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Inter-American Commission on Human Rights

REPORT No. 182/20
PETITION 1609-10

REPORT ON INADMISSIBILITY

GUILLERMO FINO SERRANO
COLOMBIA

Approved electronically by the Commission on July 6, 2020.

Cite as: IACHR, Report No. 182/20, Petition 1609-10. Inadmissibility. Guillermo Fino Serrano. Colombia. July 6, 2020.

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I. INFORMATION ABOUT THE PETITION

Petitioner:	Claudia Ximena Fino Cantón
Alleged victim:	Guillermo Fino Serrano
Respondent State:	Colombia
Rights invoked:	Articles 7 (personal liberty) and 8 (right to a fair trial) of the American Convention on Human Rights [1], in relation to its article 1.1 (obligation to respect rights)

II. PROCEEDINGS BEFORE THE IACHR[2]

Filing of the petition:	November 6th 2010
Additional information received at the stage of initial review:	November 9th 2010
Notification of the petition to the State:	November 29th 2016
State's first response:	January 9th 2018
Additional observations from the petitioner:	August 13th 2018
Additional observations from the State:	April 18th 2019

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (deposit of the instrument of ratification made on July 31st 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 *res judicata*:	No
Rights declared admissible	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	No, in the terms of section VI
Timeliness of the petition:	N/A

[1] Hereinafter "the American Convention" or "the Convention".
[2] The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioner party claims that Mr. Guillermo Fino Serrano (hereinafter, "the alleged victim" or "Mr. Fino Serrano") was convicted on crimes of improper bribery and interest when celebrating contracts, through a criminal process that did not respect his right to defense and guarantee to an impartial and independent court.

2. She states that on June 8th 2001 Mr. Fino Serano was named President of the Instituto de Seguros Sociales [Institute of Social Insurance] (hereinafter, ISS), position he held until August 27th 2002. She points out that on March 27th 2004 the alleged victim filed a criminal suit stating that since October 15th 2003, while he was in a political campaign running for the Consejo [Council] of Bogota, he started to be blackmailed via anonymous messages which demanded an amount of money in order not to disclose illicit acts he allegedly committed as President of the ISS.

3. The petitioner explains that on May 13th 2004 the one responsible for extortions, Mr. Jesús Buriticá Restrepo, was captured in flagrancy. She specifies that in the investigative stage such person made severe accusations against the victim, by indicating that he gave him an irregular commission equivalent to 30,000 dollars, sent by the legal representative of the multinational company Fresenius Medical Care Colombia S.A in order to accelerate an advanced payment corresponding to contract No. 110 from March 20th 2002, celebrated between such company and the ISS.

4. She indicates that due to this on June 22nd 2004 the Fiscal General de la Nación [General Attorney of the Nation] assigned the Fiscal Segundo Delegado [Second Delegate Prosecutor] before the Tribunal Superior del Distrito Judicial [Superior Judicial District Court] of Cundinamarca to proceed with an investigation versus Mr. Fino Serrano. She claims that on September 17th 2004 such authority issued an order of arrest versus the alleged victim and that on September 25th 2004 a preventive detention measure was imposed by the crimes of improper bribery and unbecoming interest in the celebration of contracts.

5. She says that on November 8th 2004 Mr. Fino Serrano's defense requested the benefit of substitution of the preventive detention measure for house arrest, but on November 23rd 2004 such benefit was denied. She alleges such decision was appealed, but the Prosecutor improperly denied the appeal. She argues that on February 8th 2005 the alleged victim filed an action for protection against such resolution, however on February 23rd 2005 the Sala de Casación Penal de la Corte Suprema [Criminal Cassation Chamber of the Supreme Court] declared the demand inadmissible for considering that the matter raised should be settled in an ordinary process through a nullity action and not constitutionally.

6. The petitioner party indicates that on March 23rd 2006 the Juzgado Cuarto Penal del Circuito de Bogotá [Fourth Criminal Court of the Circuit of Bogotá] sentenced the alleged victim on first instance for the crimes of improper bribery and unbecoming interest in the celebration of contracts to seventy months of imprisonment, payment of a fine and prohibition for seventy months to work and exercise rights in public office. She specifies such decision was appealed and that on October 31st 2007 the Tribunal Superior [Superior Court] of Armenia revoked the sentence and acquitted Mr. Fino Serrano, by considering that the proof provided did not distort the presumption of innocence of the defendant. She argues that the Fiscalía General de la Nación [General Attorney of the Nation] filed an extraordinary remedy of cassation against such resolution and on July 8th 2009 the Casación Penal de la Corte Suprema de Justicia [Criminal Cassation Chamber of the Supreme Court] declared the action founded and confirmed the first instance condemnatory sentence. On such Chamber's criteria, the Tribunal Superior [Superior Court] of Armenia did not properly fathom all the evidence, which clearly and consistently proved Mr. Fino Serrano's responsibility in the crimes attributed to him.

