

OAS/Ser.L/V/II
Doc. 174
24 October 2024
Original: Spanish

REPORT No. 165/24
PETITION 915-14
REPORT ON INADMISSIBILITY

RICARDO SCHEMBRI CARRASQUILLA
COLOMBIA

Approved electronically by the Commission on October 24, 2024.

Cite as: IACHR, Report No. 165/24, Petition 915-14. Inadmissibility. Ricardo Schembri Carrasquilla. Colombia. October 24, 2024.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Ricardo Schembri Carrasquilla and Angela Schembri Peña
Alleged victim:	Ricardo Schembri Carrasquilla and family members ¹
Respondent State:	Colombia ²
Rights invoked:	Articles 8 (right to a fair trial); 9 (freedom from ex post facto laws); 10 (right to compensation); 11 (right to privacy); 23 (right to participate in government) and 25 (judicial protection) of the American Convention on Human Rights. ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	June 26, 2014
Additional information received at the stage of initial review:	October 7, November 9 and 10, 2015; June 7, July 26 and August 10, 2016; May 4, 2017; March 14, 2018 and May 30, 2019.
Notification of the petition to the State:	February 11, 2020
State's first response:	October 28, 2020
Additional observations from the petitioner:	February 25, 2021

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 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	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on March 14, 2014
Timeliness of the petition:	Yes, on June 26, 2014

¹ The petition lists the following family members of Mr. Schembri: 1. Esperanza Peña Redondo (wife); 2. Angela Schembri Peña (daughter); 3. Caterina Schembri Peña (daughter); and 4. Ricardo Schembri Peña (son).

² Pursuant to Article 17.2(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the deliberations or in the decision in this case.

³ Hereinafter "the American Convention" or "the Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party. The petitioner expressed his interest in the processing of the petition in communications dated February 3, 2022, and September 26, 2023.

V. FACTS ALLEGED

The petitioner

1. Mr. Ricardo Schembri Carrasquilla (hereinafter “Mr. Schembri” or “the petitioner”) claims that his due process rights were violated as a result of a disciplinary record that disqualified him from working as a public servant for four years. In addition, he alleges the violation of his right to work, since the disciplinary record kept him from working both in government and in the private sector at present.

2. He states that on June 1, 2000, he assumed the position of director of the Advanced School of Public Administration (*Escuela Superior de Administración Pública*, ESAP), where he served at the pleasure of the president of the Republic of Colombia. He resigned on October 3, 2001, after one year and four months in the position.

3. Mr. Schembri states that, during his tenure, he detected a “parallel payroll” problem, consisting of the illegal hiring of personnel for political purposes; he maintains that this practice was attributable to the previous administration and that it worsened to the point that the number of contractors at ESAP exceeded the number of regular employees. This situation had been previously reported by the Union of State Workers of Colombia.

4. He states that on May 11, 2001, the Office of the Inspector General of Colombia (*Procuraduría General de la Nación*) opened a disciplinary proceeding against him under file number 009-53154-01; and on February 5, 2002, a statement of charges was issued against him, alleging his responsibility for the unlawful hiring of personnel within the ESAP. In a decision dated February 23, 2004, the Office of the Inspector General found the petitioner responsible for the unlawful act of “parallel payroll” or hiring for political purposes, dismissing him from his position as director of the ESAP and barring him from holding public office for four years and three months. Mr. Schembri filed a motion for reconsideration; however, the Office of the Inspector General affirmed its decision on June 22, 2004.

5. He subsequently filed a petition for the protection of constitutional rights (*tutela* action) with the Sectional Council of the Judiciary. In a judgment dated August 30, 2004, the Disciplinary Chamber of the Sectional Council declared the *tutela* action inadmissible. He appealed the decision on September 2, 2004; and in a decision dated October 20, 2004, the Disciplinary Chamber of the Superior Council of the Judiciary amended the challenged decision to deny the *tutela* action rather than find it inadmissible.

6. In response, Mr. Schembri requested a review of the *tutela* decision before the Constitutional Court, and on May 26, 2005, the Sixth Review Chamber of the Constitutional Court upheld the decision of October 20, 2004, holding, *inter alia*, as follows:

[...] The plaintiff in this *tutela* action failed to prove that his right to due process was denied. Therefore, he failed to prove that the Office of the Inspector General issued an arbitrary or unlawful decision in grave and flagrant violation of the law. The Office did not violate his fundamental constitutional rights, since it assessed the evidence presented and based its decision on that evidence. In the absence of any factual error in the assessment of the evidence that would result in an arbitrary or unlawful decision in violation of fundamental constitutional rights, the constitutional judge cannot properly intervene in disputes that were decided by the competent authority according to the rules governing due process in the respective matter.

