



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2930/2017\*, \*\*

<i>Communication submitted by:</i>	Sabas Eduardo Pretelt de la Vega (represented by counsel, Víctor Javier Mosquera Marín)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Colombia
<i>Date of communication:</i>	1 August 2016
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 11 January 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	21 July 2020
<i>Subject matter:</i>	Conviction of a former minister in sole instance by the highest judicial body
<i>Procedural issues:</i>	Examination of the matter under another procedure of international investigation or settlement; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to due process; right to a hearing by a competent, independent and impartial tribunal; right to be presumed innocent; right to have a conviction and sentence reviewed by a higher tribunal; equality before the law; right to liberty and security of person; right to freedom from discrimination
<i>Articles of the Covenant:</i>	2; 3; 9 (1); 14 (1), (2), (3) (a)–(c) and (e), (5) and (7); and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1.1 The author of the communication is Sabas Eduardo Pretelt de la Vega, a national of Colombia born in 1946. He claims that the State party has violated his rights under articles 2, 3, 9 (1), 14 (1), (2), (3) (a)–(c) and (e), (5) and (7), and 26 of the Covenant. The author is

\* Adopted by the Committee at its 129th session (29 June–24 July 2020).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Furuya Shuichi, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



represented by counsel. The Optional Protocol entered into force for the State party on 29 October 1969.

1.2 On 1 August 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to request interim measures in respect of the author under rule 94 of its rules of procedure.

### **Factual background**

2.1 Between 2002 and 2006, the author served as Minister of the Interior and Justice during the first term of President Álvaro Uribe.

2.2 On 2 to 4 June 2004, the First Committee of the House of Representatives of the Congress approved bill No. 267,<sup>1</sup> which allowed for the re-election of the then President, Álvaro Uribe. On 7 June 2004, Congressman Germán Navas Talero filed a complaint of bribery with the Supreme Court<sup>2</sup> against Congresswoman Yidis Medina Padilla.<sup>3</sup> On 23 February 2005, the Supreme Court issued a refusal order and the investigation was closed.<sup>4</sup>

2.3 In March and April 2008, the press published two articles<sup>5</sup> in which Ms. Medina Padilla admitted that she had been bribed by the author and other senior officials to vote in favour of bill No. 267 of 2004 in exchange for official privileges. As a result of these articles, on 10 April 2008 the Supreme Court decided to rescind the refusal order of 23 February 2005 and initiated criminal proceedings against former Congresswoman Medina Padilla, who was eventually convicted of taking bribes, in an advanced ruling<sup>6</sup> handed down on 26 June 2008, after she confessed to having accepted a promise of payment from the author and other senior officials in exchange for voting in favour of bill No. 267, which provided for presidential re-election.<sup>7</sup>

2.4 On 23 June 2004, in response to an application for disciplinary action,<sup>8</sup> the Counsel General's Office opened an investigation into the author and then exonerated him in an administrative decision of 16 March 2009.<sup>9</sup> Subsequently, in a decision of 20 October 2010,

<sup>1</sup> See [www.camara.gov.co/sites/default/files/2017-11/042%20REELECCION%20PRESIDENCIAL%20INMEDIATA.pdf](http://www.camara.gov.co/sites/default/files/2017-11/042%20REELECCION%20PRESIDENCIAL%20INMEDIATA.pdf).

<sup>2</sup> The Supreme Court serves as the natural judge in cases involving members of Congress, who are subject to special jurisdictional arrangements, while the Attorney General serves as the natural judge in cases involving members of the executive branch.

<sup>3</sup> Ms. Medina Padilla took part in the debate held by the First Committee of the House of Representatives on the constitutional reform bill that provided for presidential re-election and that allowed President Uribe to run for a second term; her vote was decisive.

<sup>4</sup> Supreme Court order of 23 February 2005: "The continual meetings that she held with various parliamentary benches and the information that she provided on the Government's various plans and programmes, including the social investment plan, are considered to form part of the political activities that fall within her remit and there is no evidence that they were or may have been outside or against the law."

<sup>5</sup> "Votar la reelección me mató" (Voting for re-election killed me), *El Espectador* (Bogotá), 28 March 2008, available at [www.elespectador.com/noticias/politica/votar-reeleccion-me-mato-entrevista-genero-el-proceso-d-articulo-555314](http://www.elespectador.com/noticias/politica/votar-reeleccion-me-mato-entrevista-genero-el-proceso-d-articulo-555314) and "La historia no contada" (The untold story), *Semana* (Bogotá), 5 April 2008, available at [www.semana.com/opinion/articulo/la-historia-no-contada/91968-3](http://www.semana.com/opinion/articulo/la-historia-no-contada/91968-3).

