

REPORT No. 62/ 16¹
PETITION 4449-02
REPORT ON ADMISSIBILITY
SAULO ARBOLEDA GÓMEZ
COLOMBIA
DECEMBER 6, 2016

I. SUMMARY

1. On November 5, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission,” “the Inter-American Commission,” or “the IACHR”) received a petition lodged by Saulo Arboleda Gómez (hereinafter “the Petitioner” or “the alleged victim”) against the Republic of Colombia (hereinafter “Colombia” or “the State”) alleging violation of his right to a fair trial in criminal proceedings against him.

2. According to the petitioner, he was investigated and convicted in criminal proceedings triggered in 1997 by the dissemination of illegal recordings related to the granting process for a radio broadcast station license which he oversaw in his capacity as Minister for Communications. He indicates that said audio material, obtained illegally in violation of his right to privacy, was used as evidence against him in proceedings that did not meet minimum due process requirements. He also states that, under the Colombian legal system, he could not appeal the conviction pronounced by the Criminal Division of the Supreme Court of Justice, which decided his case in sole instance. The alleged victim claims violation of his rights to a fair trial, protection of honor and dignity, equal treatment under the law, and judicial protection.

3. According to the State, it did not violate the petitioner’s human rights at any time since, it argues, due process and due judicial protection were provided in all legal proceedings. It also indicates that the petition was presented out of time and that the alleged victim has not yet exhausted the adequate domestic remedies available.

4. Without prejudice to the merits of the case, having examined the positions of the parties, and in accordance with the requirements of Articles 31 to 34 of the Rules of Procedure of the IACHR (hereinafter “the Rules of Procedure”) and Articles 46 and 47 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), the Commission has decided to declare the petition admissible in order to examine the arguments as to alleged violation of the rights enshrined in Articles 8 (Right to a fair trial) and 25 (Right to judicial protection) of the Convention, in conjunction with Articles 1(1) and 2 thereof. However, the Commission has decided to declare the petition inadmissible with respect to the allegations of violation of the rights in Articles 11 and 24 of the American Convention. The Commission has also decided to notify the parties of this decision, to publish it, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

5. The IACHR received the petition on November 5, 2002. During the initial evaluation phase, it received additional information on July 21, 2003; January 22, 2004; February 28, March 4, and September 28, 2005; and March 30, 2007. On September 20, 2013, the IACHR sent the State copies of the relevant parts of the petition and additional information received during the initial evaluation phase, giving it three months to submit its observations, on the basis of Article 30(3) of its Rules of Procedure. The State’s response was received on December 24, 2013, and was forwarded to the petitioner.

6. The petitioner submitted additional observations on September 23, 2013; April 28 and September 2 and 25, 2014; March 19, April 27, May 12, and July 8, 2015; and March 14 and April 19, 2016. The

¹ In accordance with Article 17(2)(a) of the Rules of Procedure of the Commission, Commissioner Enrique Gil Botero, a Colombian national, did not participate in the discussion or decision of this matter.

State presented additional observations on February 23, 2015 and July 18, 2016. All observations were duly forwarded to the opposing party.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

7. The petitioner indicates that, on August 17, 1997, various communications media published an “illegal recording” obtained by unknown persons of a conversation between the alleged victim, then Minister for Communications, and Rodrigo Villamizar Alvargonzález, then Minister for Mines and Energy, about the granting of a radio station broadcast license. He states that this illegal material provided the basis for criminal proceedings against him given that, on August 20, 1997, the Office of the Attorney General opened a preliminary investigation against him on an *ex officio* basis. On August 21, 1998, since the petitioner and Rodrigo Villamizar were both government ministers, they were charged before the Criminal Appellate Division of the Supreme Court of Justice (hereinafter “the Criminal Division”) with the crime of unlawful interest in a public contract. Subsequently, on May 14, 1999, the Criminal Division declared the proceedings against Rodrigo Villamizar null and void because it considered him to have acted in a private rather than ministerial capacity, which meant that it did not have the special jurisdiction established in Article 235 of the Constitution.