Lastly, the Court reiterates that mere differences of interpretation that may exist with respect to the analysis of the evidence underlying charges against a public servant cannot provide the basis for a finding of a due process violation. This must arise, as stated earlier, in a clear manner, because admitting *tutela* actions indiscriminately against any ruling could hinder or undermine the action of disciplinary bodies.

7. Subsequently, he filed an action with the Administrative Court of Cundinamarca to set aside the decision and restore his rights. In an interlocutory order of April 24, 2008, the administrative court sent

the file to the *Consejo de Estado* (Colombia's Supreme Administrative Court), considering that it was a single instance proceeding. In a judgment dated June 30, 2009, the Supreme Administrative Court ruled to set the decision aside for lack of jurisdiction. In response, the petitioner filed a motion for reconsideration; however, in a decision dated December 14, 2009, Section Two, Subsection A of the Administrative Disputes Chamber of the Supreme Administrative Court upheld the appealed decision.

8. In addition, the petitioner asked the Supreme Administrative Court to set aside the following: (i) the order of May 11, 2001; (ii) the order of February 5, 2002, containing the statement of charges against him; (iii) the decision of February 23, 2004, whereby the Office of the Inspector General of Colombia found him liable in disciplinary proceedings, removed him from office and barred him from holding public office for four years and three months; and (iv) the decision of June 22, 2004, which upheld the previous decision. In a judgment dated February 13, 2014, Section Two, Subsection A of the Administrative Disputes Chamber of the Supreme Administrative Court denied the petitioner's claims, finding that the administrative acts in question respected due process guarantees, duly assessed the evidence, and were properly reasoned in compliance with the laws in force.

9. In sum, the petitioner alleges violations of his right to a fair trial, freedom from ex post facto laws and retroactivity, right to compensation, right to privacy, right to participate in government, and right to judicial protection, enshrined in Articles 8, 9, 10, 11, 23, and 25, respectively, of the American Convention. He contends that these violations arise from the decision of the Office of the Inspector General of Colombia, which found him liable in disciplinary proceedings with no evidence against him and without considering the exculpatory evidence provided by his defense. He further argues that—nine years after the term of the penalty against him had ended—his disciplinary record continues to affect his employment, preventing him from working even in the private sector, which he considers a violation of his right to work.

10. Lastly, in a communication subsequent to the initial petition, Mr. Schembri asked the IACHR to “request that the Colombian State amend Articles 249, 267(5), and 276 of the Constitution of the Republic of Colombia to abolish the powers of Colombia's high courts (Supreme Court of Justice, Constitutional Court, Supreme Administrative Court) to appoint members of the national enforcement agencies (Office of the Prosecutor General, Office of the Inspector General, Office of the Comptroller General), because these powers politicize them, lead to influence peddling, and undermine the independence and impartiality of the judicial branch.”

The Colombian State

11. Colombia confirms that the Office of the Inspector General of Colombia conducted disciplinary proceedings against Mr. Schembri, and that the petitioner filed a *tutela* action and initiated administrative proceedings, and it agrees with the court decisions cited in the above section.

12. In addition, it requests the IACHR to declare this petition inadmissible on two grounds: (a) the petitioner is asking the Commission to act as an international court of fourth instance; and (b) failure to exhaust domestic remedies.

13. In relation to point (a), the State contends that, contrary to the petitioner's assertion, the disciplinary investigation conducted by the Office of the Inspector General of Colombia did take into account the mitigating evidence that was presented; due process guarantees were respected; and the Office of the Inspector General did not engage in any arbitrary or unlawful conduct in violation of fundamental constitutional rights in the investigation, having assessed the entire body of evidence and ruling in accordance with the applicable law. On this basis, Colombia argues that the petitioner seeks to have the Inter-American Commission act as an appellate court, in order to re-evaluate the evidence and change the meaning of the decisions issued at the domestic level. Therefore, it argues that, in keeping with the Commission's “fourth instance” doctrine, the petition is inadmissible under Article 47(b) of the Convention.

14. As for point (b), the State notes that the petitioner, in seeking the abolishment the high courts' power to appoint members of the enforcement agencies, failed to file a public action of unconstitutionality at the domestic level, stating that: “[...] it is a mechanism through which Colombians may exercise the fundamental

right to defend the integrity of the Constitution, under the protection of the fundamental right to access to justice, thus allowing any citizen to challenge national laws and regulations that contravene constitutional provisions.” Therefore, it maintains that this claim is inadmissible due to noncompliance with Article 46(a) of the American Convention.