<sup>6</sup> Record No. 173, advanced ruling in the proceedings against Yidis Medina Padilla, who, as a former member of the House of Representatives, admitted charges of bribery. In Judgment SU 1300 of 6 December 2001, the Constitutional Court held that the admission of charges amounts to a simple confession, which results in both the State and the accused making mutual concessions, as the State ceases to exercise its powers of investigation, while the accused renounces the possibility of seeing the trial through to its completion and of contesting the charge and the evidence on which it is based.

<sup>7</sup> The ruling in question contains an analysis of the testimonies of Ms. Medina Padilla and other witnesses, who claim that the author was involved in the bribery. The author states that he was denied the opportunity to defend himself and to contest the evidence during the trial; however, there is no assessment of the author's conduct nor any attribution of responsibility in the ruling against Ms. Medina Padilla.

<sup>8</sup> The complaint concerns the alleged offers made to Ms. Medina Padilla and in the case involving Mr. Avendaño, which was closely connected to the accusations made against Ms. Medina Padilla.

<sup>9</sup> Counsel General's Office, Decision 001-105507-04, 16 March 2009.

the Counsel General's Office imposed on the author the administrative penalties of dismissal and 12 years' general disqualification from the exercise of public functions for having offered former Congressman Teodoro Avendaño official privileges in exchange for his voting in favour of bill No. 267. On 30 June 2016, this decision was declared null and void by the Council of State on the grounds that it was illegal and time-barred.<sup>10</sup>

2.5 On 8 May 2008, the Supreme Court sent Ms. Medina Padilla's case file to the Attorney General's Office in order that a criminal investigation might be initiated with respect to the author, if the Office considered it appropriate. On 9 May 2008, the Attorney General recused himself from the case.<sup>11</sup> On 28 May 2008, the Supreme Court accepted the Attorney General's recusal and assigned the case to the Deputy Attorney General. On 23 June 2008, the then Deputy Attorney General took over as head of the criminal investigation concerning the author<sup>12</sup> and other senior officials.

2.6 On 19 January 2011, the Deputy Attorney General<sup>13</sup> in turn recused himself from the case. On 6 April 2011, the Supreme Court accepted his recusal<sup>14</sup> and ordered the new Attorney General to continue with the proceedings. On 29 July 2011, the Supreme Court declared null and void the indictment that had been issued with respect to the author by the Deputy Attorney General.<sup>15</sup> Then, on 23 August 2011, the Attorney General declared null and void all measures taken since the end of the investigation, including the indictment, on the grounds that the Deputy Attorney General did not have the authority to make such a decision.<sup>16</sup>

2.7 On 7 February 2012, the then Attorney General delegated the investigation, prosecution and participation in the trial to Prosecutor No. 6 assigned to the Supreme Court, in accordance with Legislative Act No. 06 of 24 November 2011.<sup>17</sup>

<sup>10</sup> Council of State, Administrative Litigation Division, Second Section, Subsection A, File No. 0583-11, Decision, 30 June 2016. According to information provided by the author, the Counsel General was placed under disciplinary investigation and threatened with dismissal by the Supreme Court for having exonerated the author of the alleged offence. In the face of this pressure, the Counsel General decided to punish the author with 12 years' disqualification for allegedly having offered to connect people recommended by former Congressman Avendaño to people within the Government, in exchange for the Congressman absenting himself from the session held by the First Committee of the House of Representatives on 3 June 2004, in order to ensure that the bill allowing for the re-election of former President Álvaro Uribe would be passed.

<sup>11</sup> Attorney General's Office, Sole Instance 0031, Indictment, 13 May 2010. Subject matter: Refusal to declare invalid and decision to prosecute. The case was assigned to Guillermo Mendoza Diago, the Deputy Attorney General, after the then Attorney General, Mario Iguarán Arana, recused himself on the grounds that he had been the Deputy Minister of Justice while the author had been the Minister of Justice. At the time of the indictment, Mr. Mendoza was serving as the Attorney General and the position of Deputy Attorney General was held by Fernando Pareja, who issued the indictment confirming that there was enough evidence to prosecute on 13 May 2010.

