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REPORT No. 120/20
PETITION 186-11
REPORT ON ADMISSIBILITY

S. A. S.
COLOMBIA

Approved electronically by the Commission on April 27, 2020.

Cite as: IACHR, Report No.120/20. Petition 186-11. Admissibility. S. A. S. Colombia. April 27, 2020.

I. INFORMATION ABOUT THE PETITION

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| Petitioner: | Mauricio Alarcón Rojas |
| Alleged victim: | S.A.S. |
| Respondent state: | Colombia |
| Rights invoked: | Articles 5 (humane treatment), 7 (personal liberty), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 10 (right to compensation), 11 (right to privacy), 13 (freedom of expression), 22 (movement and residence), 23 (right to participate in government), 24 (right to equal protection), and 25 (judicial protection) of the American Convention on Human Rights ¹ in conjunction with its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects); and other international treaties. ² |

II. PROCEEDINGS BEFORE THE IACHR³

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| Filing of the petition: | February 14, 2011 |
| Additional information received at the stage of initial review: | February 18, 2011; August 15, 2011; August 16, 2011 |
| Notification of the petition to the State: | February 8, 2016 |
| State's first response: | December 20, 2016 |
| Additional observations from the petitioner: | May 18, 19, and 22, 2017; and June 23, 2018 |
| Additional observations from the State: | November 27, 2017; and February 20, 2019 |

III. COMPETENCE

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| 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 April 19, 1978) |

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

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| Duplication of procedures and international res judicata: | No |
| Rights declared admissible: | Articles 7 (personal liberty), 8 (right to a fair trial), 24 (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) |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes, September 24, 2010 |
| Timeliness of the petition: | Yes, February 14, 2011 |

¹ Hereinafter "Convention" or "American Convention."² Article 14 of the International Covenant on Civil and Political Rights.³ The observations submitted by each party were duly forwarded to the opposing party.

V. ALLEGED FACTS

1. Mr. Mauricio Alarcón Rojas (hereinafter “the petitioner”) claims that the human rights of S.A.S. (hereinafter, “the alleged victim”) were violated. He indicates that the Supreme Court of Justice unlawfully and retroactively applied a change of precedent in order to take jurisdiction over a criminal lawsuit against the alleged victim that was being heard in the ordinary justice system; consequently, the alleged victim was submitted to a special single-instance criminal procedure and was deprived of his rights to appeal the judgment before a higher court and to stand trial before a competent and impartial tribunal.

2. The petitioner reports that the alleged victim served as governor of the department of Sucre from January 1, 2001, to December 31, 2003. He indicates that in January 2001 opposition politicians accused the alleged victim of collaborating with and supporting paramilitary groups; the Prosecutor General of the Nation opened an investigation that concluded with the May 6, 2003, decision against further investigation. The petitioner also reports that while the alleged victim was governor, he suspended then Municipal Mayor of El Roble as ordered by the Office of the Inspector General and the General Accounting Office of the Department of Sucre; that the suspended mayor was found murdered on April 10, 2003; and that the deceased’s family members pointed to the alleged victim as one of the potential suspects.

3. The petitioner indicates that the Office of the Prosecutor General assigned the investigation of this homicide to Prosecutor’s Office 29 of the National Unit for Human Rights and International Humanitarian Law (hereinafter “Prosecutor’s Office 29”). He also maintains that on November 15, 2006, the Criminal Cassation Division of the Supreme Court of Justice (hereinafter, “Criminal Cassation Division”), during proceedings being brought against other individuals, learned of information that in its view could criminally implicate the alleged victim; and that accordingly, it sent copies thereof to the Prosecutor General of the Nation to have him investigate, “within his authority,” the alleged victim. The petitioner further indicates that on December 1, 2006, Prosecutor’s Office 29 revoked the decision not to investigate the acts that took place when the alleged victim was governor of Sucre, previously handed down by the Prosecutor General of the Nation in favor of the alleged victim. He goes on to state that on February 5, 2008, Prosecutor’s Office 29 decided to prosecute the alleged victim for the aggravated offences of forced disappearance, murder, and conspiracy, and issued a warrant for his arrest. The petitioner indicates that the criminal proceedings against the alleged victim were conducted in the ordinary justice system, specifically at the First Criminal Court of the Bogotá Specialized Circuit (hereinafter the “First Court”), in accordance with the provisions of Article 235 of the Constitution, which establishes that the special privilege granted to officials in criminal matters will, when those officials have ceased to hold office, only apply for punishable offenses associated with their prior role. The petitioner underscores that for over 18 years the Supreme Court of Justice has repeatedly upheld the precedent that it lacks jurisdiction to try, as a single-instance court, individuals who have ceased to hold positions that had granted them special privilege, except for in cases of so-called *delitos propios* (offenses committed due to, on the occasion of, or in the exercise of their duties).

