance criminal conviction of a civil servant. See: IACHR, Report No. 62/16, Petition 4449-02, Admissibility, Saulo Arboleda Gómez, Colombia, December 6, 2016, paras. 38 and 39.

⁶ The IACHR has stated that Article 23 of the American Convention protects public officials from arbitrary dismissals and is not restricted in the judicial sphere to judges and prosecutors. See: IACHR, Report No. 63/19, Case 13.036, Merits, Norka Moya Solis, Peru, May 4, 2019, para. 71.

and to decide on its merits when it involves domestic proceedings that could entail violations of rights guaranteed by the American Convention.

19. Finally, as regards the claims about a possible violation of Articles 4 (life), 5 (humane treatment), 11 (privacy), and 24 (equal protection) of the American Convention, the Commission notes that the petitioner has not offered adequate contentions or grounds for a *prima facie* consideration that they were breached.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 7, 8, 23, and 25 of the American Convention, in conjunction with Articles 1.1 and 2 thereof;

2. To find the instant petition inadmissible in relation to Articles 4, 5, 11, and 24 of the American Convention; and,

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

Approved by the Inter-American Commission on Human Rights on the 25th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.