

OEA/Ser.L/V/II.
Doc. 131
27 April 2020
Original: Spanish

REPORT No. 121/20
PETITION 1133-11
REPORT ON ADMISSIBILITY

MARIO URIBE ESCOBAR
COLOMBIA

Electronically approved by the Commission on April 27, 2020.

Cite as: IACHR, Report No. 121/20, Petition 1133-11, Admissibility, Mario Uribe Escobar, Colombia, April 27, 2020.



I. INFORMATION ABOUT THE PETITION

Petitioner(s):	Ricardo Cifuentes Salamanca
Alleged victim(s):	Mario Uribe Escobar
Respondent State:	Colombia
Rights invoked:	Articles 5 (right to humane treatment), 7 (right to juridical personality), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 21 (right to property), 23 (right to participate in government), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights, ¹ in connection with Articles 1(1) (obligation to respect rights) and 2 (duty to adopt provisions under domestic law) thereof

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition	August 22, 2011
Additional information received at the stage of initial review	November 28, 2012
Notification of the petition to the State	December 17, 2015
State's first response	March 17, 2017
Additional observations from the petitioner(s)	August 30, 2017 and September 4, 2018
Additional observations from the State	May 8 and October 18, 2018

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 PROCEEDINGS AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION

Duplication of proceedings and international <i>res judicata</i>	No
Rights declared admissible	Articles 7 (right to personal liberty), 8 (right to a fair trial), 21 (right to property), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention, in connection with Articles 1(1) (obligation to respect rights) and 2 (duty to adopt provisions under domestic law) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule	Yes, February 26, 2011
Timeliness of the petition	Yes, August 22, 2011

¹ Hereinafter, the "Convention" or "American Convention."²The observations of either party were duly forwarded to the opposing party.

V. ALLEGED FACTS

1. Ricardo Cifuentes Salamanca (hereinafter "petitioner") claims violations of the human rights of Mario Uribe Escobar (hereinafter "alleged victim"), alleging that he was a congressman and that the Supreme Court initiated a criminal investigation against him, after which the alleged victim resigned from his post and the Supreme Court referred the case to the regular courts because it considered that it had lost jurisdiction due to his resignation, an opinion that it stated repeatedly at the time. The petitioner alleges that after the process had progressed in the regular system of justice, the Supreme Court changed its position to consider that it retained competence to investigate and judge congresspersons even after they have resigned their posts; and that it unlawfully applied this new criterion retroactively to the alleged victim, judging and sentencing him on the basis of the proceedings advanced in the regular justice system, which should have been considered null and void if one accepted the new criterion. In addition, he claims that the proceeding before the Supreme Court of Justice did not conform to the standards of the American Convention inasmuch as it was a single instance and there was no separation between the functions of judgment and investigation.

2. The petitioner states that on July 10, 2007, the Criminal Cassation Division of the Supreme Court of Justice decided to open a preliminary investigation against the alleged victim, who was a congressman at the time. He says that the alleged victim resigned from that position, with the result that the Court's Criminal Division, applying what was its line of jurisprudence at the time, referred the case to the Office of the Attorney General on October 10, 2007, considering that it no longer had jurisdiction over the alleged victim owing to his resignation. Then, on December 5, 2007, a prosecutor delegated to the Court heard the alleged victim in an investigation proceeding, and on April 21, 2008, a pretrial detention order was issued against him as the probable perpetrator of the crime of aggravated conspiracy. The petitioner notes that on August 19, 2008, the Deputy Attorney General revoked the detention measure due to a lack of evidentiary merit and that on June 12, 2009, the Attorney General's Office closed the investigation, thus leaving the matter ready for evaluation.

