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REPORT No. 63/21
PETITION 1294-11

REPORT ON ADMISSIBILITY

JORGE DE JESUS CASTRO PACHECO
COLOMBIA

Approved electronically by the Commission on March 17, 2021.

Cite as: IACHR, Report No. 63/21. Petition 1294-11. Admissibility. Jorge de Jesus Castro Pacheco. Colombia. March 17, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner	Claudia Ximena Fino Caranton
Alleged victim	Jorge de Jesus Castro Pacheco
Respondent State	Colombia
Rights invoked	Articles 7 (personal liberty), 8 (fair trial), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights[1], in relation to Article 1.1 thereof (obligation to respect rights)

II. PROCEEDINGS BEFORE THE IACHR[2]

Filing of the petition:	September 21, 2011
Additional information received during the initial study of the petition:	September 23, 2011
Notification of the petition:	June 26, 2017
State's first reply:	May 4, 2018
Additional observations by the petitioner:	August 30, 2018
Warning of potential archive:	April 12, 2017
Response of the petitioner to the potential archive of the petition:	April 16, 2017

III. COMPETENCE

Ratione personae:	Yes
***Ratione loci*:**	Yes
***Ratione temporis*:**	Yes
***Ratione materiae*:**	Yes, American Convention (instrument of ratification deposited on July 31,1973)

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	Articles 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Article 1.1 thereof (obligation to respect rights)
Exhaustion or exception to the exhaustion of domestic remedies	Yes, on March 24, 2011
Timeliness of the petition	Yes

V. ALLEGED FACTS

1. The petitioner invokes the international responsibility of Colombia for the violation of Mr. Jorge Castro Pacheco's rights to personal liberty, fair trial, equal protection and judicial protection, by virtue of his criminal prosecution and conviction decided by the Supreme Court of Justice as a single-instance tribunal – i.e., with no right to appeal.

2. The petition explains that Mr. Jorge Castro was registered for the 2006 legislative elections as part of an electoral list of candidates for the "Colombia Viva" movement. The head of this list was Mr. Dieb Nicolás Maloof Cuse, who was the only senator actually elected from said movement. On May 24, 2007, the 15th

[1] Hereinafter, "Convention" or "American Convention".
[2] The observations from each party were duly notified to the other party.

Specialized Prosecutor's Office of the National Counter-Terrorism Unit initiated a preliminary investigation against several persons, including Mr. Jorge Castro Pacheco, for possible links with paramilitary armed groups. On August 10, 2007, the Criminal Decision Chamber of the Supreme Court of Justice formally indicted senator Dieb Maloof, who resigned his seat in Congress in order to be prosecuted by the ordinary jurisdiction and not by the tribunal with special parliamentary jurisdiction – that is, the Supreme Court of Justice. After the arrest of Mr. Maloof, there was a vacancy in his legislative seat, for which Mr. Jorge Castro Pacheco, as the second in line on the list for the "Colombia Viva" political movement, was summoned by the Senate Board of Directors to serve as Senator, which he effectively did as of December 19, 2007. On February 8, 2008, the Supreme Court of Justice opened an investigation against Mr. Jorge Castro, and on February 14, 2008 it summoned him to declare. Faced with said summons, on February 19, 2008, Mr. Castro resigned from his seat and from his privilege of parliamentary jurisdiction; as a result of this, the Supreme Court's Criminal Decision Chamber, by a ruling of February 25, 2008, decided that it was not competent to investigate him, as his case had ceased to fall under its constitutional parliamentary jurisdiction, for which reason it referred the process to the Office of the General Prosecutor of the Nation. On April 22, 2008, the Prosecutor's Office formally began investigation against Mr. Castro by summoning him to declare, and on May 12, 2008, the Delegate Prosecutor's Unit before the Supreme Court of Justice ordered his preventive detention, considering him allegedly responsible for the offense of aggravated conspiracy to commit crimes, and ordering his arrest; all of this took place within the framework of the so-called "para-politics scandal". Mr. Castro voluntarily appeared before the Barranquilla Prosecutor's Office on May 15, 2008 and was detained. Against the ruling of May 12, 2008, a request for reconsideration was filed with a subsidiary appeal, which were denied by the Delegate Prosecutor and the Deputy General Prosecutor of the Nation, respectively.