<sup>12</sup> He took over the investigation concerning the author on 23 June 2008 and the investigation concerning Echeverri and other officials on 19 August 2008. The proceedings were consolidated by a decision of 28 August 2012.

<sup>13</sup> Juan Carlos Forero Ramírez, Deputy to Attorney General Viviane Morales.

<sup>14</sup> The then Deputy Attorney General stated that he had issued a professional opinion on the matter and that the aforementioned official had influenced his judgment, thus undermining the impartiality that should have governed his actions as a representative of an investigating body. See also the decision of 29 July 2011 of the Criminal Cassation Chamber of the Supreme Court, contained in record No. 268.

<sup>15</sup> Supreme Court, Record No. 268, Decision, 29 July 2011.

<sup>16</sup> At the pretrial hearing of the author's case that was held on 29 July 2011, the Supreme Court declared null and void the proceedings that had taken place since the author's indictment, on the basis that the then Deputy Attorney General lacked jurisdiction because the grounds on which he had been granted jurisdiction had ceased to apply when the role of Attorney General had been taken over by someone who was not precluded from handling the case.

<sup>17</sup> Legislative Act No. 06 of 24 November 2011, which amended articles 251 and 235 of the Constitution, gave the Attorney General the power to delegate to the Deputy Attorney General and to the prosecutors assigned to the Supreme Court the investigation and prosecution of cases involving persons subject to special jurisdictional arrangements under the Constitution that fall within his or her jurisdiction.

2.8 On 6 March 2012, Prosecutor No. 6 reconfirmed that there was enough evidence to prosecute and charged the author with the single offence of having given or offered a bribe, noting as aggravating circumstances the fact that he had been the Minister of the Interior and Justice<sup>18</sup> and that he had been a joint participant in the offence,<sup>19</sup> and as a mitigating circumstance the fact that he had no criminal record.<sup>20</sup> The case was then referred to the Supreme Court for trial.

2.9 A hearing was held on 7 December 2012, during which Prosecutor No. 6 expressed concern about a possible conflict of interest involving the author's defence lawyer, as she was being investigated in connection with the same facts in separate proceedings and was being put forward as a witness in the author's trial. On 9 December 2012, the author's defence lawyer resigned.<sup>21</sup>

2.10 On 5 July 2013, the author filed a petition for *amparo* with the Criminal Cassation Chamber of the Supreme Court and the Attorney General's Office, invoking his right to due process and his right to be investigated and prosecuted by the competent authority in accordance with the laws in force at the time of the events. On 21 May 2015, the Constitutional Court rejected his petition,<sup>22</sup> arguing that it had not been shown that the alleged irregularity had been brought to the attention of the authority concerned within the appropriate procedural time frame.<sup>23</sup>

2.11 On 15 April 2015, the Criminal Cassation Chamber of the Supreme Court, ruling in sole instance, declared the author criminally responsible as "co-perpetrator of a series of offences of a single type, consisting of giving or offering a bribe" and sentenced him to 80 months' imprisonment, a fine of 167 times the statutory minimum monthly wage and 112 months' disqualification from the exercise of public rights and duties.

2.12 The author claims that domestic remedies have been exhausted because his conviction in sole instance by the Criminal Chamber of the Supreme Court<sup>24</sup> cannot be appealed, as the judgment itself states.<sup>25</sup> He also reports that, on 4 September 2015, he filed a petition for *amparo* on the grounds that the conviction constituted a violation of his right to due process and his right to be presumed innocent.<sup>26</sup> On 17 September, the Civil Cassation Chamber of the Supreme Court rejected his petition.<sup>27</sup> He challenged this decision on 23 September 2015 and his petition was rejected again on 9 November 2015 by the Labour Chamber of the Supreme Court.

2.13 In addition, the author notes that in a judgment of 29 October 2014, the Constitutional Court urged the Congress to introduce comprehensive legislation establishing the right to challenge all convictions, within one year of notification of the judgment. If the Congress did not do so, it would be understood that all convictions could be challenged before the authority that was functionally or hierarchically superior to the one that had handed down the sentence. On 25 April 2016, this potential legal consequence became a reality, as the stipulated time

<sup>18</sup> Criminal Code, art. 58 (9).

<sup>19</sup> Criminal Code, art. 58 (10).