8. On October 25, 2000, the Criminal Division sentenced the alleged victim to a principal penalty of 54 months in prison, 15 monthly legal minimum wages, and disqualification from public office for the length of his prison term. In response, as there was no possibility of appeal, the petitioner lodged a *tutela* action [action for protection of constitutional rights] with the Sectional Council of the Judiciary of Cundinamarca (hereinafter “the Sectional Council”), which was denied in a judgment issued on December 1, 2000. The alleged victim lodged an appeal with the Superior Council of the Judiciary (hereinafter “the Superior Council”), which on February 1, 2001, upheld the contested decision, thereby denying the requested protection.

9. Subsequently, in a judgment of March 6, 2002, the Constitutional Court upheld the decision of the Superior Court of the Judiciary, arguing that the recording of the telephone conversation had been barred from evidence by both authorities, the Office of the Attorney General and the Supreme Court of Justice and that the evidence on which the charge and conviction were based came not from that recording but from separate, independent sources.

10. In addition, in the context of disciplinary proceedings also initiated as a result of the illegal recordings, the alleged victim indicates that the Administrative Tribunal of Cundinamarca reversed two rulings against him that had been issued by the Office of the Inspector General. In his opinion, this voiding of administrative sanctions is further evidence of his innocence and proves that the criminal conviction against him is unjust.

11. Furthermore, the alleged victim states that he lodged three actions for review that were rejected, as described below.

a. First action for review

12. In the context of a *tutela* action, the investigation proceedings against Rodrigo Villamizar were voided by Constitutional Court judgment T-058/2006. According to the petitioner, this circumstance constituted new evidence of his innocence. Accordingly, he lodged an action for review of his conviction with the Criminal Division. However, it was rejected in a decision of December 5, 2007, which indicated that the aforesaid ruling in the *tutela* action did not terminate the criminal investigation or absolve Rodrigo Villamizar of criminal responsibility but merely invalidated the proceedings so that they could be reinitiated in accordance with internal procedures.

b. Second action for review

13. The petitioner reports that, in compliance with the constitutional ruling in (a) above, the Office of the Inspector General conducted a new investigation and determined in its decision of August 21, 2009, that Rodrigo Villamizar had not acted in a public capacity. Considering this outcome to constitute new evidence, the alleged victim lodged a second action for review with the Criminal Division. However, the request was declared inadmissible on technical grounds in orders entered March 9 and May 4, 2011.

14. It should be noted that, following the above inadmissibility order, the petitioner, who considered the Criminal Division to have violated his right to due process, lodged a *tutela* action with the Superior Court of the Judiciary, which denied the requested protection on February 9, 2012.

c. Third action for review

15. The petitioner reports that, on the basis of the State's argument in its response to the petition filed at the IACHR, which pointed to the availability of the action for review under Colombian law, he presented a third action for review with the Criminal Division on September 16, 2014. However, the action was declared inadmissible in an order entered May 25, 2015, which stated that the allegations concerning the criminal proceedings presented no new evidence and which also instructed him to refrain in the future from initiating additional actions for review of the same decisions.

16. Following this rejection, the petitioner filed a *tutela* action with the Civil and Labor Divisions of the Supreme Court of Justice, which denied his requests, confirming the rejection of the third action for review of the conviction. The alleged victim indicates that protection was denied because the Supreme Court of Justice considers itself a body of last resort and therefore does not accept *tutela* actions against its judgments. The aforementioned action was subsequently referred to the Constitutional Court, which declined to review it in an order of February 15, 2016, despite the *insistencia* request [request to persist] submitted by two judges, who urged the Constitutional Court to review the case.

17. The petitioner claims that his rights to privacy, due process, and due judicial protection were violated by the use of illegal evidence (the aforementioned recording). He also claims that the judicial authorities did not evaluate the evidence presented correctly and denied him the possibility of submitting additional evidence. Regarding the right to equal treatment before the law, the petitioner says that, in the criminal proceedings, the State applied different criteria for Rodrigo Villamizar, which supposed unequal treatment.

