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**REPORT No. 311/20**  
**PETITION 1331-11**  
REPORT ON ADMISSIBILITY

JORGE AURELIO NOGUERA COTES  
COLOMBIA

Approved electronically by the Commission on October 16, 2020.

**Cite as:** IACHR, Report No. 311/20, Petition 1331-11. Admissibility. Jorge Aurelio Noguera Cotes. Columbia. October 16, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Jorge Aurelio Noguera Cotes, Victor Javier Mosquera Marín
<b>Alleged victim:</b>	Jorge Aurelio Noguera Cotes
<b>Respondent State:</b>	Colombia
<b>Rights invoked:</b>	Articles 8 (fair trial) and 25 (judicial protection) in relation to 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the American Convention on Human Rights <sup>1</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

<b>Filing of the petition:</b>	September 30, 2011
<b>Additional information received at the stage of initial review:</b>	April 8, 2013, August 28, 2015
<b>Notification of the petition to the State:</b>	December 29, 2015
<b>State's first response:</b>	April 7, 2017
<b>Additional observations from the petitioner:</b>	August 10, 2017
<b>Additional observations from the State:</b>	April 13, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument made on July 31, 1973)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 7 (personal liberty), 8 (fair trial), 24 (equal protection) and 25 (judicial protection) of the American Convention in connection with its articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes,
<b>Timeliness of the petition:</b>	Yes,

**V. FACTS ALLEGED**

1. Jorge Aurelio Noguera Cotes and Victor Javier Mosquera Marín (hereinafter “the petitioners”) denounce purported violations to the human rights of Jorge Aurelio Noguera Cotes (hereinafter “the alleged victim”) alleging that he was criminally convicted in a special single-instance criminal procedure that deprived him of his rights to appeal the conviction before a higher court. They further claim that the alleged victim’s

<sup>1</sup> Hereinafter “American Convention”.

<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

conviction was based on evidence that had been illegally collected by an authority that lacked competence to investigate him.

2. According to the petitioners' narration, the alleged victim was the Director of the Administrative Department of Security (DAS) in Colombia from 2002 until he resigned from the position on the 25 of October of 2005. The petitioners explain that, due to the position he occupied, the alleged victim was afforded a constitutional protection under which a criminal investigation against him could only be carried out by the Attorney General and a criminal trial against him would have to be carried out in sole instance by the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia (hereinafter "the CSJ"). They continue to narrate that on April 17, 2006, the Attorney General opened a preliminary criminal investigation against the alleged victim, ordered evidentiary proceedings, and designated the Second Deputy Delegate Prosecutor Before the CSJ (hereinafter "the deputy prosecutor") to perform the evidentiary proceedings as well as any other evidentiary proceedings deemed relevant by the deputy prosecutor. They allege that the constitution did not allow the Attorney General to delegate his exclusive powers to investigate constitutionally protected persons, because of which in designating a deputy prosecutor to carry out the investigation the Attorney General violated the alleged victim's right to natural justice.

3. They further narrate that on January 22, 2007 the designated deputy prosecutor, after having concluded several evidentiary proceedings, formally opened the investigation against the alleged victim. The petitioners purport that on January 30, 2007, an attorney representing the government of Colombia requested the deputy prosecutor to declare his decision to open the investigation null and void because such investigation was the exclusive competence of the Attorney General. However, on February 14, 2007 the deputy prosecutor denied this request. The restitution and appeal remedies filed against this decision were also rejected.

4. On February 22, 2007, an order was issued by the deputy prosecutor for the imprisonment of Mr. Cotes upon the finding of sufficient information linking him to crimes against public security, against life and against personal integrity. It is submitted that on March 14, 2007 the alleged victim filed an habeas corpus action against the order for his imprisonment, which has initially rejected by the deputy prosecutor. However, on March 23, 2007, the Disciplinary Jurisdictional Chamber of the Superior Council of the Judiciary granted the habeas corpus request reasoning that Mr. Cotes' detention was unconstitutional and in violation of natural justice as it had not been ordered by sole authority competent to do it, namely the Attorney General. Later, on May 8, 2007 the Attorney General assumed the case against Mr. Cotes, ordered a new interrogation of the alleged victim, and once again commissioned the deputy prosecutor to perform the interrogation.

5. The petitioners indicate that on July 6, 2007, the Attorney General decided to impose preventive detention against the alleged victim and that the alleged victim requested that all proceedings that had been illegally performed by the deputy prosecutor be declared void, this request being denied by the Attorney General on July 30, 2007. In addition, on February 1, 2008, the Attorney General formally accused Mr. Cotes "as the probable perpetrator of the crimes of aggravated conspiracy to commit multiple crimes including the use of classified or secret information, and abuse of authority for multiple arbitrary and unjust acts", which resulted in the process advancing to the trial stage before the CSJ. They further explain that on June 11, 2008 the CSJ partially granted what had been requested by the alleged victim by declaring void all of the proceedings that had been performed by the deputy prosecutor starting, from the moment he formally opened the investigation. They argue that this decision from the CSJ was in violation of natural justice and due process and it allowed for evidence that had been illegally collected by the deputy prosecutor to be kept within the judicial process and to serve as bases for the accusation against the alleged victim and his eventual conviction. They add that the CSJ determined that the alleged victim did not have standing the challenge this decision as his request had been granted, even though what he had requested was for all of the proceedings conducted by the deputy prosecutor to be declared void and not just those that had been undertaken after the formal opening of the investigation. They further claim that the CSJ did allow the deputy prosecutor to challenge the decision but ultimately rejected his challenge.

