



## 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. 2931/2017\*, \*\*

<i>Communication submitted by:</i>	Alberto Velásquez Echeverri (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 the former Director of the Administrative Department of the Office of the President 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 Alberto Velásquez Echeverri, a national of Colombia born in 1949. He claims that the State party has violated his rights under articles

\* 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 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.



2, 3, 9 (1), 14 (1), (2), (3) (a)–(c) and (e), (5) and (7), and 26 of the Covenant. The author is 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 issue a request for interim measures in respect of the author under rule 94 of the Committee’s rules of procedure.

1.3 On 8 February 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures,<sup>1</sup> agreed to issue a request for interim measures in the form of permission to remain under house arrest, as sought by the author, under rule 94 of the Committee’s rules of procedure.<sup>2</sup>

### **Factual background**

2.1 Between 7 August 2002 and 19 July 2004, during the Administration of President Álvaro Uribe, the author held the post of Director of the Administrative Department of the Office of the President of the Republic of Colombia.

2.2 Between 2 and 4 June 2004, the First Committee of the House of Representatives approved bill No. 267,<sup>3</sup> which made it possible for the then President, Álvaro Uribe, to be re-elected. On 7 June 2004, Congressman Germán Navas Talero filed a complaint with the Supreme Court<sup>4</sup> against Congresswoman Yidis Medina Padilla<sup>5</sup> for the offence of bribery. On 23 February 2005, the Supreme Court issued a refusal order and the investigation was closed.<sup>6</sup>

2.3 In March and April 2008, two press articles<sup>7</sup> were published in which Ms. Medina Padilla admitted that she had been bribed by the author of the communication 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 revoke the refusal order of 23 February 2005 and initiated criminal proceedings against former Congresswoman Yidis Medina Padilla, who was eventually convicted of taking bribes, in an advanced ruling handed down on 26 June 2008,<sup>8</sup> after she confessed to having accepted a promise of payment

<sup>1</sup> On 7 February 2017, the author of the communication filed a request for interim measures, stating that his mental health had deteriorated following his transfer from house arrest to a military garrison.

<sup>2</sup> On 13 February 2017, the State party requested that the measures be lifted. The author’s comments regarding the request were not shared with the State party and no decision was taken as to whether the measures should be lifted. The author was released in 2018.

<sup>3</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>4</sup> The Supreme Court acts as the natural judge in cases involving members of Congress, who are subject to special jurisdictional arrangements. The Attorney General is the natural judge in cases involving members of the executive branch.

<sup>5</sup> Ms. Medina Padilla participated in the debate in the First Committee of the House of Representatives on the constitutional reform bill introducing presidential re-election, which allowed President Uribe to run for a second term. Her vote was decisive.

<sup>6</sup> Supreme Court order of 23 February 2005: “the regular meetings she held with groups of parliamentarians and any information she may have provided on the Government’s various national plans and programmes, including in the area of social investment, appear to fall within the political activities assigned to her portfolio, and there is no evidence that her actions were outside or against the law.”

<sup>7</sup> “Votar la reelección me mató” (Voting for re-election killed me), *El Espectador*, 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*, 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>8</sup> Order No. 173, advanced ruling in the trial of Ms. Medina Padilla, who, as a former member of the House of Representatives, admitted charges in respect of the offence of bribery. The Constitutional Court, in Judgment SU 1300 of 6 December 2001, held that the acceptance of charges constitutes a simple confession, under which both the State and the accused make mutual concessions, as the State ceases to exercise its investigative powers and the accused waives the right to the usual trial proceedings, including the opportunity to contest the charges and the evidence on which they are based.

from the author and other senior officials in exchange for voting in favour of bill No. 267, which provided for presidential re-election.<sup>9</sup>

2.4 On 14 May 2008, on the basis of the information that Ms. Medina Padilla had provided to the media, the Counsel General's Office initiated an ex officio disciplinary investigation in respect of the author of the communication. He was exonerated in an administrative decision issued on 16 March 2009.<sup>10</sup>

2.5 On 8 May 2008, the Supreme Court transferred the contents of the file relating to Ms. Medina Padilla to the Attorney General's Office so that, if it considered it appropriate, it could launch a criminal investigation in respect of the author of the communication. On 13 June 2008, the then Attorney General recused himself from the case.<sup>11</sup> On 23 June 2008, the then Deputy Attorney General took over as head of the criminal investigation concerning the author and other senior officials<sup>12</sup> and, on 8 November 2010, ordered the closure of the investigation.<sup>13</sup>

2.6 On 19 January 2011, the new Deputy Attorney General<sup>14</sup> in turn recused himself from the case. On 6 April 2011, the Supreme Court accepted his recusal<sup>15</sup> and instructed the new Attorney General to continue with the relevant proceedings. On 23 August 2011, she declared null and void all aspects of the proceedings from the closure of the investigation onward, on the basis that the Deputy Attorney General lacked the authority to make that decision.<sup>16</sup>

<sup>9</sup> The ruling contains an analysis of the testimony of Ms. Medina Padilla and other witnesses who accused the author of the offence of bribery. The author indicates that he was denied the opportunity to defend himself in the trial and contest the evidence; however, the text of the ruling issued against Ms. Medina Padilla does not contain an assessment of the author's conduct or an attribution of responsibility.

<sup>10</sup> Decision No. 002-173076-08 of the Counsel General's Office, 16 March 2009.