<sup>20</sup> Criminal Code, art. 55 (1).

<sup>21</sup> The author provides an audio recording of the hearing. The recording makes it clear that the Supreme Court recommended that the author should take a few days to consider what was in his best interests, but the lawyer was never technically prevented from defending the author. Nevertheless, the author claims that he was prevented from being defended continuously by a trusted lawyer.

<sup>22</sup> Constitutional Court, Judgment SU-279, 21 May 2015.

<sup>23</sup> Constitutional Court, Judgment SU297/15, 21 May 2015.

<sup>24</sup> Article 235 (4) of the Constitution stipulates that: "The functions of the Supreme Court include trying ... cabinet ministers for any offences with which they are charged." This means that the author is subject to special jurisdictional arrangements under the Constitution. Similarly, article 32 (6) of the Code of Criminal Procedure (Act No. 906 of 2004) stipulates that: "The Criminal Cassation Chamber of the Supreme Court is responsible for: ... trying the officials mentioned in article 235 (4) of the Constitution."

<sup>25</sup> Judgment SP4250-2015, 15 April 2015, operative paragraph 11, p. 319.

<sup>26</sup> In accordance with article 86 of the Constitution, which reads as follows: "The decision, which shall be immediately enforceable, may be challenged before the competent judge, who shall in each case refer the matter to the Constitutional Court for possible review."

<sup>27</sup> Supreme Court, Civil Cassation Chamber, STC12624-2015, 17 September 2015.

period elapsed and the Congress had not complied with the Constitutional Court's order. On 28 April 2016, in press release No. 08/16, the Supreme Court emphasized that the consequence arising from the Constitutional Court's ruling was "unfeasible", since, as the highest ordinary court and a "unifying court" (*órgano de cierre*), it was unable to establish a hierarchically superior authority that would review the judgments of its specialized chambers. On the same day, the Constitutional Court handed down Unifying Judgment SU215/16, which established that the right to challenge convictions handed down in sole instance would apply only to cases that had been tried on or after 24 April 2016. On 18 May 2016, the Criminal Cassation Chamber of the Supreme Court declared the author's appeal against his conviction of 15 April 2015<sup>28</sup> to be inadmissible, based on the argument set out in the press release.

### The complaint

3.1 The author claims to be a victim of violations of his rights under articles 2, 3, 9, 14 and 26 of the Covenant.

3.2 The author claims that the State party has failed to meet its obligations under articles 2 and 3 of the Covenant, since, on account of his status as a senior official, it has not ensured but rather obstructed and prevented effective access to the rights enshrined in the Covenant, especially the right established in article 14 (5).

3.3 Regarding the violation of article 9, the author claims that his freedom was restricted on the basis of a criminal conviction that does not meet the minimum requirements established in article 14 of the Covenant. The author notes, in particular, that this right was violated because he was not granted effective access to house arrest, even though he was entitled to this privilege under domestic law.<sup>29</sup>

3.4 The author claims that during the proceedings against him, he was at a legal disadvantage because the investigation and prosecution of his case was delegated to an official without jurisdiction, as a result of the application of a law that had been passed after the commission of the alleged acts. He also maintains that his right to be heard by a competent court, under article 14 (1) of the Covenant, was violated because the only person who had the authority under domestic law to conduct the criminal investigation and prosecution was the Attorney General. Yet, the Attorney General delegated this authority to a subordinate. The author claims, in addition, that he was not allowed to be tried individually and that his right to a fair trial was therefore restricted, in violation of article 14 (1).

3.5 The author considers that the State party violated his right to be heard by an independent and impartial tribunal, firstly, because the judges who tried him influenced the decision as to which prosecutor would be in charge of the criminal investigation<sup>30</sup> and secondly, because the judges allowed themselves to be swayed by personal biases and had preconceived ideas about the case. The author claims that the independence of the court was compromised by the fact that the judges referred to the political implications of their decisions in the judgment. He also notes that the reporting judge had served as an adviser to one of the judges who had convicted Ms. Medina Padilla and that Prosecutor No. 6 ended up serving as an assistant judge under one of the judges who tried him. The author claims that the judges who took part as trial judges had already expressed their opinion on the case.

<sup>28</sup> Supreme Court, Criminal Cassation Chamber, File No. 39156, 18 May 2016.