18. Lastly, he indicates that, in accordance with Colombian law, he was tried in sole instance, which meant that he could not appeal his conviction. In this connection, he states that, under Article 235(4) of the Constitution, the Supreme Court has jurisdiction over punishable acts alleged against cabinet ministers and that, under Article 75(2) of the Criminal Procedure Code, decisions issued by the Criminal Division of the Supreme Court of Justice cannot be appealed. He says that the application of these precepts denied him the protection of double instance in a criminal case.

19. On the basis of the foregoing, the petitioner claims that the State violated the rights recognized in Articles 8, 11, 24, and 25 of the American Convention to his detriment.

B. Position of the State

20. The State maintains that the petition should be considered inadmissible since it was lodged out of time, i.e., after the six-month period provided in the American Convention. It indicates that the Constitutional Court judgment upholding the rejection of the petitioner's *tutela* action was issued on March 6, 2002, and that the petition was presented on November 5, 2002; in other words, that eight months elapsed between the final judicial decision and the petition to the IACHR.

21. The State also asserts that the facts described by the alleged victim do not constitute violations of the Convention. In its view, the petitioner is seeking review of a court ruling only because it is not in his favor. Furthermore, with respect to the publication of the recordings of conversations between former Minister Saulo Arboleda and former Minister Rodrigo Villamizar, Colombia states that this evidence was expressly barred during the criminal proceedings and maintains that the judicial authorities based their decisions on evidence other than this illegally obtained information.

22. In addition, regarding the petitioner's reference to the existence of new evidence justifying the review of his criminal case, the State indicated that he could avail himself of the action for review, which was an adequate national legal mechanism designed to resolve the legal situation described. On that basis, it claimed non-exhaustion of domestic remedies.

23. Lastly, it argues that the IACHR is not a court of appeal with the power to review decisions made by domestic courts in accordance with the law and due process. By accepting the petition, it would be acting as a "fourth instance," which is yet another reason for which the petition should not be admitted.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

24. Under Article 44 of the American Convention and Article 23 of the Rules of Procedure, the petitioner may submit petitions to the Commission. This petition names as the alleged victim an individual whose rights under the American Convention the State agreed to respect and protect as from July 31, 1973, when it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* to consider the petition.

25. The Commission has competence *ratione loci* to consider the petition because the alleged facts occurred within the jurisdiction of a state party to the American Convention. The Commission also has competence *ratione temporis* under the American Convention because the facts occurred after the ratification of said treaty. Lastly, the Commission has competence *ratione materiae* because the alleged facts involve possible violations of rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

29. Article 46(1)(a) of the American Convention and Article 31(1) of the Rules of Procedure make admission of the claims in the petition subject to prior exhaustion of the remedies available under domestic law in accordance with generally recognized principles of international law. The purpose of this requirement is to allow the national authorities to consider the alleged violation of a protected right and, if appropriate, resolve the situation before it is considered by an international court. Article 46(2) of the Convention and Article 31(2) of the Rules of Procedure provide that the requirement of prior exhaustion of domestic remedies shall not apply when (i) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (ii) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

30. In the instant case, the petitioner claims that, in the absence of the guarantee of double instance, he could not appeal his October 25, 2000 conviction by the Criminal Division. He argues that Colombian law does not provide for appeal in proceedings against high-level government officials. However, he indicates that he submit a *tutela* action that was rejected on December 1, 2000, by the Sectional Council, which did not consider his rights to due process, privacy, and equal treatment to have been violated in the investigation and criminal proceedings against him. Subsequently, the Constitutional Court also rejected this request in a decision of March 6, 2002. For its part, the State indicates that the petitioner has not exhausted the

remedies under domestic law because he can lodge an action for review to have his criminal case considered in the light of new evidence. In this regard, the alleged victim indicates that he has filed three actions for review without obtaining restitution of his rights. It should be noted that the State has not expressly refuted the petitioner's claim regarding the absence of a remedy against a decision issued by the Criminal Division of the Supreme Court of Justice in proceedings against high-level government officials. It has merely indicated that the alleged victim has recourse to the action for review.