6. The petitioner's explain that on September 8, 2009, the Supreme Court received requests by the alleged victim and a representative of the government of Colombia for the annulment of the resolution in which the Attorney General first designated the deputy prosecutor and all actions undertaken as a consequence

of that resolution. They indicate that the court resolved these requests on the same day they were filed granting some partial annulations but refusing the request to declare the nullity of all procedural actions performed by the deputy prosecutor. They further add the representatives of the alleged victim challenge this decision but the Court declared the challenge vacated due to it being limited to repeating arguments that had already been made and decided on. They also stress that the single instance nature of the process forced them to challenge the CSJ decision through a constitutional protection action that was rejected on January 14, 2010 by the Sectional Council of the Judiciary of Cundinamarca, the appeal filed by the alleged victim against this decision was also rejected on 17 February, 2010.

7. On September 14, 2011 the CSJ issued a decision convicting the alleged victim of the crimes of aggravated conspiracy; homicide; destruction, suppression or concealment of a public document and disclosure of secret material, by means of a single instance judgment. The petitioner maintains that the Colombian system discriminates against high-ranking public officials by allowing them to be judged only by the Criminal Chamber of the Supreme Court of Justice depriving them of their right to appeal the judgment before higher court in violation of due process and the right to an effective remedy. They stress that the review appeal and the *tutela* action do not satisfy the requirements of the right to challenge the conviction enshrined in article 8.2(h) of the American Convention and that this was recognized by the Constitutional Court of Colombia in 2014.

8. They continue to narrate that on March 13, 2012 the alleged victim filed a new *tutela* action against the conviction which was declared inadmissible by the CSJ on April 10, 2012. On May 18, 2012 the action was filed again before the Disciplinary Jurisdictional Chamber and on June 6, 2012, the Chamber denied the request. The refusal was challenged and on August 23, 2012, the Chamber decided to confirm the decision. The filed pertaining this *tutela* action was then submitted to the Constitutional Court for review on September 17, 2012 and transferred to the selection room on September 19, 2012. However, on October 10, 2012 it was decided that the alleged victim's case would not be selected for review.

9. The State, for its part, considers that the petition presents facts that were already adjudicated before various internal judicial processes, without any violation of due process, or violation of any obligations established in the instruments of the inter-American system for the protection of human rights. It indicates that, if the Commission proceeds to review the petition, it would be acting as a court of appeal, thus invoking the formula of the fourth instance. In addition, the State claims that the petitioner has not provided sufficient evidence on the occurrence of a legal act, capable of generating such human rights obligations for the Colombian State. It stresses that the decisions issued in respect of the several challenges filed by the alleged victim were duly reasoned. It explains that, as to the refusal to declare void proceedings conducted by the deputy prosecutor in the preliminary investigation stage, the domestic courts concluded that while the Attorney General could not delegate its exclusive powers to investigate and prosecute the alleged victim it could indeed commission a deputy prosecutor for these purposes.

10. Regarding the alleged violations of due process due to the alleged victim being subjected to a special single instance process, it maintains that the special constitutional protection afforded to high level public officers is justified. It explains that them being judged solely by the supreme court maintains equilibrium in the relationship between the different branches of public power in Colombia, protects the officers from having to deal with processes in multiple jurisdictions which would interfere with their functions, and protects the judicial system from the power these high ranking officers could exercise over lower level members of the judiciary. They further add that the Constitutional Court of Colombia has determined that the special criminal procedure for high officers does not violate the domestic constitution nor the American Convention as there are other ways to satisfy a person's right to challenge a criminal conviction other than with a second instance. They maintain that the right to challenge the conviction of those convicted in single instance by the CSJ is satisfied in the Colombian System by them being afforded the opportunity to challenge the conviction through the appeal for review or through the constitutional protection action.

11. The state also maintains that the petition is inadmissible in relation to the petitioner's request for compensation due to the alleged victim's failure to exhaust domestic remedies. It explains that a direct reparation action for actions of the legislators would have allowed the alleged victim to request compensation

for the alleged legal flaws in the design of the special criminal procedure followed against him. They highlight that this legal remedy allows for integral reparation under the standards of the Inter-American System.

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

12. The Commission takes note that the petitioners have claimed that alleged victim made use of all judicial defense mechanisms both before the Office of the Attorney General and CSJ2 while the State alleges the partial inadmissibility of the petition due to lack of exhaustion of the direct reparation action.