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

15. To analyze the exhaustion of domestic remedies in this case, the IACHR recalls that, according to its consistent and long-standing practice, the first methodological step in identifying the appropriate remedies that a petitioner should have exhausted before turning to the inter-American system is to identify the different claims made in this petition in order to examine them individually.⁵

16. In this case, the petitioner has presented the Commission with three claims: (i) violations of the right to a fair trial during the disciplinary process that dismissed and disqualified Mr. Schembri from holding public office, as well as during the subsequent judicial proceedings that upheld the legality of that penalty; (ii) the violation of his right to work, due to the fact that, nine years after the disciplinary proceedings and despite the completion of the term of the penalty imposed, he has been unable to hold a public or private position; and (iii) the violation of judicial impartiality due to the power of the high courts to appoint members of the enforcement agencies.

17. In relation to allegation (i), the Inter-American Commission has established that the appropriate remedies to be exhausted in cases of alleged violations of due process and other human rights during judicial proceedings are, as a general rule, those means available under national procedural law that make it possible to challenge—during the proceedings in question—actions and decisions made in those same proceedings, in particular the ordinary judicial remedies that may be available, or the extraordinary remedies if they were filed by the alleged victims in order to assert their rights. The Commission has also established as a general standard that if the petitioner used these subsequent, additional, or, as the case may be, extraordinary remedies with the reasonable expectation of obtaining a favorable result, then they may be considered remedies validly exhausted for the purposes of complying with the petition admissibility requirements. Furthermore, the IACHR takes into account, as an important indication of the relevance or admissibility of these remedies, that they have been admitted for processing and adjudicated by the respective courts, and not rejected as inadmissible.⁶

18. The information provided by the parties shows that Mr. Schembri filed several appeals challenging the disciplinary penalty imposed by the Office of the Inspector General of Colombia, which established his responsibility for the unlawful hiring of personnel during his tenure as director of ESAP, as summarized in the table below:

Legal/Administrative action	Judicial/Administrative body	Decision	Date of decision
Motion for reconsideration	Office of the Inspector General of Colombia	Disciplinary penalty upheld	February 23, 2004
<i>Tutela</i> action	Sectional Council of the Judiciary of Cundinamarca	Action ruled inadmissible	August 30, 2004

⁵ See the following IACHR admissibility reports for illustrative purposes: Report No. 117/19. Petition 833-11. Admissibility. Freed Workers of the Boa-Fé Caru Farm. Brazil. June 7, 2019, paras. 11-12; Report No. 4/19. Petition 673-11. Admissibility. Fernando Alcântara de Figueiredo and Laci Marinho de Araújo. Brazil. January 3, 2019, paras. 19 et seq.; Report No. 164/17. Admissibility. Santiago Adolfo Villegas Delgado. Venezuela. November 30, 2017, para. 12; Report No. 57/17. Petition 406-04. Admissibility. Washington David Espino Muñoz. Dominican Republic. June 5, 2017, paras. 26-27; Report No. 168/17. Admissibility. Miguel Ángel Morales Morales. Peru. December 1, 2017, paras. 15-16; Report No. 122/17. Petition 156-08. Admissibility. Williams Mariano Paría Tapia. Peru. September 7, 2017, paras. 12 et seq.; Report No. 167/17. Admissibility. Alberto Patishtán Gómez. Mexico. December 1, 2017, paras. 13 et seq.; Report No. 114/19. Petition 1403-09. Admissibility. Carlos Pizarro Leongómez, María José Pizarro Rodríguez and their family members. Colombia. June 7, 2019, paras. 20 et seq.

⁶ IACHR, Report No. 156/17, Petition 585-08. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, para. 17; IACHR, Report No. 27/16, Petition 30-04. Inadmissibility. Luis Alexander Santillán Hermoza. Peru. April 15, 2016, paras. 25-26.

Appeal of <i>tutela</i> decision	Disciplinary Chamber of the Superior Council of the Judiciary	<i>Tutela</i> action denied	October 20, 2004
Review of <i>tutela</i> decision	Constitutional Court	Judgment upheld	May 26, 2005
Action to set aside the decision and restore rights	Supreme Administrative Court	Granted	June 30, 2009
Request to set aside administrative act	Supreme Administrative Court	Denied	February 13, 2014

19. In view of the foregoing, the IACHR considers that the decision that exhausted domestic remedies was the denial of the request to set aside the administrative act imposing the penalty of dismissal and disqualification from public office for four years and three months against Mr. Schembri, as well as the one that upheld that decision; therefore, the Commission concludes that this part of the petition complies with the exhaustion requirement set forth in Article 46.1(a) of the American Convention.