31. The Commission notes that the State did not take responsibility for proving the existence and availability of adequate, appropriate, and effective domestic remedies² that had not been exhausted by the Petitioner. In this regard, the Commission observes that the action for review cited by the State is an extraordinary remedy invocable against final judgments on specific grounds and therefore cannot be considered an appropriate remedy that ensures review or appeal of a conviction before it becomes final.³ Therefore, in accordance with Article 42(2)(a) of the American Convention, the rule of exhaustion of remedies under domestic law does not apply because the State did not afford the alleged victim a remedy that could protect the rights allegedly violated.

32. Notwithstanding the foregoing, the IACHR observes that, for the purpose of obtaining review of his conviction and restitution of his rights, the alleged victim attempted unsuccessfully to bring three actions for review in the Supreme Court of Justice. In 2007, the petitioner submitted new evidence in the form of a constitutional judgment voiding some of the investigation proceedings against one of the defendants in the case in which he had been convicted. This request was rejected on the grounds that the constitutional ruling did not declare anyone innocent and only provided for investigations to be initiated in accordance with internal procedures. Subsequently, in 2011, after the aforesaid investigations had ended, the petitioner lodged a second action for review, arguing that the results of those proceedings constituted new evidence. However, the Criminal Section rejected his case because of technical defects without entering into the merits. Lastly, in 2015, the Criminal Section declared a third action for review lodged by the petitioner inadmissible on the grounds that there was no new evidence, and it also instructed him to refrain in the future from filing actions for review of decisions that it had already evaluated. Therefore, in view of the foregoing, the Commission considers that, in lodging the aforesaid actions, the petitioner used the national legal mechanisms available in the absence of appropriate remedies under domestic law.

33. It should be noted that, by its nature and purpose, Article 46(2) operates independently of the other substantive rules of the Convention. Accordingly, a determination should be made as to the applicability of the exception therein to the exhaustion-of-domestic-remedies rule prior to, and separately from, the analysis of the merits, since it relies on a different standard of evaluation than the one used to determine violation of Articles 8 and 25 of the Convention.⁴

34. Therefore, the Commission concludes that the instant case is covered by the exception to the exhaustion of domestic remedies established in Article 46(2)(a) of the American Convention and Article 31(2)(a) of the Rules of Procedure.

2. Timeliness of the petition

35. According to Article 46(1)(b) of the American Convention and Article 32(1) of the Rules of Procedure, to be admitted by the Commission, a petition must have been lodged within a period of six months from the date on which the party alleging violation of his or her rights was notified of the final judgment. In the complaint under consideration, the IACHR has established the applicability of the exception to the exhaustion of domestic remedies contained in Article 46(2)(a) of the American Convention and Article 31(2)(a) of the Rules of Procedure. Under Article 46(2) of the Convention and Article 32(2) of the Rules of Procedure, in cases

² IACHR, Report No. 34/07, Admissibility, *Liakat Ali Alibux*, Suriname, March 9, 2007, para. 46; *I/A Court H. R., Case of Liakat Ali Alibux v. Surinam*, Judgment of January 30, 2014 (Preliminary Objections, Merits, Reparations and Costs); Series C, No. 276; para. 15.

³ IACHR, Report No. 33/14, Case 12.820, Merits, *Manfred Amrhein et al*, Costa Rica, April 4, 2014; para. 203.

⁴ IACHR, Report No. 20/14, Petition 1566-07, Report on Admissibility, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán*, Guatemala; April 3, 2014, para. 41.

in which the exceptions to prior exhaustion of domestic resources are applicable, the petition must be presented within a reasonable period of time, to be determined by the Commission. For such purpose, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances of each case.

36. In the case under consideration, the IACHR has established the applicability of the exception to exhaustion of domestic remedies provided in Article 46(2)(a) of the American Convention and Article 31(2)(a) of the Rules of Procedure. The petition before the IACHR was received on November 5, 2002, and notification was made on May 20, 2002, of the Constitutional Court judgment of March 6, 2002 ending the *tutela* action filed by the alleged victim, which remains in effect. Furthermore, the IACHR notes that in 2007, 2011, and 2015, the petitioner lodged three actions for review with the Criminal Division of the Supreme Court, unsuccessfully requesting review of his conviction in sole instance. Therefore, in light of the context and characteristics of this case, the Commission deems the petition to have been presented within a reasonable period and the admissibility requirement of timely presentation to have been met.