7. She sustains that the defense of the alleged victim filed for nullity versus such decision of the Supreme Court, however on July 24th 2009 the Sala de Casación Penal [Criminal Cassation Chamber] of such court declared the action inadmissible, since it does not proceed versus Cassation sentences. She points out that in response to this, Mr. Fino Serrano's representative filed an action for protection, claiming that the criminal process violated his rights to defense and to a neutral judge, since the Fiscalía General de la Nación [General Attorney of the Nation] designated partial prosecutors with no competence to investigate the reported

facts, and that the magistrates who issued the cassation decision against him were disabled since they had previously adopted decisions related to his case.

8. She specifies that on November 11th 2009 the Sala de Casación Civil [Civil Cassation Chamber] of the Supreme Court of Justice rejected the action, indicating that the actions for protection do not correspond against decisions by the Supreme Court. She argues that on January 19th 2010 the defense of Mr. Fino Serrano filed another action for protection before the Consejo Superior de la Judicatura de Cundinamarca, [Higher Council of the Cundinamarca Judiciary] contradicting once again the sentence by the Supreme Court. On February 1st 2010 such judicial entity declared the resource inadmissible since, among other reasons, the alleged victim did not apply for the disqualification of the questioned magistrates in a timely manner neither did he question the designation of competent prosecutors for his case at the right procedural time. She explains that such decision was appealed and that on April 14th 2010 the Sala Disciplinaria del Consejo Superior de la Judicatura [Disciplinary Chamber of the Higher Council of the Judiciary] confirmed the inadmissibility of the action. Finally, on July 7th 2010 the Sala de Selección de la Corte Constitucional [Selection Chamber of the Constitutional Court] excluded the file from revision.

9. The petitioner party claims that the criminal process breached the alleged victim's right to defense, since in spite the fact that on August 10th 2004 the Prosecutor ordered to listen to him through free version sessions, such act did not take place since the prosecutor in charge of the investigation could not attend due to other duties. She argues that authorities did not reschedule to carry out such free version sessions and that on September 16th 2004 the investigation was initiated without prior compliance of such diligence, which would call for nullity of all proceedings.

10. Also, she says that the aforementioned process breached the guarantee of an impartial and independent judge. In this regard, claims that the Fiscal General de la Nación [General Prosecutor of the Nation] disregarded the competence pre-established by law 600 of 2000 by designating the Fiscal Segundo Delegado [Second Delegate Attorney] before the Court of Cundinamarca to investigate the reported facts, disrespecting the fact that it was the job of the Fiscal Seccional Delegado [Sectional Attorney Delegate] before the Jueces Penales [Criminal Judges] of the Circuit of Bogota to order such investigation. Likewise, questions the fact that the Attorney Delegate had no competence before the Supreme Court of Justice either to investigate the controversy. On the other hand, claims that the magistrates who resolved Mr. Fino Serrano's case at a cassation instance should have been declared disabled, since they had previously declared inadmissible the action for protection filed against the Prosecutor for rejecting its request to substitute the preventive detention measure. Also, indicates that one of the magistrates who resolved such cassation action had already analyzed other incidents related to the same process. In the petitioner's view, such acts would prove the predisposition of such judicial authorities against the alleged victim.

11. The State, in return, says the process the alleged victim was involved in, developed according to the applicable legal and constitutional regulations, and in full respect for judicial guarantees and due process. It requests that the petition be declared inadmissible based on article 47(b) of the American Convention since the petitioner's attempt is considered as having the Commission act as a Higher Court, countering its complementary nature. It affirms that the alleged violation to the right for defense was resolved during the development of the criminal process by the organisms of justice, which considered the omission of having a free version session, to lack the necessary relevance as to declare nullity for the whole criminal process and that the alleged victim did not prove the concrete detriment that such omission caused him. For this reason, the State affirms that such allegation was dealt with at an internal level, through competent authority applying current regulations and in light of its obligation to ensure the access to justice.