<sup>29</sup> According to the provisions of article 38 of the Criminal Code (Act No. 599 of 2000), which were in force at the time when the acts were committed:

"The prison sentence shall be served in the place of residence or home of the convicted person or, failing that, in a place decided upon by the judge, provided that the following conditions are met: (1) The sentence is imposed for punishable conduct for which the minimum penalty established by law does not exceed 5 years' imprisonment; (2) The convicted person's conduct in the personal, work, family or social spheres allows the judge to conclude, on the basis of serious and valid reasons, that he or she will not place the community in danger or avoid serving the sentence."

<sup>30</sup> The author notes that in October 2015, several Colombian media outlets released recordings showing that the decision to appoint the Deputy Attorney General rather than an ad hoc prosecutor was made more for political convenience than for legal reasons, in order to allow for the conviction of the senior officials under investigation.

3.6 The author considers that his right to be presumed innocent, under article 14 (2), was violated because he was presumed guilty throughout the judicial proceedings, since the conviction of Ms. Medina Padilla implied that he too would be convicted, as demonstrated by the fact that most of the evidence was transferred from other judicial proceedings.

3.7 The author claims that the guarantees set out in article 14 (3) were not observed, on the grounds that: (a) he and the other senior officials accused by Ms. Medina Padilla<sup>31</sup> were not given the opportunity to testify at her trial and to counter the allegations made against them, nor were they allowed to contest the evidence that had been transferred from other trials;<sup>32</sup> (b) his new lawyer<sup>33</sup> was not given enough time to look into the case; and (c) he had to deal with the fact that the criminal investigation and the proceedings lasted for almost seven years, as there was an undue delay between the formal charging and the start of the trial.

3.8 The author maintains that the State party violated his right to have his conviction reviewed by a higher tribunal, which is enshrined in article 14 (5), because the State party's domestic legislation stipulates that the Supreme Court is responsible for hearing and ruling on such cases in sole instance, and its rulings cannot be appealed.<sup>34</sup>

3.9 Lastly, the author alleges that the double jeopardy rule established in article 14 (7) was violated because the decision handed down in the disciplinary proceedings conducted by the Counsel General's Office was not taken into account.

3.10 With regard to article 26, the author notes that the State party discriminated against him throughout the proceedings, especially by restricting his right to challenge his conviction before a higher court.

#### **State party's observations on admissibility**

4.1 In its comments of 20 February 2017, the State party notes that the communication is inadmissible under article 5 (2) of the Optional Protocol because the matter has already been examined under another procedure of international investigation or settlement.

4.2 The State party reports that it received two notes verbales – G/SO 215/1 COL 222 of 22 September 2015 and G/SO 215/1 COL 222 of 22 May 2016 – from the Human Rights Council relating to communications submitted by the Centro Democrático (Democratic Centre) party in respect of Colombia, alleging persecution of the party and its members; some of the allegations specifically concerned the author of the present communication. In note verbale G/SO 215/1 COL 222 of 22 August 2016, the Human Rights Council accepted the State party's comments on the allegations made by the Centro Democrático party and its members, and declared that the allegations seemed to be politically motivated.

<sup>31</sup> The author explains that Ms. Medina Padilla admitted to and was convicted of an offence that inevitably involved an active participant and a passive participant; the first was criminally responsible for offering or giving the bribe and the second for accepting it. He also states that in the judgment concerning Ms. Medina Padilla, the senior government officials in question were held directly criminally responsible by the court.

<sup>32</sup> Supreme Court, Decision, 19 April 2013, p. 17:

In the procedure provided for in Act No. 600 of 2000, unlike the oral accusatorial procedure provided for in Act No. 906 of 2004, the principle of the preservation of evidence prevails, which means that the process of collecting evidence for the trial should not be viewed as an opportunity to repeat the process of investigation but rather as an opportunity to gather new or additional evidence that the parties did not have the chance to submit during the investigation or that they have not yet contested as they are entitled to do. With that in mind, the Chamber considered the requests made in this regard by the various persons involved in the proceedings.

Supreme Court, Decision, 19 April 2013, p. 52: “[The author] claims that it is the witness who states or confirms whether the Public Prosecution Service has made the correct assessment, whereas it is for the defence counsel and the Court to do so.”

<sup>33</sup> The author claims that his trusted lawyer was forced to resign as a result of false accusations and vetoes by the Public Prosecution Service and the Supreme Court. See para. 2.9.