4. The petitioner indicates that the suit brought against the alleged victim moved forward in the ordinary justice system and that the examination of evidence, evidentiary hearing, and presentation of the parties’ final arguments were completed in that system; accordingly, everything was in place for the First Court to issue its first-instance judgment. However, on September 1, 2009, the Criminal Cassation Division, in a suit brought against a different individual, changed precedent, deeming that it did have the authority to hear cases against privilege-enjoying persons accused of aggravated conspiracy due to their potential ties to members of the self-defense forces, even when they no longer held the office through which they had been granted the privilege. The petitioner indicates that when it learned of this new precedent, on September 7, 2009, the First Court transferred the criminal suit against the alleged victim to the Criminal Cassation Division, which assumed jurisdiction over it on September 28, 2009, despite the dissenting vote of two members of the Division who considered that it lacked jurisdiction. The petitioner emphasizes that the Office of the Attorney General called for the decision to be nullified, but the action for nullification was disallowed and the subsequent motion for reconsideration declared void. On December 3, 2009, the Criminal Cassation Division then handed down a single-instance judgment sentencing the alleged victim to 40 years in prison. The petitioner adds that the alleged victim filed actions for the enforcement of his constitutional rights [*tutela* actions] but they were found inadmissible. This led him to bring the second-instance judgment to the Constitutional Court, which did not

select it for review and further, rejected the request submitted to insist on review. The petitioner underscores that the alleged victim's representative was notified of this decision on September 24, 2010.

5. The petitioner considers that the alleged victim's rights were violated, as although the Supreme Court of Justice can legally change precedent, it did not have the authority to once again take up a criminal action that it had previously sent to the ordinary justice system in compliance with the case law in force at the time. He emphasizes that when the Supreme Court of Justice took jurisdiction over the case, the ordinary justice system court had already overseen the entire trial stage. He also alleges that the single-instance process before the Criminal Cassation Division is incompatible with Articles 8 and 25 of the American Convention because under it the alleged victim was unable to submit motions for reconsideration and appeals against the conviction. The petitioner argues that the possibilities of challenging the Division's decision through a motion to vacate the unappealable conviction or through a *tutela* action do not fulfill the requirements of Article 8.2(h) of the American Convention, because they would not lead to a new, comprehensive examination of the case but rather only to an analysis of the judicial decision being appealed based on a closed, very restrictive set of flaws previously established in positive law. He maintains that the Division's retroactive application of a new legal precedent—to subject the alleged victim to a process that would be even more disadvantageous for him—contravenes Article 9 of the American Convention, and highlights that in its judgment C-792 of 2014, the Constitutional Court had established that all criminal convictions can be challenged and had urged Congress to fill the existing legal gaps on matters of doing so. The petitioner considers this to be a tacit recognition by the State of its failure to fulfill its international obligations in this regard.

6. The petitioner also alleges that the alleged victim's right to a competent tribunal was violated, as the Supreme Court did not have jurisdiction to prosecute him given that the crime he was accused of was a common crime, and because according to Article 235(4) of the Constitution, the Supreme Court's authority to try governors required prior indictment by the Prosecutor General of the Nation, but the only accusation against the alleged victim had been made by Prosecutor's Office 29. He emphasizes that it was not until November 2011, after the alleged victim had already been convicted, that Article 235 of the Constitution was modified to extend, to the Deputy Prosecutor General of the Nation and to the local prosecutors, the authority to accuse privilege-enjoying individuals before the Supreme Court of Justice. He further argues that the alleged victim's right to a competent tribunal was violated during the investigation stage, given that the investigation was advanced by Prosecutor's Office 29 when the competent tribunal was in fact the Prosecutor General of the Nation, accepting the alleged victim's privileged status. The petitioner adds that Prosecutor's Office 29 acted illegally as it did not have the authority to revoke the decision not to investigate handed down by the higher-level Prosecutor General of the Nation. He also argues that the alleged victim's right to an impartial court was violated, because six of the Criminal Cassation Division judges had already issued opinions against him when they sent documents to the Prosecutor General requesting that he be investigated.

7. The petitioner considers the domestic remedies to have been exhausted with the Constitutional Court's refusal to accept the follow-up request for review of the second-instance judgment that had confirmed the inadmissibility of the *tutela* action brought by the alleged victim. He maintains that the remedy of a direct compensation claim against the acts of a legislator was not one that needed to be exhausted before turning to the Inter-American system, because its only purpose is to provide financial compensation rather than to reestablish the violated rights. With regard to the violation of the alleged victim's right to an impartial judge, the petitioner indicates that the Criminal Cassation Division justices were obliged to disqualify themselves *sua sponte*. He likewise indicates that this Division was obliged to nullify *sua sponte* the actions of the prosecutor's office that did not have jurisdiction over the matter.