3. The petitioner goes on to say that on September 1, 2009, the Criminal Division of the Supreme Court of Justice issued an order in which it changed its jurisprudence in relation to proceedings brought against congresspersons for the offense of aggravated conspiracy to commit a crime who had renounced the office which granted them jurisdictional privileges. He says that while the jurisprudence up to that time had been to decline jurisdiction in favor of the regular courts in such cases, the Court shifted to consider that it retained jurisdiction in such cases—despite the defendant's resignation—because they were offenses related to the exercise of official duties. He notes that on September 21, 2009, the Prosecutor's Office referred the case it had brought against the alleged victim to the Supreme Court for reasons of jurisdiction. Then, on September 30, 2009, the Court took cognizance of the process, which was challenged in a motion to annul filed by the Delegated Oversight Attorney; the motion was denied and the decision was reaffirmed on December 16, 2009, when the motion for reconsideration filed against said denial was rejected. The petitioner says that on the basis of the investigation conducted by the Prosecutor's Office, on February 24, 2010, the alleged victim was charged as the alleged perpetrator of the crime of conspiracy to promote illegal groups. Subsequently, on April 27, 2010, while the preparatory hearing was taking place, the defense of the accused requested the nullification of the proceedings on the grounds that the criteria used by the Court to support its jurisdiction were erroneous. That request was rejected by the Division, which proceeded to convene the trial hearing. On 21 February 2011, the Division convicted the alleged victim of conspiracy to promote illegal armed groups and sentenced him to 90 months' imprisonment, disqualification from public service for the same period, and a fine of 6,500 times the statutory minimum monthly wage. The petitioner says that the alleged victim was notified of the final decision on February 26, 2011.

4. The petitioner claims that the Court acted unlawfully in that it applied to the alleged victim a procedure which was not provided for in the law, that is reassuming jurisdiction over a matter in which it had already declined jurisdiction. He also argues that the Court's reassumption of jurisdiction was contrary to the principle of legality provided for in Article 9 of the American Convention. He notes that in the case of the alleged victim and in others cases involving similar circumstances where the Court also reassumed jurisdiction after having declined it, members of the Court wrote opinions expressing positions such as that given that the law had not changed, the Court could not change a rule of jurisdiction that it had already defined by merely changing its criteria; that the change in jurisprudence should only apply to the case in which it was adopted and to future

cases, but not to cases in which the Court had already declined jurisdiction; and that the Court, having adopted a position on its jurisdiction in a case, could not change it in the same case without a supervening fact that warranted it. He adds that, if it were considered that the Court retained its exclusive jurisdiction over the alleged victim, the proceedings and the evidence collected in the regular courts and used by the Court to convict him would be null and void.

5. The petitioner further argues that there was no separation of the functions of investigation and trial in the proceeding against the alleged victim before the Criminal Division of the Supreme Court, with the same judges in charge of the formulation of the indictment, the judgment, and the sentence. He considers that this contravenes the right to an impartial judge, since, having presented an opinion by formulating the indictment, the judges could not consider themselves impartial in judging the accused. Similarly, he argues that the process violated the guarantee provided for in Article 8(2)(h) of the American Convention because it was a single-tier proceeding. It argues that the possibility of challenging the decision by means of an extraordinary appeal for review or an action for protection does not satisfy the guarantee of double instance in criminal matters because these appeals have to meet very specific and limited circumstances for their admissibility and because the Constitutional Court's authority to select rulings on actions for protection to review is entirely discretionary. He points out that the alleged victim's situation was not covered by any of the grounds for the application for review and that the action for protection was rejected by the Supreme Court of Justice, after which the Constitutional Court did not select the decision for review. He maintains that the mere possibility that the judgment convicting him could have been examined by the Constitutional Court through an action for protection—which, indeed, it was not—does not imply that the alleged victim's right to right to a two-tier judicial procedure has been respected.

6. The petitioner further argues that the sentence handed down on the alleged victim was unfair since it was based on the statements of a witness who lacked credibility because of multiple contradictions, references to hearsay, and doubts about important issues. He also claims that this witness's statement should have been disregarded because he could not be cross-examined by the defense, thus violating the rights to mount a defense and to challenge evidence. He points out that the Oversight Attorney from the Public Prosecution Service had requested that the Division acquit the alleged victim. He further alleges that the proceedings against the alleged victim led, not only to the unjust deprivation of his liberty, but also to the destruction of reputation and good name, and that a fine was imposed on him with the aim of leaving him and his family destitute. It adds that the alleged victim did not exhaust the action for direct reparation because it involved a procedure that could have taken around 15 years and the lawsuit would have been doomed to fail in any case, since the sentence was based on the constitutional regulations in force and the unified jurisprudence of the high domestic courts that have endorsed single-tier trials for members of Congress.