<sup>34</sup> Judgment SP4250-2015, 15 April 2015.

4.3 The State party also notes that the author has not exhausted the available domestic remedies. On 15 April 2015, the nine judges of the Criminal Cassation Chamber of the Supreme Court declared the author criminally responsible as co-perpetrator of a series of offences of a single type, consisting of giving or offering a bribe. As a civil servant subject to special jurisdictional arrangements under the Constitution, the author was sentenced in sole instance; however, he has not exhausted all the available remedies because, although in his case there can be no appeal to a court of second instance, he can nevertheless apply for the judgment to be reviewed, as stipulated in the Code of Criminal Procedure.<sup>35</sup>

4.4 The State party also argues that the Constitutional Court itself has emphasized that: “In the criminal law tradition, review proceedings were designed as a means of protecting the fundamental rights of convicted persons, in view of the nature of the interests that are at stake in this area, particularly the right to personal liberty.”<sup>36</sup>

#### **Author’s comments on the State party’s observations on admissibility**

5.1 In his submissions of 27 March and 12 June 2017, the author states that his communication meets the admissibility criteria set out in the Optional Protocol and reiterates the allegations made in his initial submission.

5.2 In response to the State party’s arguments concerning inadmissibility, the author notes that the Human Rights Council does not hear disputes and its actions are not binding; the procedure in question therefore cannot be considered an international remedy that has been exhausted. The Human Rights Council, the Special Rapporteurs and the United Nations working groups are not considered quasi-judicial international bodies; their procedures therefore cannot be invoked as grounds for inadmissibility.<sup>37</sup>

5.3 The author reiterates his allegations that the criminal proceedings against him constituted a violation of article 14 (5) of the Covenant. The remedies mentioned by the State party do not provide for a substantive review of the conviction and sentence. The author notes that the law on criminal procedure invoked by the State party<sup>38</sup> is not the law that was applied in his case.<sup>39</sup> Judicial reviews are an extraordinary remedy and, as such, do not provide for decisions to be challenged during the trial but rather only once the trial is over and new evidence is identified, there is a change in case law, or some other new point comes to light that justifies a review of the deliberations but does not constitute a challenge to definitive judgments already handed down. Moreover, reviews of this kind are conducted by the same court that handed down the ruling in sole instance; they therefore cannot be considered an appropriate remedy.

5.4 The author points out that the Supreme Court’s judgment itself states that “no appeal is possible”. Consequently, there is no appropriate and effective remedy that provides for a review of the conviction and sentence that were handed down by the Court in sole instance. The remedy mentioned by the State party is neither appropriate nor effective. The author reiterates that the rules governing the trial of senior officials subject to special jurisdictional arrangements by the Supreme Court in sole instance, which exclude the possibility of the conviction and sentence being reviewed by a higher court, violate article 26 of the Covenant by denying this right to certain public officials.

<sup>35</sup> Article 32 of the Code of Criminal Procedure (Act No. 906 of 2004) reads as follows: “Supreme Court. The Criminal Cassation Chamber of the Supreme Court is responsible for: ... (2) Conducting reviews of executory judgments and rulings preventing further investigation that have been handed down in sole instance or at second instance by this body or by the courts.”

<sup>36</sup> Constitutional Court, Judgment C 979/05.

<sup>37</sup> The Human Rights Committee has established that it may examine communications that have been submitted to other quasi-judicial bodies, provided that they have not been considered on the merits by those bodies. The author refers to *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), *Laureano Atachahua v. Peru* (CCPR/C/56/D/540/1993) and *Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 9.2.

<sup>38</sup> Act No. 906 of 2004.

<sup>39</sup> Act No. 600 of 2000.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee notes the State party's argument that the Human Rights Council accepted the State party's comments on the allegations made by the Centro Democrático party and its members, and declared that the allegations seemed to be politically motivated. The Committee also notes the author's argument that, since the Human Rights Council does not hear disputes and its actions are not binding, the procedure in question cannot be considered an international remedy that has been exhausted. The Committee notes that the Human Rights Council is not a body that adjudicates cases or settles disputes within the meaning of article 5 (2) (a) of the Optional Protocol and that, in any case, the procedure in question has reportedly been concluded.<sup>40</sup> The Committee therefore concludes that there is no obstacle to the admissibility of the communication under article 5 (2) (a).