8. The State, in turn, requests that the petition be denied based on Article 47 of the American Convention because the acts set forth therein do not amount to human rights violations. It considers that the petitioner wrongly intends to use the Commission as a fourth-instance court for the review of domestic decisions handed down by competent courts that provided due grounds for their decisions.

9. The State notes that for special criminal proceedings for privilege-enjoying officials held in the jurisdiction's final courts, the convicted party's right to challenge the decision is honored through the establishment of a judicial remedy that ensures the convicted party's rights are protected but does not strictly

require that the challenge be heard and decided on by a higher court. The State further maintains that the principle of the right of appeal is not absolute and that it can be subject to restrictions that are evaluated to ensure their reasonability and proportionality. It affirms that a party's right to challenge a decision can be satisfied not only through an appeal, but also through other mechanisms like the *tutela* action against court orders or an action for review, which are suitable, effective procedural channels to that end. It highlights that domestic case law has recognized the *tutela* action as valid against convictions handed down in single-instance cases, whenever there appear to have been flaws committed therein. It also affirms that according to domestic constitutional case law, the prosecution of high-level State dignitaries in single-instance proceedings does not entail a violation of due process; and that such individuals have access to other means of judicial defense to challenge decisions contrary to their interests. The State also underscores that the alleged victim did file a *tutela* action against the Supreme Court of Justice and as a result the competent judges clarified the grounds for their claims. Regarding the statement that Constitutional Court judgment C-792 implies a tacit recognition of the State's responsibility, it holds that this is merely the petitioner's interpretation, as the implementation of a legal reform does not definitively imply that the approach previously applied violated international human rights law. It further indicates that in any case, such allegations pertain to the merits of the issue and therefore should not be analyzed in the admissibility stage.

10. The State also alleges that the legitimate change of a legal precedent and its application to an ongoing process does not constitute a violation of the principles of legality or nonretroactivity, given that the courts do not produce criminal law. Therefore, if a court reinterprets a regulation developed in a prior case, the accused must accept it, as the new interpretation is not intended to be a retroactive punishment or intensification of previous measures, but rather the manifestation of the will of the law, which had always existed but had not been correctly interpreted until then. The State also notes that the domestic system allows the highest-instance courts of the different jurisdictions—such as the Criminal Cassation Division—to vary their jurisprudential criteria as long as they provide due grounds for their decisions. The State emphasizes that the Criminal Cassation Division broadly explained the reasons why it had to change its precedent; and that it justified the failure to nullify the proceedings held by the prosecutors and the judges in the ordinary justice system “as they were all conducted in exercise of a jurisdiction that at that time been granted to them by the court”. The State maintains that these hearings can be presumed legal as they were held with full respect for due process and the rules of jurisdiction then applicable, which allowed the Supreme Court to proceed with the process at the procedural stage it had already reached once it resumed jurisdiction over the case due to the legitimate change in precedent.

11. The State adds that the petition should be declared inadmissible with regard to the alleged victims' claims for reparation, because he did not exhaust the remedy of a direct compensation claim against the act of a legislator, which would have been the appropriate, effective domestic remedy for the supposed alleged violations with regard to the regulatory establishment of a single-instance process for individuals with constitutional privilege. The State considers this remedy to have been appropriate because—as set forth by the petitioner—the alleged damages requested resulted from an error in the exercise of a legislative duty; and because a regulation does not have to have been declared unconstitutional for a party to seek compensation for damages it has caused. The State also underscores that this remedy allows for ordering comprehensive reparation for the affected person through the adoption of satisfaction and rehabilitation measures and guarantees of nonrecurrence. It further indicates that the alleged victim did not file a motion for recusal, a mechanism that was applicable if he thought that the prior decisions made by the Supreme Court justices provided sufficient grounds to disqualify them from hearing the case.

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

12. The petitioner indicates that the domestic remedies were exhausted with the Constitutional Court decision of which the alleged victim's representative was notified on September 24, 2010, and that the direct compensation claim was not a suitable remedy that the alleged victim needed to have exhausted before turning to the Inter-American system. The petitioner also notes that the State has indicated that the domestic remedies were not exhausted with respect to the claim for damages because the alleged victim did not file

either a direct compensation claim or the applicable motions for recusal against the Criminal Cassation Division judges who, in his judgment, were not impartial.