7. The State, for its part, requested that the petition be declared inadmissible under Article 47 of the American Convention because the facts stated do not tend to establish a violation of human rights. It points out that in special criminal proceedings for public servants with jurisdictional privilege that are conducted in separate tribunals, the guarantee of appeal against the decision is observed by the enshrinement of a judicial remedy allowing the decision to be reviewed and the rights of the convicted person to be protected, without strictly requiring that said remedy be taken up and resolved by a superior tier. It argues that the dual-tier principle is not absolute and may be subject to restrictions assessed for their reasonableness and proportionality. It states that the right to challenge is not satisfied solely through the remedy of appeal, but may also be satisfied through other mechanisms such as an action for protection against judicial orders or an action for review, which are effective procedural means of exercising the right to challenge. It argues that applications for review and protection are complementary to the guarantee of being able to appeal against a conviction; therefore, in cases such as that of the alleged victim which do not fall within the scope of the application for review, the guarantee of being able to appeal against a conviction is satisfied by the protection remedy. It also notes that the special jurisdiction granted to members of Congress is an essential element of the system of checks and balances on the powers of the Colombian State.

8. The State says that the supposed violation of the principle of impartiality claimed by the alleged victim is a consequence of the type of inquisitorial criminal procedure adopted by the Criminal Division of the Supreme Court and that Colombia is not obliged under international law to change its domestic criminal

procedural law in order to adopt a particular type of criminal system. For these reasons, it considers that the petitioner's arguments related to the incorrectness of the system adopted are not sufficient for the colorability requirement to be deemed met; an assessment is required in each case as to whether the judge's actions were in accordance with the guarantee of impartiality. It points out that the Constitutional Court has examined the special criminal proceedings conducted by the Supreme Court of Justice, such as the one that the alleged victim underwent, and concluded that they are constitutional and compatible with Colombia's treaty-based obligations. It further states that the judgment handed down against the alleged victim was duly supported by the evidence and that the petitioner has not met the minimum burden of proof with respect to his complaints of alleged violations of the rights to humane treatment, personal liberty, and property.

9. The State also claims that the existence of a legitimate change of judicial precedent and its application to an ongoing proceeding does not constitute a violation of the principle of legality and retroactivity or of fair trial guarantees since a consolidated legal situation was not affected. It notes that the domestic courts have recognized that "if the court reinterprets a rule developed in previous case law, the accused has a duty to endure such a situation, since according to its meaning, the new interpretation is not a retroactive punishment or aggravation, but the realization of a will of the law that has always existed but has only now been correctly recognized." Similarly, it stresses that the domestic system allows the highest courts in the different jurisdictions to alter their jurisprudential criteria as long as they duly justify their reasons for doing so. It says that in the case of the alleged victim, the Division rejected the motions for reconsideration lodged by the Prosecutor's Office and the defense with duly reasoned decisions. It adds that the possibility of varying established jurisprudential criteria is a requirement for the evolution of the law in democratic societies.

10. In addition, the State considers that the petition should be declared inadmissible for failure to meet the requirement of exhaustion of domestic remedies in the terms of Article 46(1)(a) of the American Convention. It indicates that the petitioner did not exhaust the action for direct reparation for acts of the legislature that is appropriate in cases where the exercise of the State's legislative function causes a person injury that they are not legally obliged to bear. It argues that such an action would have been suitable for the petitioner to present his claims and obtain reparation for the defects he alleges exist in the constitutional structure of the special criminal proceeding for members of Congress related to the lack of a double-tier procedure and separation of the trial and investigation functions. It stresses that a declaration of unconstitutionality of a norm is not a prerequisite for an action for direct reparation for injury caused by it. Similarly, the State says that an action for protection against judicial orders was an appropriate and effective mechanism for the alleged victim to appeal against the conviction. It stresses that the causes of admissibility of an action for protection against a judicial decision include factual, substantive and organic defects; therefore, the petitioner could have invoked such an action to press his claims that the court that convicted him was not competent or that it had committed errors in its assessment of the evidence or in its application of the law. It maintains that, although the petitioner presented arguments with respect to an action for protection filed on behalf of the alleged victim against the sentence handed down against him by the Criminal Division of the Supreme Court of Justice, that remedy was not exhausted as established by the State in its official databases.