3. On October 24, 2008, the Office of the Delegate Prosecutor before the Supreme Court of Justice finalized the investigation, and on the following December 2, it issued an indictment against Mr. Castro as the author and co-author of the interlinked offences of aggravated conspiracy to commit crimes and voter constraints. Once this decision was appealed, on April 24, 2009, the Office of the Deputy General Prosecutor of the Nation decided to declare that the criminal action fell under the statute of limitations with respect to the crime of voter constraint, and to confirm the accusation for the crime of conspiracy to commit a crime. Once this decision became final, the case was referred to the Specialized Criminal Circuit Courts of Santa Marta. However, on May 7, 2009, at the request of the Prosecutor's Office, the Criminal Decision Chamber of the Supreme Court ordered the remission of the case to the Judicial District of Bogotá, where it was assigned to the Sixth Specialized Criminal Circuit Court of this city, which asserted jurisdiction and continued with the process. On July 29, 2009, the preparatory hearing was held before said Court.

4. On September 16, 2009, without there being any request in that sense by the relevant parties to the proceedings, the Sixth Specialized Criminal Circuit Court of Bogotá referred the process back to the Supreme Court of Justice, invoking the jurisprudential change that had taken place with regard to the jurisdiction of the Supreme Court to prosecute and adjudge upon former congressmen linked to the "para-politics scandal" - jurisprudential change which materialized in the Order of September 1, 2009 of the Criminal Decision Chamber of the Supreme Court. On September 28, 2009, the Criminal Decision Chamber reasserted its jurisdiction over the case against Mr. Castro, at the stage in which it then was, taking into account that the link between the attributed crime and the role of congressman had been configured through the fact that Mr. Castro had colluded with the paramilitary groups in order to obtain a Senatorial seat. The Criminal Decision Chamber gathered certain items of evidence, and a public hearing was held which ended on April 22, 2010. On May 12, 2010, the Supreme Court of Justice sentenced Mr. Castro to the principal penalties of 90 months of imprisonment and the payment of a fine in the amount of 6,500 legal monthly minimum wages, as well as the accessory penalty of disqualification from the exercise of public rights and offices for the same period of time. Given that the Supreme Court ruling was issued by it acting as a court of single instance, no ordinary appeal against it was possible. On July 12, 2010, Mr. Castro filed a constitutional writ of protection (*acción de tutela*) before the Civil Decision Chamber of the Supreme Court of Justice, which was rejected. In response to this rejection, Mr. Castro filed a new constitutional writ of protection before the Sectional Council of the Judiciary of Cundinamarca on August 15, 2010, and it was denied on September 3, 2010; the first instance denial ruling was appealed, and the Superior Council of the Judiciary –Disciplinary Jurisdictional Chamber– modified it in the sense of declaring the *tutela* inadmissible. The process was referred to the Constitutional Court for its

eventual review, and the Constitutional Court by order of March 24, 2011 decided not to select the casefile. With this, the petitioners allege that domestic legal remedies have been exhausted.

5. In his petition, Mr. Castro raises several reasons for which he considers that his human rights under the American Convention were violated, including the following: (a) The right to be tried by a competent, independent and impartial judge or tribunal previously established by law, in the terms of Article 8.1 of the Convention, was violated, since the criminal procedural legislation previously established that Mr. Castro had to be prosecuted and tried by the specialized judges of the ordinary jurisdiction and not by the Supreme Court of Justice, whose subsequent jurisprudential change did not enable the first-instance criminal judge to relinquish his legal jurisdiction and refer the process to the Criminal Decision Chamber, as he did; to the same extent, he alleges that the jurisprudential decisions of the Supreme Court of Justice, such as the order of September 1, 2009 in which it modified its position on its own jurisdiction over the crime of conspiracy to commit a crime in coordination with illegal paramilitary groups and its relationship with the congressmen in exercise of their functions, could not displace the attribution of competences carried out by express and specific legal provisions which preexisted the corresponding judicial decision. In short, the petition alleges that after his resignation from the Senatorial seat, Mr. Castro had acquired a consolidated right to be prosecuted by the specialized judges of the ordinary jurisdiction, like any other citizen, and that to the same extent, the Supreme Court was not his natural judge, a legal position that could not be modified by any subsequent jurisprudential change. He also disputes the applicability of the Supreme Court's constitutional jurisdiction over congressmen to his case, arguing extensively that the crime he was accused of was not related to his functions as a congressman, since the meetings he supposedly held with paramilitary groups took place before he took said public office. (b) His right to an appeal, enshrined in Article 8.2 of the American Convention, was ignored, since the rulings rendered in proceedings where the Criminal Decision Chamber of the Supreme Court acts as the special judge for members of Congress cannot be appealed, by constitutional mandate. With this impossibility of obtaining a review of the conviction, he alleges that his rights to personal liberty (Article 7 of the Convention) and judicial protection (Article 25 of the Convention) were also consequently violated.