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.⁴ 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.⁵

14. The Commission considers that the *tutela* action was an appropriate vehicle for examining, in the domestic system, the petitioning party's claims regarding the human rights violations that allegedly occurred in the context of the criminal lawsuit 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; in turn, the petitioner has alleged that such a claim was not a suitable remedy as it is geared towards obtaining monetary compensation and not towards reestablishing the right that was violated. 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. Regarding the failure to bring a motion for recusal against the Criminal Cassation Division judges that in his view had already issued a judgment against him, the Commission deems that such a motion could have been, *prima facie*, a suitable remedy for the aforementioned offense. The petitioner has not submitted any information that would indicate that the alleged victim did not have access to this remedy or that he would have been prevented from exercising it; neither does the case record show this.

16. Accordingly, the Commission considers that the domestic remedies with respect to this petition were exhausted with the Constitutional Court's refusal to accept the follow-up request for review of the second-instance judgment that had confirmed the disallowal of the *tutela* action brought by the alleged victim. Since this decision was reported on September 24, 2010, and the petition was submitted on February 14, 2011, the Commission concludes that the petition does comply with the requirements of Article 46.1(a) and (b) of the American Convention, except with regard to the arguments that the Criminal Cassation Division judges lacked impartiality as they had allegedly already issued a judgment against the alleged victim.

VII. ANALYSIS OF COLORABLE CLAIMS

17. The Commission observes that the petition includes allegations to the effect that the Supreme Court unlawfully used a change of precedent to retake jurisdiction over a process that it had previously sent to the ordinary justice system, and to take jurisdiction away from the court that had heard all stages up to the parties' presentation of their closing arguments; that the right to a competent tribunal was violated as the Supreme Court tried the alleged victim without the Prosecutor General of the Nation having formally accused him, although the Constitution requires such an accusation in order for the Supreme Court to have jurisdiction

⁴ IACHR, Report No. 26/16, Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru. April 15, 2016, paragraph 25.

⁵ 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.

over the matter; and that the Supreme Court unlawfully handed down its conviction based on proceedings held in the ordinary justice system even though its new precedential position held that those authorities did not have the authority to try or investigate the alleged victim; and that the alleged victim did not have access to an effective remedy against the conviction.

18. In view of such allegations, the Commission considers it appropriate to recall that the Inter-American Court of Human Rights has indicated that “the 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, discrediting 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.”⁶ The Commission also recalls that even though the Inter-American Court has recognized 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,”⁷ 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.”⁸ 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”⁹ in case of criminal procedures that are decided in the first instance by the highest court of country. The Commission also deems relevant to recall that it has already said that “the logic of the criminal procedure guarantees is based on the personal involvement of the judge, conceived of as the adequate organ for safeguarding them. The objective of the principle of procedural immediacy is to try to avoid a distancing of the judge from the elements of the process, especially the accused.”¹⁰

19. In view of these considerations and after reviewing the elements of fact and law set forth by the parties, the Commission considers that the petitioner’s 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).

20. With regard to the allegations on the violation of Articles 5 (humane treatment), 9 (freedom from *ex post facto* laws), 10 (right to compensation), 11 (right to privacy), 13 (freedom of expression), 22 (movement and residence), and 23 (political rights) of the American Convention, the Commission holds that the petitioner did not set forth elements or grounds that would allow it to consider *prima facie* the possibility that they were violated, nor do such elements or grounds follow from the case file.

21. With regard to the allegations on the violation of the International Covenant on Civil and Political Rights, the Commission does not have the authority to determine whether that instrument was violated. However, pursuant to Article 29 of the American Convention, the Commission will be able to consider it for the purpose of interpreting the American Convention in the merits stage.

22. The Commission will not analyze the colorable claim with regard to aspects of this petition that are inadmissible according to the conclusions set forth in Section VI *supra*.

⁶ Inter-American Court of Human Rights, Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009, Series C No. 206 paragraph 77.

⁷ 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.

⁸ Inter-American Court of Human Rights Liakat Ali Alibux Judgment, paragraph 103.

⁹ Inter-American Court of Human Rights Liakat Ali Alibux Judgment, paragraph 104.

¹⁰ IACHR, Report No. 2/99, Case 11.509. Merits. Manuel Manríquez. Mexico. February 23, 1999, paragraph 80.

VIII. DECISION

1. Declare this petition admissible with regard to Articles 7, 8, 24, and 25 of the Convention, in conjunction with its Articles 1.1 and 2.
2. Declare this petition inadmissible with regard the allegations of certain Criminal Cassation Division judges' lack of impartiality due to them having previously requested an investigation of the alleged victim; and with regard to Articles 5, 9, 10, 11, 13, 22, and 23 of the American Convention.
3. Notify the parties of this decision; proceed with an analysis of the merits; and 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; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.