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

11. The Commission notes that the petitioner has indicated that the action for direct reparation was not an effective remedy for the alleged victim's case and that the action for protection was filed but proved ineffective in practice because it was rejected by the Supreme Court and not selected for review by the Constitutional Court. Similarly, it notes that the State maintains that both the action for direct reparation for acts of the legislature and the action for protection against a judicial order were adequate and effective remedies that the alleged victim should have exhausted but did not do so.

12. In view of the parties' submissions, the Commission considers it relevant to recall its sustained position that whenever a State alleges the petitioners' failure to exhaust the domestic remedies, it has the burden of identifying which remedies should be exhausted and demonstrating that the remedies that have not been exhausted are "adequate" for remedying the alleged violation, which means that the function of those

remedies within the domestic legal system is suitable for protecting the legal right that has been infringed.³ Similar are its criteria that for the purposes of determining the appropriate procedural avenue in the domestic system it necessary first to determine the object of the petition presented to it,⁴ and that exhaustion of remedies that are ineffective because they offer no reasonable prospect of success is not required.⁵

13. The Commission notes that the State has indicated the reasons why it considers that the action for direct reparation for acts of the legislature would have been an appropriate remedy for the alleged victim to press his claims at the domestic level. The petitioner has argued that this action would have been doomed to failure since domestic jurisprudence had repeatedly endorsed the constitutionality and conventionality of the single tier and the non-separation of the functions of investigation and trial in special criminal proceedings against members of congress. This assertion by the petitioner is supported by the information provided by the State, which has also referenced the criteria held by the domestic courts on these points. In addition, the Commission notes that the main aim of the alleged victim was to secure the reversal of his criminal conviction, which was not achievable through the action of direct reparation. For these reasons, the Commission considers that the action for direct reparation was not a suitable remedy whose exhaustion could be required of the alleged victim.

14. With regard to the action for protection, the Commission notes that the parties dispute whether that remedy was exhausted. The Commission also notes that the record shows that there was already a repeated criterion in domestic case law that the lack of a second tier or of separation between investigative and adjudicatory functions in special criminal proceedings against persons with jurisdictional privilege did not constitute violations of constitutional or treaty-based rights. For this reason, the Commission considers that such an action had no real prospect of success insofar as the petitioner's claims in relation to these points were concerned. The State has indicated that some of the petitioner's claims, including those referring to the lack of competence of the Supreme Court of Justice to judge him, matched the grounds for admissibility of the action for protection against judicial decisions. In relation to this point, the Commission recalls it has already established that the rule on exhaustion of domestic remedies does not mean that alleged victims necessarily have the obligation to exhaust all available remedies. Therefore, if the alleged victim raised the issue by any of the valid and appropriate alternative means under the domestic system of laws and the State had the opportunity to remedy the matter within its jurisdiction, then the purpose of the international rule has been met.⁶ In the instant case, the Commission finds that the alleged victim's claims regarding the lack of competence of the Supreme Court to judge him were presented in a regular proceeding in the course of the criminal trial. For this reason, it considers, as it did previously in a case of a similar nature, that the rule on exhaustion of domestic remedies does not require the alleged victim also to have invoked extraordinary constitutional remedies.⁷

15. For the above reasons and given that the alleged victim was notified of the final decision on February 26, 2011, and that the petition was lodged on August 22, 2011, the Commission concludes that this petition meets the requirements set out in Article 46(1)(a) and (b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

16. The Commission notes that the petition includes allegations that: (1) the Supreme Court resorted to a change of precedent to reassume jurisdiction over the criminal proceedings brought against the alleged victim and to remove it from the cognizance of the regular courts, despite the absence of any legal rule granting it the power to decide unilaterally to reassume jurisdiction over a matter over which it had already declined jurisdiction; (2) the Supreme Court unlawfully issued its sentence based on proceedings conducted in the

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

⁴ IACHR, Report No. 56/08, Petition 11.602, Admissibility, Workers Dismissed from Petróleos Del Perú (Petroperú) Northwest – Talara Area, Peru, July 24, 2008, par. 58.