6.3 The Committee notes the State party's argument that the author has not exhausted all the available domestic remedies because he could have challenged the Supreme Court's conviction of 15 April 2015 by requesting a judicial review. The Committee also notes the author's claims that this remedy was neither appropriate nor effective and that the Supreme Court's judgment itself stated that "no appeal" was possible. The Committee notes that the State party has not explained how the remedies mentioned in its observations would be effective in the author's case, in other words, how they would allow for a review of his conviction and sentence.<sup>41</sup> Consequently, the Committee considers that the requirements set out in article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee notes that the author alleges violations of articles 2, 3 and 26 of the Covenant but fails to put forward any arguments that would demonstrate how he was treated differently from other persons in similar situations; it therefore declares these claims inadmissible under article 2 of the Optional Protocol for lack of substantiation.

6.5 The Committee notes the author's claims under article 9 of the Covenant that his freedom was restricted; that he was forced to serve a sentence that was arbitrary because both the classification of the offence and the penalty imposed were inappropriate; and that he was not granted effective access to house arrest despite being entitled to this privilege as a former senior official. However, the Committee notes that these claims were presented in general terms, without sufficient justification. The Committee therefore concludes that the author has not sufficiently substantiated these claims for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes the author's allegations that the State party violated his right to equality before the courts and before the law and his right to a fair trial, under article 14 (1) of the Covenant, since there was no equality of arms; that a law passed after the fact was applied, which led to a violation of his right to the natural judge as he was charged by a prosecutor without jurisdiction; that the judges who tried him had already formed an opinion on his case; and that the prosecutor who charged him ended up being his judge. The Committee also notes the State party's arguments that the proceedings against the author were the type of criminal proceedings that are brought against senior officials subject to special jurisdictional arrangements; that there are no grounds on which the authority or impartiality of the Supreme Court may be questioned; and that the charges were brought by the competent prosecutor. The Committee notes that the author has not explained how his right to equality before the courts was violated or how the appointment of the prosecutor in question resulted in a violation of his right to be heard by a competent, independent and impartial tribunal, bearing in mind that he could have brought those facts to the attention of the courts. In view of the foregoing, the Committee concludes that the author has not

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<sup>40</sup> *Moreno de Castillo v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2610/2015), para. 8.3.

<sup>41</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 48.

sufficiently substantiated these claims for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

6.7 The Committee notes the author's claims that his right to be presumed innocent and his right to contest the evidence were violated; that he did not have adequate time and facilities for the preparation of his defence, because the authorities denied him access to evidence; that the Supreme Court did not admit evidence that was essential for his defence; and that he was not tried within a reasonable time. With regard to the author's claims relating to the examination of evidence by the Supreme Court, the Committee recalls its jurisprudence to the effect that it is for the organs of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that this evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>42</sup> In the present case, the Committee notes that the author has not specified the nature of the evidence that was essential for his defence but was not admitted, or the nature of the evidence to which he was denied access, and it is not possible to deduce this information from the Supreme Court judgment, which is available to the Committee. Accordingly, the Committee concludes that the author has not sufficiently substantiated his claim that his rights under article 14 (2) and (3) (a)–(c) and (e) of the Covenant were violated and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 The Committee notes the author's claim under article 14 (7) of the Covenant that he was tried twice for the same acts. The Committee notes, however, that from the information provided, it is not possible to conclude that the exoneration of the author by the Counsel General's Office and the administrative penalty subsequently imposed on him by the same authority,<sup>43</sup> within the framework of disciplinary administrative proceedings, were equivalent to an acquittal and a criminal penalty, respectively. The Committee recalls that the guarantee set forth in this provision of the Covenant applies to criminal offences only and not to disciplinary measures that do not amount to a sentence for a criminal offence within the meaning of article 14 of the Covenant.<sup>44</sup> Accordingly, the Committee considers that this claim has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.9 The Committee considers, however, that the author has sufficiently substantiated his claims under article 14 (5) of the Covenant regarding the fact that he was tried in sole instance and was unable to have his conviction and sentence reviewed. The Committee therefore finds the author's claims under article 14 (5) of the Covenant to be admissible and proceeds to examine them on the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the criminal proceedings against him constituted a violation of article 14 (5) of the Covenant, since there was no effective mechanism whereby he could appeal the judgment and request that the conviction and sentence handed down by the Criminal Chamber of the Supreme Court on 15 April 2015 be reviewed by a higher tribunal.