37. Without prejudice to the above, the Commission notes that in the response received on December 24, 2013, the State indicates that the petition was presented out of time since the Constitutional Court judgment was issued on March 6, 2002, and the petition was presented on November 5, 2002, approximately eight months after the final judicial decision. In additional observations received on July 18, 2016, the State indicates that the instant petition was filed on January 18, 2008, after what was in its view a period of six years, which should be considered to constitute breach of the requirement established in the Convention. On this point, the alleged victim states that notification of the March 6, 2002 judgment was made on May 20, 2002, and he attaches a certificate to that effect issued by the Disciplinary Division of the Sectional Council of the Judiciary of Cundinamarca. In this regard, the IACHR reiterates that the petition was lodged on November 5, 2002, and its determination that the case was submitted within a reasonable period is based on that date.

3. Duplication of proceedings and international *res judicata*

38. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding for settlement, or is substantially the same as one previously studied by the Commission or by another international organization. The grounds for inadmissibility established in Articles 46(1)(c) and 47(d) of the Convention and Article 33(1)(a) and 33(1)(b) of the Rules of Procedure therefore do not apply.

4. Characterization of the alleged facts

39. For the purposes of admissibility, the Commission must decide whether the alleged facts might constitute a violation of rights pursuant to Article 47(b) of the American Convention and Article 34 of the Rules of Procedure, or whether the petition is “manifestly groundless” or “obviously out of order,” pursuant to Article 47(c) of the American Convention and Article 34(b) of the Rules of Procedure. The criteria for evaluating admissibility differ from those applied to rule on the merits of a petition, since the Commission only conducts a *prima facie* assessment to determine whether the petition establishes an apparent or potential violation of a right protected by the American Convention. This examination is a summary analysis that neither prejudices nor offers a preliminary opinion on the merits of the case.

40. Furthermore, the relevant legal instruments do not require the petitioners to identify the specific rights allegedly violated by the State in a case submitted to the Commission, although the petitioners may do so. It is up to the Commission to determine in its admissibility reports, on the basis of the System’s case law, which provisions of the relevant inter-American instruments apply and can be shown to have been violated if the alleged facts are proven by adequate evidence.

41. According to the alleged victim, he was convicted in criminal proceedings that did not ensure the right to double instance; in other words, he could not contest a judgment against him. According to the State, the petitioner sought constitutional protection through the *tutela* action and can lodge an action for

review if he has new evidence that could reverse the initial judgment. In view of the factual and legal information submitted by the parties and the nature of the case before it, the IACHR considers that, if proven, sole-instance criminal proceedings might constitute a possible violation of the rights protected in Articles 8 and 25 of the American Convention, in conjunction with Article 1(1) and 2 thereof, to the detriment of Saulo Arboleda Gómez.

42. Lastly, regarding the alleged violation of the rights to honor and dignity and to equality before the law, contained in Articles 11 and 24 of the American Convention, the Commission does not consider the allegations or evidence sufficient to establish a *prima facie* case for violation of those articles. In regard to the right to equality before the law, the Commission notes that, according to the petitioners' own claims, the Criminal Division voided the proceedings against Rodrigo Villamizar because it considered him to have acted in a private rather than ministerial capacity, which meant that it did not have special jurisdiction.

V. CONCLUSIONS

43. On the basis of the factual and legal arguments set forth above, the Inter-American Commission concludes that this petition satisfies the admissibility requirements established in Articles 31 to 34 of the Rules of Procedure and Articles 46 and 47 of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition admissible with respect to Articles 8 and 25 of the American Convention, in conjunction with the obligations established in Articles 1(1) and 2 thereof;
2. To declare this petition inadmissible with respect to Articles 11 and 24 of the American Convention;
3. To notify the parties of this decision;
4. To continue with its analysis of the merits of the case; and
5. To publish this decision and include it in the Commission's Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Panama, Panama, on the 6th day of the month of December, 2016. (Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and Esmeralda E. Arosemena Bernal de Troitiño Commissioners.