6. The State, for its part, requests that the petition be declared inadmissible, insofar as it would raise what it considers or designates as "the formula of the fourth instance", in relation to the alleged violation of the right to appeal a criminal conviction and the right to a natural judge, matters which the State regards as already having been dismissed by the national judges, through reasoned decisions adopted in accordance with the guarantees of the American Convention. In a subsidiary manner, Colombia alleges that domestic remedies have not been exhausted with respect to the petitioner's request for reparations.

7. The State specifies that, in its view, the petitioner is challenging three domestic judicial decisions before the IACHR, namely: the order of September 1, 2009 in which the Supreme Court modified its jurisprudential position with respect to its own jurisdiction over former congressmen accused of ties to paramilitary groups; the subsequent conviction delivered by the Criminal Decision Chamber of the Supreme Court on May 12, 2010; and the Order of September 16, 2009 of the Sixth Specialized Criminal Circuit Court of Bogotá that referred the matter to the Supreme Court for consideration. For the State, these three decisions respected due process and are protected by the principle of *res judicata*. Therefore, it alleges that should it review such judicial decisions, the Commission would be acting as an "international fourth instance".

8. As for the possibility of appealing a single-instance ruling issued in cases of parliamentary jurisdiction by the Supreme Court of Justice, the State summarizes the jurisprudence of the Inter-American Court of Human Rights, and recalls that in the judgment of the case of Liakat Ali Alibux vs. Suriname, the Court explained that in the case of people prosecuted by the highest court of justice under special jurisdictional privileges, the right to appeal a conviction does not necessarily imply a review by a higher judge; in terms of the State, *"in relation to single-instance proceedings against those holding jurisdictional privileges before supreme courts, the guarantee of appealing the judgment is honored with the existence of a judicial remedy that allows for the review of the ruling and the protection of the rights of the convicted person, without strictly requiring that the challenge be heard and resolved by a hierarchical superior ".* In this line, Colombia asserts that in its domestic legal system there are two judicial channels to dispute a single-instance conviction issued by the Supreme Court in these cases: the review action, and the *tutela* action, both of them extraordinary mechanisms that are only exceptionally admissible, as explained at length in the State's response. The State presents in detail the

hypotheses and requirements of admissibility for both judicial remedies, and cites numerous judgments of the Constitutional Court in which this high tribunal has validated the constitutionality of both legal actions, and has expressly affirmed that the fundamental rights and the rules of the Colombian Political Constitution are respected by this system for challenging the single-instance rulings of the Supreme Court in cases of senior officials holding jurisdictional privileges. It is to those judgments of the Constitutional Court that the State refers when it alleges that the "fourth instance formula" has been configured in this matter; in its own words: *"(…) the Colombian legal system, from its Political Constitution onwards, establishes a special investigation and prosecution process for the high authorities of the State, which is operated by the Supreme Court of Justice (…). This institutional design has been endorsed by the jurisprudence of the Constitutional Court".*

9. Regarding the alleged retroactive application of jurisprudential guidelines on the jurisdiction of the Supreme Court of Justice to the case of Mr. Castro, the State explains, in a similar line of argument, that said charges have already been dismissed by the national judges through duly motivated decisions and in accordance with the American Convention. Colombia argues that *"under no circumstance, may the existence of a legitimate modification of precedent result in a disqualification of the judicial decision that contains it as being contrary to the guarantees enshrined in the Convention."* It holds that with this jurisprudential change the Supreme Court did not modify the legislation nor the Constitution, but rather proceeded in accordance with the need to examine the true effect and meaning of Article 235 of the Political Constitution; and it alleges that the application of this new jurisprudential position to the case of Mr. Jorge Castro was equally legitimate under the Colombian constitutional system.