7.3 The Committee also notes the State party's arguments that, firstly, the constitutional case law in force at the time of the trial had authorized the trial of senior officials by the Supreme Court as "the best way to ensure due process" and had justified restricting such persons to a hearing at second instance on the grounds that they were tried by the highest

<sup>42</sup> *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4, and *L.D.L.P. v. Spain* (CCPR/C/102/D/1622/2007), para. 6.3.

<sup>43</sup> The administrative penalty was imposed in connection with the case involving Mr. Avendaño. Meanwhile, the judgment handed down in criminal proceedings – in which the author was found guilty of a series of offences of a single type, consisting of giving or offering a bribe – referred to the offers made to both Ms. Medina Padilla and Mr. Avendaño.

<sup>44</sup> General comment No. 32 (2007), para. 57.

court, which was collegiate in nature and offered advantages such as procedural economy and the avoidance of any errors that might be committed by lower judges or courts; and, secondly, that the trial of such persons, as senior officials subject to special jurisdictional arrangements, by the highest criminal court was in itself a way of fully ensuring due process.

7.4 The Committee recalls that article 14 (5) of the Covenant establishes that everyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that the phrase “according to law” is not intended to mean that the very existence of a right to review should be left to the discretion of the States parties. Although a State party’s legislation may provide in certain circumstances for the trial of an individual, because of his or her position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant’s right to have his or her conviction and sentence reviewed by a court.<sup>45</sup> The Committee also notes that, although the Constitutional Court urged the Congress to introduce comprehensive legislation establishing the right to challenge all convictions, at the time the Congress did not comply with the Constitutional Court’s order. In addition, on 28 April 2016, the Supreme Court emphasized in a press release<sup>46</sup> that the consequence arising from the Constitutional Court’s ruling was “unfeasible”, since, as the highest ordinary court and a “unifying court” (*órgano de cierre*), it was unable to establish a hierarchically superior authority that would review the judgments of its specialized chambers. Later, on 18 May 2016, the Criminal Cassation Chamber of the Supreme Court declared the author’s appeal against his conviction of 15 April 2015 to be inadmissible, based on the arguments set out in the press release. The Committee also takes note of Unifying Judgment SU215/16 of 28 April 2016 of the Constitutional Court, which established that the right to challenge convictions handed down in sole instance would apply only to cases that had been tried on or after 24 April 2016 and resulted in the author’s appeal to the Criminal Cassation Chamber of the Supreme Court being found inadmissible,<sup>47</sup> because his sentence had been handed down before that date, on 15 April 2015. In the present case, the Committee notes that there was no available effective remedy whereby the author could request that his conviction and sentence be reviewed by a higher court. Accordingly, the Committee finds that the State party violated the author’s rights under article 14 (5) of the Covenant.<sup>48</sup>

8. The Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14 (5) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. The State party is under an obligation to provide appropriate compensation to the author and to take all steps necessary to prevent the occurrence of similar violations in the future. In this regard, the Committee notes that on 18 January 2018, through Legislative Act No. 01 of 2018, the legislature amended the Constitution to guarantee the right to a second hearing in criminal cases for senior officials;<sup>49</sup> the Committee considers this measure to be a guarantee of non-repetition.<sup>50</sup>

<sup>45</sup> *Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4. See also general comment No. 32 (2007), paras. 45–47, and Constitutional Court, Judgment SU146/20, 21 May 2020, available at [www.corteconstitucional.gov.co/relatoria/2020/su146-20.htm](http://www.corteconstitucional.gov.co/relatoria/2020/su146-20.htm).

<sup>46</sup> See Supreme Court press release No. 08/16.

<sup>47</sup> See Supreme Court, Criminal Cassation Chamber, File No. 39156, Decision, 18 May 2016.

<sup>48</sup> *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.4, *I.D.M. v. Colombia* (CCPR/C/123/D/2414/2014), para. 10.4, and *Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 11.1.

<sup>49</sup> The Vice-President of the Republic; cabinet ministers; the Counsel General; the Ombudsman; members of the Public Legal Service assigned to the Supreme Court, the Council of State and the courts; directors of administrative departments; the Comptroller General of the Republic; ambassadors and heads of diplomatic or consular missions; governors; judges; and generals and admirals of the armed forces.

<sup>50</sup> Legislative Act No. 01 of 2018, available at [www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=85699](http://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=85699).

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated.

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