20. Regarding the filing deadline for the petition, the Commission notes that the denial of the request to set aside the administrative acts imposing the disciplinary penalty against the petitioner was dated February 13, 2014; that he received notice of that decision on March 14, 2014; and that this petition was filed on June 26, 2014. Therefore, the Commission also concludes that this claim complies with the provisions of Article 46.1(b) of the Convention.

21. Lastly, in relation to claims (ii) and (iii), regarding the alleged violation of Mr. Schembri's right to work and the alleged violation of judicial impartiality due to the high courts' power of appointment in the enforcement agencies, the Commission notes that the petitioner has neither indicated nor provided any documentation showing whether these claims were brought to the attention of the competent authorities or whether they were challenged by any procedural means provided for under the domestic law. Therefore, the Inter-American Commission considers, with respect to these parts of the petition, that the information provided by the petitioner is manifestly lacking or insufficient to allow the Commission to verify compliance with the exhaustion of domestic remedies requirement under Article 46.1(a) of the American Convention or to support any of the exceptions provided for in Article 46.2 thereof.

VII. ANALYSIS OF COLORABLE CLAIM

22. First, the Commission reiterates that the evaluation criterion for the admissibility phase differs from that used to decide on the merits of a petition; the IACHR must make a *prima facie* assessment at this stage to determine whether the petition establishes the basis for a possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of such violation. This determination on the characterization of violations of the American Convention is a primary analysis, which does not entail prejudging the merits of the case. For the purposes of admissibility, it must decide whether the alleged facts may constitute a violation of rights, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," in accordance with subparagraph (c) of the same article.

23. As established in the above sections, the petition is based on the alleged violation of Mr. Schembri's right to a fair trial during the disciplinary proceedings that resulted in his removal from office and disqualification from holding public office, and during the subsequent judicial proceedings that upheld the legality of that penalty.

24. The petitioner's own statement clearly shows that his intention is to seek a review by the Inter-American Commission, as an international legal body, of the actions and evidence in the disciplinary proceedings against him, as well as of the decisions issued during the *tutela* proceedings; the action to set aside the decision and restore rights; and the request to set aside administrative acts filed with the Supreme Administrative Court, seeking for the State to be ordered to reverse those decisions that found him liable in disciplinary proceedings of the practice known as "parallel payroll," despite their having been reviewed and affirmed by different judicial authorities.

25. The Commission reiterates that the assessment of the evidence, the interpretation of the law, and the relevant procedure are within the remit of the domestic legal system, which cannot be replaced by the IACHR.⁷ The petitioners' mere disagreement with the domestic courts' interpretation of the relevant legal norms is not sufficient to establish violations of the Convention. The function of the Commission is to ensure compliance with the obligations assumed by the States parties to the American Convention, but it cannot act as a court of appeal to examine alleged errors of law or fact that may have been committed by national courts acting within the scope of their jurisdiction.⁸

26. Therefore, the Commission concludes, as it has in other similar precedents,⁹ that the petitioner's claim is inadmissible based on Article 47(b) of the American Convention, since the facts presented do not show, even *prima facie*, possible violations of the Convention.

VIII. DECISION

1. To find the instant petition inadmissible.
2. To notify the parties of this decision; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of October, 2024. (Signed:) Roberta Clarke, President; José Luis Caballero Ochoa, Second Vice President; Arif Bulkan, and Gloria Monique de Mees, Commissioners.

⁷ IACHR, Report No. 193/21. Petition 1833-12. Inadmissibility. Alfonso Rafael López Lara. Colombia. September 7, 2021, para. 25; IACHR, Report No. 345/21. Petition 739-10. Inadmissibility. Héctor Eladio Maury Arguello et al. Colombia. November 22, 2021, para. 33.

⁸ IACHR, Report No. 70/08, (Admissibility), Petition 12.242, Pediatric Clinic of the Region of Los Lagos, Brazil, October 16, 2008, para. 47.

⁹ IACHR, Report No. 428/21. Petition 419-12. Inadmissibility. Wilder González Ocampo and family. Colombia. December 19, 2021; and IACHR, Report No. 365/21. Petition 125-12. Inadmissibility. Family members of José Ancizar Ferreira Cedeño. Colombia. December 2, 2021.