10. Finally, and in a subsidiary manner, Colombia claims that Mr. Castro could have resorted to the direct reparation action before the contentious-administrative jurisdiction to seek that the State be judicially declared responsible for the acts of the legislature, or for failure in the judicial service, and that his damages be repaired; but he chose not to do so, for which reason he incurred in failure to exhaust domestic remedies. It emphasizes that in accordance with the current jurisprudence of the Council of State, the full reparations granted by the contentious-administrative jurisdiction through the direct reparation action comply with the reparation standards of the Inter-American system, for which reason this was a suitable remedy that should have been exhausted.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. Regarding compliance with the requirement of exhaustion of domestic remedies in the case under study, the Commission notes that no ordinary remedy is available against the rulings issued by the Criminal Decision Chamber of the Colombian Supreme Court of Justice against high-ranking officials under its special constitutional jurisdiction, since these are "single-instance" -i.e., non-appealable- decisions. The IACHR also takes into consideration that, as the State explained in ample detail in its response, under the Colombian legal system it would be possible to file two types of extraordinary judicial remedies against such single-instance rulings, namely, the review action and the *tutela* action. The latter judicial route, in light of the jurisprudence of the Constitutional Court, proceeds in an exceptional and extraordinary manner against judicial decisions, whenever judges have incurred in them in what the Constitutional Court has called "*de facto* actions" (*vías de hecho*), that is, specific and restricted causes for the admissibility of a *tutela* claim. Thus, it is a constitutional remedy of an extraordinary nature provided by the Colombian legal system.

12. Likewise, the IACHR recalls that, although in some cases extraordinary remedies may be adequate to address human rights violations, as a general rule, the only remedies that need to be exhausted are those whose normal functions within the legal system make them appropriate to remedy the violation of a legal right. In principle, these are the ordinary remedies, and not the extraordinary ones[3]. Likewise, for the purposes of the rule of exhaustion of domestic remedies, extraordinary remedies that the petitioner has not voluntarily decided to file are not suitable remedies to hear claims for violations of fair trial guarantees.[4]

[3] IACHR, Report N. 161/17, Petition 29-07. Admissibility. Andy Williams Garcés Suárez and family. Perú. November 30, 2017, par. 12.

[4] IACHR, Report N. 154/10, Petition 1462-07. Admissibility. Linda Loaiza López Soto and family. Venezuela. November 1, 2010, par. 49; Report N. 111/19. Petition 335-08. Admissibility. Marcelo Gerardo Pereyra. Argentina. June 7, 2019, par. 11 and subsequent; Report N. 167/17. Admissibility. Alberto Patishtán Gómez. México. December 1, 2017, par. 13 and subsequent.

13. In the present case, it is observed that Mr. Castro filed a *tutela* action before the Sectional Council of the Judiciary of Cundinamarca against the conviction issued against him by the Criminal Decision Chamber of the Supreme Court of Justice; this action was denied on September 3, 2010 in first instance. Upon appeal of this ruling, the Superior Council of the Judiciary - Disciplinary Jurisdictional Chamber - modified it to declare the *tutela* action inadmissible. The Constitutional Court, by order of March 24, 2011 decided not to select the casefile for review, at which time it is considered that this extraordinary route of judicial defense was exhausted. Therefore, in the opinion of the IACHR, Mr. Castro effectively initiated and exhausted the extraordinary judicial remedies available to him. This conclusion does not preclude underscoring that the Colombian legal system does not provide ordinary remedies (such as an appeal) to dispute the rulings adopted by the Supreme Court of Justice as a single-instance tribunal, a matter that constitutes one of the substantive legal problems that will have to be resolved in the corresponding stage of the current Inter-American proceedings, and on which no pronouncement whatsoever is adopted in the present admissibility report.

14. Taking into account that the notification of the decision of the Constitutional Court not to select the *tutela* casefile for review, which exhausted the available domestic remedies, was notified to Mr. Castro by order of March 24, 2011, and that the petition was received at the Executive Secretariat of the IACHR on September 21, 2011, it is concluded that the deadline for submission set by Article 46.1.b) of the American Convention was complied with.

