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REPORT No. 115/17
PETITION 1297-07
REPORT ON ADMISSIBILITY

ÁLVARO JAVIER CISNEROS MEDINA
COLOMBIA

Approved by the Commission at its session No. 2098 held on September 7, 2017.
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 SEPTEMBER 7, 2017

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Álvaro Javier Cisneros Medina
Alleged victim:	Álvaro Javier Cisneros Medina
State denounced:	Colombia
Rights invoked:	Articles 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention on Human Rights; ² Articles 3, 4, 6 and 7 of the Protocol of San Salvador; and other instruments ³

II. PROCEDURE BEFORE THE IACHR⁴

Date on which the petition was received:	October 4, 2007
Date on which the petition was transmitted to the State:	August 22, 2011
Date of the State's first response:	April 4, 2012
Additional observations from the petitioning party:	October 12 and 26, 2011; May, 9 and 29, 2012; and November 19, 2013
Additional observations from the State:	September 14, 2012
Date on which the petitioner was notified of the possible archiving of the petition:	May 26, 2017
Date on which the petitioner responded to the notification regarding the possible archiving of the petition:	June 6, 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 (deposit of instrument of ratification on July 31, 1973)

IV. ANALYSIS OF 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
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¹ Pursuant to Article 17.2.a of the IACHR's Rules of Procedure, Commissioner Luis Vargas, a Colombian national, did not participate in the discussion or the decision on this matter.

² Hereinafter "the Convention" or "the American Convention."

³ Articles 19 and 24 of the Inter-American Charter of Social Guarantees.

⁴ The observations presented by each party were duly transmitted to the opposing party.

Rights declared admissible	Articles 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws) and 25 (Judicial Protection) of the American Convention, in relation to 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; June 2, 2011
Timeliness of the petition:	Yes; October 4, 2007

V. ALLEGED FACTS

1. Mr. Álvaro Javier Cisneros Medina (hereinafter "Mr. Cisneros" or "the alleged victim") submits that he worked as a specialized professional at the Ministry of Labor and Social Welfare, headquartered in Bogotá (hereinafter "the Ministry"), from September 20, 1980 until April 30, 1993, when he was removed from office. He claims that he was dismissed for alleged abandonment of post, and that his removal was groundless as it was decided without due process of law.

2. As a result, Mr. Cisneros filed an appeal for annulment and reparation for damages before Cundinamarca's Administrative Court, which on May 9, 1997 ordered his reinstatement or his appointment to a higher post. Subsequently, the Ministry lodged an appeal which the Council of State settled on March 9, 2000, confirming the lower judgment. The alleged victim submits that on October 27, 2000 the Ministry ordered his reinstatement as a university professional at the headquarters in Quibdó, a post of a lower category and in a different city. Consequently, on November 22, 2000, he resigned as he considered that this reinstatement did not comply with the terms of the judgment and negatively affected his family life.

3. The alleged victim asserts that until December 19, 2000 he had not received any news about his resignation to the post and that he insisted the Ministry to answer his request and informed it that, for personal reasons, he would be out of the city as of December 20, 2000. He claims that on January 14, 2001 he found a notification dated December 20, 2000 about the adoption of the resolution No. 002475 of December 14, 2000, by which he was reinstated to a higher post in Bogotá. On January 15, 2001, Mr. Cisneros accepted the post and requested a two-month extension to take up the post and informed that he would resign unless the extension was granted –he had a conflict of interest for taking up the post due to his work as an attorney in more than 300 lawsuits and the time needed to resign from these.

4. He asserts that on February 6, 2001, by the resolution No. 00185 of February 2, 2001, the Ministry declared the post vacant on the grounds that Mr. Cisneros had abandoned the post as in the month following the notification he had not appeared to start his job. The alleged victim believes that the Ministry did not consider that there was a reasonable cause for him not to take up the post nor took into account his requests, which he believes violated his right to due process. In this regard, he submits that the Ministry willfully declared the post abandoned, despite his repeated reporting of his situation, and that the Ministry alleged false grounds because its decision was not based on prior disciplinary proceedings in which his responsibility had been proved.

5. Therefore, Mr. Cisneros filed an appeal for annulment and reparation for damages before Cundinamarca's Administrative Court. On August 5, 2005, the Court declared that the resolution of abandonment of post was lawful, on the grounds that for the purpose of his reinstatement, the alleged victim did not need to take up the post; and that he was obliged to undertake the assigned functions, given that he could have taken up the post and then request an unpaid leave in order to resign from the lawsuits in which he was working as an attorney. The alleged victim filed an appeal to the Administrative Court of Cundinamarca, which was rejected on September 23, 2005 since under Law No. 954 of 2005 these proceedings must be settled in single instance of jurisdiction in view of the amount of damages. Therefore, he filed an appeal for review to the Administrative Court of Cundinamarca and a complaint before the Council of State (*Consejo de Estado*), both of which were rejected on November 3, 2005 and June 22, 2006, respectively.

6. The alleged victim states that he lodged a writ for protection of fundamental rights with the Council of State (*Consejo de Estado*), which on October 25, 2006 was dismissed on the grounds that it was not the appropriate remedy to appeal against a sentence. Later, by a legal provision, the case file was transmitted to the Constitutional Court. On March 15, 2007, the Court, at its discretion, decided not to choose the case for a review.