13. In view of the parties' allegations, the Commission reiterates that whenever a State alleges that the petitioners have failed to exhaust the domestic remedies, the State itself also has the burden of identifying which domestic remedies should have been exhausted and demonstrating that they were appropriate for redressing the alleged violation—in other words, that the function of those remedies within the national legal system is suitable for protecting the legal right that was infringed.<sup>3</sup> The Commission likewise reiterates that in order to determine the appropriate procedural means within the Commission's internal laws, it is necessary to first determine the purpose of the petition submitted for its review.<sup>4</sup>

14. The Commission considers that the nullity and constitutional protection actions filed by the alleged victim were an appropriate vehicle for examining, in the domestic system, the petitioner's claims regarding the human rights violations that allegedly occurred in the context of the criminal investigation and trial brought against the alleged victim. The State has indicated its reasons for considering that a claim for direct compensation for the acts of a legislator would have been the appropriate remedy for the petitioner to present his grievances within the domestic system. However, the Commission observes that the alleged victim's primary aim was to have the criminal conviction against him revoked, and that he could not have achieved this through a direct compensation claim. Therefore, the Commission considers that the direct compensation claim was not a suitable remedy that the alleged victim needed to exhaust in order for the petition submitted to be admissible. According to the State, the failure to exhaust this remedy would make the petition partially inadmissible with regard to claims for reparations. However, the Commission considers that in cases of human rights violations that have not been recognized by the State and that have lingering effects, claims for reparations are ancillary to and indivisible from the primary purpose of the petition, and that it is the remedies associated with the primary purpose that must be exhausted in order for the petition to be admissible.

15. Accordingly, the Commission considers that the domestic remedies with respect to this petition were exhausted in compliance with article 46.1(a) of the American Convention with the Constitutional Court's decision not to select for review the file corresponding to the constitutional protection action filed by the alleged victim against his criminal conviction. It is observed that the final decision was made on October 10, 2012 while the instant petition was filed with the Commission on September 30, 2011. Thus, the Commission concludes that the instant petition meets the requirements of article 46.1(b) of the American Convention.

## **VII. ANALYSIS OF COLORABLE CLAIM**

16. The Commission observes that the petition includes allegations to the effect that the alleged victim was criminally convicted through a special single instance criminal procedure that deprived the alleged victim of the opportunity to obtain an integral review of his conviction.

17. In view of such allegations, the Commission considers it appropriate to recall that the Inter-American Court of Human Rights has indicated that "the designation of the highest body of justice for the criminal prosecution of high-ranking officials is not, per se, contrary to Article 8(2)(h) of the American

<sup>3</sup> IACHR, Report No. 26/16, Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru. April 15, 2016, paragraph 25.

<sup>4</sup> IACHR, Report No. 56/08, Petition 11.602. Admissibility. Workers dismissed from Petróleos del Perú (Petroperú) Northwest-Talara Area. Peru. July 24, 2008, paragraph 58.

Convention,”<sup>5</sup> the same tribunal has also warned that “the rank of the adjudicating tribunal cannot guarantee that a judgment in a sole instance will be delivered free of errors or defects”<sup>6</sup>. In addition, the Commission takes into account that the Inter-American court has ratified “the importance of the existence of a process allowing the review of a conviction”<sup>7</sup> in case of criminal procedures that are decided in the first instance by the highest court of country.

18. In view of these considerations and after reviewing the elements of fact and law set forth by the parties, the Commission considers that the petitioners’ allegations are not manifestly unfounded and require a study of their merits, as the acts described, if corroborated as true, could represent violations of Articles 7 (personal liberty), 8 (right to a fair trial), 24 (right to equal protection), and 25 (judicial protection) of the American Convention, in conjunction with its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).

19. With respect to the State’s allegations regarding the so-called “fourth instance” formula, the Commission reiterates that, for the purposes of admissibility, it must decide whether the alleged facts may characterize a violation of rights, as stipulated in article 47 (b) of the American Convention, or if the petition is “manifestly unfounded” or “its total inadmissibility is evident”, pursuant to subsection (c) of said article. The criteria for evaluating these requirements differs from that used to rule on the merits of a petition. Likewise, within the framework of its mandate, it is competent to declare a petition admissible when it refers to internal processes that could violate rights guaranteed by the American Convention. In other words, in light of the aforementioned conventional standards, in accordance with article 34 of its Rules of Procedure, the admissibility analysis focuses on the verification of such requirements, which refer to the existence of elements that, if true, could constitute *prima facie* violation of the American Convention.

### VIII. DECISION

1. To find the instant petition admissible in relation to Articles 7, 8, 24 and 25 of the American Convention in relation to Articles 1.1 and 2 thereof; and

2. 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 16<sup>th</sup> day of the month of October, 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.

<sup>5</sup> Inter-American Court of Human Rights. Case of Liakat Ali Alibux v. Surinam. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 30, 2014 (“Inter-American Court of Human Rights Liakat Ali Alibux Judgment”), paragraph 88.

<sup>6</sup> Inter-American Court of Human Rights Liakat Ali Alibux Judgment, paragraph 103.

<sup>7</sup> Inter-American Court of Human Rights Liakat Ali Alibux Judgment, paragraph 104.