12. On the other hand, it argues that there was not a breach of guarantees for independence and impartiality either. It specifies that both the Constitution and the criminal legislation clearly establish that the Fiscal General de la Nación [General Attorney of the Nation] is competent to designate or dismiss his assistants in investigations and processes, provided such act be properly motivated, and that such entitlement does not mean modifying the competences established by law, but to simply specify the clerks who are to fulfill them. It remarks that the administrative act through which the Fiscal Segundo Delegado [Delegate Second Attorney] before the Court of Cundinamarca to investigate the situation of the alleged victim was adequately motivated

in the national relevance and connotation of the alleged facts. Likewise, adds that no member of the Supreme Court incurred in any of the causes of impediment foreseen on article 4 of Law 600 of 2000, since their previous resolutions and participation were not related to the central subject resolved when sentencing the alleged victim. In the State's view, such reasoning was manifested in the cassation sentence.

13. Additionally, the State points out that there was a wrongful exhaustion of domestic remedies. It argues that Protection Rulings clearly stated that the alleged victim did not timely file for disqualification of the questioned magistrates neither did he question the designation of competent prosecutors for his case at the right procedural time. Due to which, concludes that Mr. Fino Serrano's defense did not properly use the internal remedies to pursue his claims.

14. Finally, the State sustains that the petition is inadmissible because not all domestic jurisdictional remedies have been exhausted. In its view, the alleged victim has not used the contentious administrative channels to clarify the State's responsibility. It indicates that through a direct reparation action it would have been possible to question the alleged defective functioning of the justice administration to claim an eventual indemnity.

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

15. The petitioner party indicates that the domestic remedies were exhausted on July 7th 2010 with the decision of the Corte Constitucional [Constitutional Court] of Colombia to not select an action for protection filed by the defense of the alleged victim. The State, on the other hand, considers that national jurisdiction has not been exhausted, since a direct remedy action has not been filed to clarify a supposed wrong functioning of the justice administration. Notwithstanding the above, it highlights there was a wrongful exhaustion of domestic remedies used by the alleged victim, since the alleged effects on his right to an impartial and independent court were not timely questioned with the domestic processes.

16. In this regard, the Commission reminds that, as a general rule, the petitioner party must previously exhaust domestic remedies in conformity with domestic procedural legislation, which is why such requirement cannot be deemed as met if the demands were declared inadmissible based on reasonable and procedural base as opposed to arbitrary, like filing an action for protection without prior exhaustion of pertinent channels[3]. At the present case, the IACHR confirms that the courts that knew the action for protection filed by the alleged victim to question the judicial authorities who knew his case declared the demand inadmissible, arguing there was no previous filing for disqualification of the questioned magistrates in a timely manner neither did he question the designation of competent prosecutors for his case at the right procedural time. On this point, the petitioner party has provided neither proof nor argument that would allow to infer that such decisions were arbitrary or unreasonable. Upon the information provided, the IACHR concludes that there was a wrongful exhaustion of domestic remedies, which is why the requirement of admissibility foreseen on article 46.1.a of the Convention regarding these allegations cannot be considered fulfilled.

VII. ANALYSIS OF COLORABLE CLAIM

17. The Commission reminds it is not competent to revise sentences dictated by national courts which act within the sphere of their competence and which apply the due process and judicial guarantees. In the present case, the petitioner claims there was no diligence of free version prior to the opening of the criminal process. The State has affirmed that the situation was duly examined by domestic judicial authorities who concluded that, although such action was omitted, the lack of such activity was not enough as to declare the nullity of the whole criminal process, since it did not substantially affect the right to defense of the alleged victim. The petitioner has not submitted elements of fact or law which indicate that such decision is somehow vitiated or that it implies a violation to the American Convention. Therefore, the Commission concludes that

[3] IACHR, Report No. 90/03, Petition 0581/1999. Inadmissibility. Gustavo Trujillo González. Peru. October 22nd 2003, par. 32

such allegation is inadmissible based on article 47 (b) of the American Convention, since the facts exposed do not produce, not even prima facie, possible violations to the Convention.

VIII. DECISION

1. To declare this petition inadmissible; and

2. To notify the parties of this decision; to publish this decision and to 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 6th day of the month of July, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Julissa Mantilla Falcón, Commissioners.