7. The petitioner claims that disciplinary proceedings were needed to determine his guilt for abandonment of post, in accordance with Law No. 200 of 1995, in effect at the time of the facts; and that Cundinamarca's Administrative Court "retroactively" applied Decree No. 1950 of 1973, which was no longer in force, to reject the need of prior disciplinary proceedings. As a result, the alleged victim considers that this violated the principle of presumption of innocence, the right of defense and the right to equal protection; and that the rule that should have been applied is Law No. 200 of 1995. Likewise, he asserts that the domestic courts failed to consider the constitutional jurisprudence according to which disciplinary law must be subjected to constitutional principles, particularly to the rights of defense and rebuttal. He also submits that, in similar cases, the Constitutional Court and the Council of State (*Consejo de Estado*) established that when a reasonable cause is proved, the judgment establishing abandonment of post must be declared null, and that taking up a post is necessary when a reinstatement involves an appointment to a post of a higher rank.

8. On the other hand, the State indicates that the resolution ordering the petitioner's reinstatement was notified to him by certified mail, through a Ministry officer at his attorney-work office address. It submits that the petitioner's late finding of his reinstatement is attributable to the petitioner himself. Therefore, the State asserts that his abandonment of post cannot be attributable to a lack of notification of the resolution. Moreover, it informs that Mr. Cisneros filed a special appeal for review to the Council of State (*Consejo de Estado*) and that on October 2, 2008 it was rejected on grounds of untimeliness. As a result, the alleged victim filed an appeal before the Council of State (*Consejo de Estado*) to request the settlement of the special appeal for review. On January 28, 2010, the Council of State (*Consejo de Estado*) decided to annul the proceedings of October 2, 2008 and ruled to carry on with the admissibility procedures concerning the appeal for review. However, on June 2, 2011, the Council of State (*Consejo de Estado*) found the remedy inadmissible on the grounds that new facts and arguments were filed on the merits of the matter. The State indicates that the Ministry of Labor and Social Welfare did conduct a disciplinary investigation into the matter, file No. 039 of 2001, in which it concluded that the petitioner had indeed abandoned the post.

9. It claims that one-instance proceedings are not contrary to the rights of defense, due process and access to justice, since the right to double-instance proceedings is meant for criminal matters and results from the application of a law of exceptional and temporary nature. In addition, it asserts that the principle of freedom of ex post facto laws is applicable to criminal matters only. Therefore, it considers that the facts described here do not establish violations of Articles 8 and 9 of the Convention.

10. The State submits that this petition leads to a fourth instance as the decisions made were duly justified and based on the laws in force, and because the State ensured the rights of access to justice, due process and to a fair trial, in an impartial and independent way. Consequently, it believes that the decisions were made in accordance with due process, and that the alleged victim requests the Commission to review domestic resolutions. Finally, the State requests the IACHR to limit its actions to the consideration of possible violations of the American Convention.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. The petitioner indicates that the domestic legal remedies were exhausted by the Constitutional Court's decision of March 15, 2007. On the other hand, the State did not controvert this information about the exhaustion of domestic remedies nor the timeliness of the petition in the light of the American Convention. However, the State did submit information about subsequent remedies.

12. Based on the foregoing, after analyzing the information in the petition's file, the Commission believes that the domestic remedies were finally exhausted through the Council of State's (*Consejo de Estado*) decision of June 2, 2011, by which the Council rejected the appeal against the judgment of August 5, 2005. Likewise, in view of the fact that the petition was received by the IACHR on October 4, 2007, it meets the admissibility requirements set forth in Article 46.1(a) and (b) of the American Convention on Human Rights.

VII. COLORABLE CLAIM

13. Based on the elements of fact and law presented by the alleged victim and the nature of the matter brought to the Commission's attention, the IACHR believes that the arguments concerning the application of Law No. 954 of 2005 (under which proceedings must be settled in single instance of jurisdiction in view of the amount of damages applicable in cases such as that of the alleged victim⁵), the alleged violations of due process as well as the purported application of an invalid rule to proceedings of a punitive administrative nature establish possible violations of Articles 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws) and 25 (Judicial Protection) of the American Convention, in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of the alleged victim.

14. As regards to the claim about the purported violation of Article 24 (Equal Protection) of the American Convention, the Commission notes that the alleged victim did not submit sufficient arguments or proof to *prima facie* consider a possible violation.

15. As to the State's arguments about the "fourth-instance formula," the Commission recognizes that it is not entitled to conduct a review on the judgments issued by domestic courts in their jurisdiction and in accordance with due process of law and the right to a fair trial. However, the Commission recalls that under its mandate it is competent to declare a petition admissible and, if there is a merits stage, decide on the merits of the case even when the matter concerns domestic proceedings that may have violated any of the rights protected by the American Convention.

16. As regards to the alleged violation of Articles 3, 4, 6 and 7 of the Protocol of San Salvador, the Inter-American Commission notes that it is competent to rule only on possible violations of Articles 8 and 13 of the Protocol; but as regards to the rest of the articles, the Commission may take them into account for interpretation purposes of the American Convention at the merits stage of this case, on the terms of Article 29 of the Convention. In addition, concerning the Inter-American Charter of Social Guarantees, the Commission lacks competence to determine violations of the rules in that treaty, without prejudice of Article 29 of the Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 9 and 25 of the American Convention, in relation to Articles 1.1 and 2 of the same treaty;
2. To find the instant petition inadmissible in relation to Article 24 of the American Convention;
3. To notify the parties of this decision;
4. To continue with the analysis on the merits; and
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

⁵ In previous cases, the Inter-American Commission has admitted petitions concerning the alleged lack of an instance of review for administrative proceedings in view of the application of Law No. 954 of 2005 (on competence, decongestion, efficiency and access to justice) in Colombia. See please: IACHR, Report No. 71/09, Petition 858-06, Massacre of Belén – Altavista, Colombia, August 5, 2009; par. 44; IACHR, Report No. 69/09, Petition 1385-06, Rubén Darío Arroyave Gallego, August 5, 2009, par. 37.

Approved by the Inter-American Commission on Human Rights in the city of México, on the 7 day of the month of September, 2017. (Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.