VII. ANALYSIS OF COLORABLE CLAIM

15. The State has alleged that Mr. Castro resorts to the IACHR as an international court of fourth instance, in order for it to review the content of three specific judicial decisions: the order by which the Supreme Court modified its jurisprudence on its competence to prosecute former congressmen accused of conspiracy with paramilitary groups to commit crimes; the order by which the Sixth Specialized Criminal Circuit Court of Bogotá referred the process to the Criminal Review Chamber of the Supreme Court so that it could carry on with the procedure; and the conviction handed down by the Supreme Court of Justice against Mr. Castro. Among these three judicial decisions, the IACHR notes that only the conviction is a final ruling and is protected by *res judicata*, since the other two orders are of a procedural nature, and did not result in a final resolution of the legal matter at hand, in application of the relevant substantive legal provisions. Moreover, in his petition Mr. Castro has not disputed either the content of, or the evidentiary assessment made in, the conviction ruling issued against him; his claims focus on the non-appealable nature of said single-instance judgment, on the fact that he did not have access to a comprehensive review of it made by a judicial authority other than the one who issued it, and on the alleged violation of the principle of the natural judge through the retroactive application of the Supreme Court's jurisprudence on parliamentary jurisdiction in Colombia, with all of which he considers that Articles 7, 8, 24 and 25 of the American Convention in relation to its Article 1.1 were violated. The arguments that Mr. Castro has raised to support his preliminary characterization of the violations of the American Convention are clear, and will have to be examined at the merits stage of the present Inter-American proceedings, together with the important substantive arguments presented by the State in its response.

16. Colombia also argues that in the present case the petitioner resorts to the IACHR as a fourth instance, because his arguments on the merits of the alleged violations of the American Convention have already been the subject of judicial pronouncements in Colombia; specifically, the State brings up numerous judgments of the Colombian Constitutional Court, in which it has been declared that the system for judging high-ranking officials under the special jurisdiction of the Supreme Court in a single instance is compatible with the Political Constitution and with the international obligations of the State. These judgments were adopted in cases and proceedings other than that appertaining to Mr. Castro, and they constitute jurisprudential precedents in force in the country, in general terms. Along these lines, the State argues that if the IACHR accepts jurisdiction over the present case, it would be ignoring the multiple final pronouncements of the highest Colombian constitutional tribunal that have already resolved the issue of the compatibility with the Political Constitution and the American Convention of the aforementioned system for judging with no possibility of appeal those public officials holding jurisdictional privileges. However, the Commission considers it important to specify that this is not the meaning of the so-called fourth instance formula, which actually refers to the legal

impossibility for the IACHR to review the content of judicial decisions specifically adopted in relation to a concrete petitioner, and to his particular case. The fact that the substantive legal issues that are brought before the IACHR have already been addressed in one way or another by national judicial decisions adopted in other cases, that is to say, that they are the subject of current national jurisprudence, does not undermine the competence of the IACHR to hear a petition, since the Commission as a general rule, does not decide on the content of that jurisprudence of a general scope, and because the legal referents of its analyses are different and based on Inter-American instruments. Should the jurisdiction of the IACHR be obstructed by the fact that the issues within the field of human rights have already been the subject-matter of some judicial ruling at the national level, or because there is some domestic precedent on the legal problems raised, it would be impossible for the Commission to properly fulfill its own functions, since it is difficult to identify a human rights issue that has not already been the subject-matter of some type of judicial ruling at the national level. The Commission reiterates that it is in relation to the judicial decisions adopted at the domestic level in the specific and concrete case of the petitioners and victims who come to the IACHR, that the rule at hand is applied, according to which the Inter-American Commission cannot enter into the review the judicial reasoning or the evidentiary assessment carried out by national judges in their decisions of a definitive nature which carry *res judicata*.

17. In view of these considerations, and after examining the factual and legal elements submitted by the parties, the Commission considers that the allegations of the petitioner are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, could characterize violations of Articles 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Article 1.1 (obligation to respect rights) thereof, to the detriment of Mr. Jorge de Jesus Castro Pacheco.

18. Regarding the claim of alleged violation of Article 24 (equality before the law) of the American Convention, the Commission observes that the petitioners have not provided sufficient arguments or support to allow for a *prima facie* case of its possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 7, 8 and 25 of the American Convention, in connection with Article 1.1 thereof;

2. To declare the instant petition inadmissible in relation to Article 24 of the American Convention; and

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 17th day of the month of March, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice-President; Flávia Piovesan, Second Vice-President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana, Commissioners.