⁵ IACHR, Report No. 18/12, Petition 161-06, Admissibility, Juvenile Offenders Sentenced to Life Imprisonment without Parole, United States, March 20, 2012, par. 47.

⁶ IACHR, Report No. 16/18, Petition 884-07, Admissibility, Victoria Piedad Palacios Tejada de Saavedra, Peru, February 24, 2018, par. 12.

⁷ IACHR, Report No. 25/07, Petition 1419-04, Admissibility, Hanny Fahmy, Costa Rica, March 9, 2007, par. 50.

regular courts, despite the fact that its new jurisprudential position held that the regular courts lacked competence to judge or investigate the alleged victim; (3) the alleged victim did not have access to effective recourse against the judgment that convicted him; and (4) the alleged victim was convicted by a court that could not be considered impartial because it was composed of the same persons who conducted the investigation and formulated the charges against him.

17. In view of such allegations, the Commission considers it pertinent to recall that the Inter-American Court has concluded that “[jurisdictional] privilege does not necessarily come into conflict with the right to a competent tribunal, if such privilege is expressly established and defined by the Legislative branch and serves a legitimate purpose, as has been previously indicated. In this way, not only the right in question is respected but also the jurisdiction court turns into the competent tribunal of the individual who enjoys a privilege. If, however, the law does not provide for privileges but the Executive branch or the Judiciary itself establishes such privileges, distracting in this way the individual from the court that the law embodies as its competent tribunal, the right to be tried by a competent court would be violated.”⁸ Likewise, the Inter-American Court has acknowledged 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 Convention.”⁹ However, it has noted that “the rank of the adjudicating tribunal cannot guarantee that a judgment in a sole instance will be delivered free of errors or defects,”¹⁰ and it reaffirmed for such cases “the importance of the existence of a process allowing the review of a conviction.”¹¹ In addition, the Inter-American Court has indicated that “impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.”¹²

18. In the light of these considerations, and having examined the factual and legal elements put forward by the parties, the Commission considers that the petitioner's allegations are not manifestly unfounded and require a substantive examination since the facts alleged, if confirmed as true, could characterize violations of the Articles 7 (right to personal liberty), 8 (right to a fair trial), 21 (right to property), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights, in connection with Articles 1(1) (obligation to respect rights) and 2 (duty to adopt provisions under domestic law) thereof.

19. As to the alleged violations of Articles 5 (right to humane treatment), 9 (freedom from ex post facto laws), and 23 (right to participate in government) of the American Convention, the Commission considers that the petitioner has not provided, nor does the record show, sufficient evidence to allow the Commission to consider, *prima facie*, the possibility of their violation.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 7, 8, 21, 24, and 25 of the American Convention, in connection with Articles 1(1) and 2 thereof.¹³

2. To declare this petition inadmissible in relation to Articles 5, 9, and 23 of the American Convention.

⁸ I/A Court H.R., Case of Barreto Leiva v. Venezuela, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C No. 206, par. 77.

⁹ I/A Court H.R., Case of Liakat Ali Alibux v. Suriname, Preliminary Objection, Merits, Reparations, and Costs, Judgment of January 30, 2014 (“I/A Court H.R., Liakat Ali Alibux Judgment”), par. 88.

¹⁰ I/A Court H.R., Liakat Ali Alibux Judgment, par. 103.

¹¹ I/A Court H.R., Liakat Ali Alibux Judgment, par. 104.

¹² I/A Court H.R., Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, par. 56.

¹³ On November 9th, 2020, the Executive Secretariat of the IACHR rectified the inadvertent error observed in this report, modifying the phrase “To declare this petition admissible in relation to Articles 7, 8, 21, 23, 24, and 25 of the American Convention, in connection with Articles 1(1) and 2 thereof” to the terms established in this report, in accordance with the decision adopted by the Commission at the time the petition was analyzed.

3. To notify the parties of this decision, to continue with the analysis of 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 27th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón and Stuardo Ralón Orellana, Commissioners.