<sup>11</sup> The case was assigned to Guillermo Mendoza Diago, the Deputy Attorney General, following acceptance of the recusal of the then Attorney General, Mario Iguarán Arana, who had held the post of Deputy Minister of Justice when one of the accused persons, Sabas Pretelt de la Vega, was Minister of Justice. At the time of the assessment of the evidence, Mr. Mendoza Diago was serving as Attorney General ad interim and the position of Deputy Attorney General was held by Fernando Pareja, who on 13 May 2010 confirmed that there was sufficient evidence and issued an indictment.

<sup>12</sup> On 22 July 2008, one of the senior officials filed a petition for *amparo* with the Supreme Court, arguing that the ruling against Ms. Medina Padilla violated his rights to maintain his reputation and honour, to be presumed innocent and to be treated equally. On the same day, the Supreme Court refused the petition and he submitted an appeal to the Cundinamarca District Council of the Judiciary against the Supreme Court, which was also rejected. The author challenged the decision and the petition was referred to the High Council of the Judiciary, which, in a ruling of 2 October 2008, granted *amparo*. The case was assigned to the Deputy Attorney General, following acceptance of the recusal of the then Attorney General.

<sup>13</sup> Judgment SP4250-2015 of the Supreme Court states: "after gathering a number of statements and a range of documentary evidence, on 8 November 2010 the Deputy Attorney General ordered the closure of the investigation in relation to these three defendants" (p. 13).

<sup>14</sup> Juan Carlos Forero Ramírez, Deputy to the Attorney General Viviane Morales.

<sup>15</sup> The then Deputy Attorney General stated that he had issued a professional opinion in relation to the matter and that the judgment of the aforementioned official had been compromised, affecting the impartiality that should govern his actions as a representative of an investigative body. See also the resolution of 29 July 2011 of the Criminal Cassation Chamber of the Supreme Court, contained in Decision No. 268.

<sup>16</sup> The grounds for this decision were mainly those presented by the Criminal Chamber of the Supreme Court in the pretrial hearing held on 29 July 2011 concerning another of the senior officials prosecuted, Sabas Pretelt de la Vega. The Supreme Court declared null and void the proceedings that had taken place from the time the indictment was issued against Mr. Pretelt de la Vega, on the basis that the then Deputy Attorney General lacked jurisdiction to hear the case because the grounds on which he had been granted jurisdiction had ceased to apply when the role of Attorney General had been assumed by someone who was not precluded from handling the case.

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

2.8 On 6 March 2012, Prosecutor No. 6 reassessed the evidence provided in the pretrial proceedings and indicted the author for the alleged offence of giving or offering a bribe, noting as aggravating circumstances the distinguished position he held<sup>18</sup> and the fact that he had acted with others,<sup>19</sup> and as a mitigating circumstance the fact that he had no criminal record.<sup>20</sup> The case was subsequently referred to the Supreme Court for trial.

2.9 On 8 March 2012, the author filed a request for review of the criminal charges with Prosecutor No. 6 and on 12 March 2012 he requested an extension of the legal deadline for substantiation of his request for review. On 13 March 2012, Prosecutor No. 6 refused the extension. On the same date, the author filed a request for annulment of the charges arising from the reassessment of evidence on the ground that the Specialized Prosecutor lacked jurisdiction under the law in force at the time.<sup>21</sup> On 2 May 2012, Prosecutor No. 6 upheld the criminal charges listed in the indictment. On 28 August 2012, the Supreme Court ordered the case to be joined with those of two other senior officials.<sup>22</sup> On 4 September 2012, the author requested that the order joining the proceedings be revoked. On 19 April 2013, the Supreme Court denied the request for review of the charges and rejected the request to revoke the order joining the proceedings.<sup>23</sup> With respect to the annulment requested owing to the case being delegated to the Specialized Prosecutor, the Supreme Court reiterated that the indictment dealt with that issue and contained an explanation of the reasons why the said Prosecutor should decide whether there was sufficient evidence to bring charges.<sup>24</sup>

2.10 On 5 July 2013, one of the other defendants in the same criminal case as the author filed a petition for *amparo* with the Criminal Cassation Chamber of the Supreme Court and the Attorney General's Office, citing his rights to due process and to have the investigation and prosecution conducted by the natural judge in accordance with the laws in force at the time of the events. On 21 May 2015, the Constitutional Court<sup>25</sup> rejected his petition, arguing

<sup>17</sup> Legislative Act No. 06 of 24 November 2011 modified articles 251 and 235 of the Constitution and granted 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 who fall within his or her jurisdiction.

<sup>18</sup> Article 58 (9) of the Criminal Code.

<sup>19</sup> Article 58 (10) of the Criminal Code.

<sup>20</sup> Article 55 (1) of the Criminal Code.

<sup>21</sup> For its part, the Counsel General's Office requested the annulment of the indictment, stating that Legislative Act No. 06 of 2011 should apply only after its entry into force, and that by applying it retroactively, the principle of the natural judge had been disregarded, since the natural judge is none other than the one previously established by law. The Supreme Court determined that the Public Legal Service did not have the authority to consider the matter of the request for annulment. Decision No. 118, resolution in sole instance No. 39.156 of the Supreme Court, 19 April 2013.

<sup>22</sup> Diego Palacios Betancourt and Sabas Pretelt de la Vega.

<sup>23</sup> In the view of the Supreme Court, there was necessarily a connection between the alleged actions of each of the defendants: "While they are of course not all charged with the same offence of bribery – on the contrary, the individual allegations against them clearly relate to different facts – that does not mean that these are isolated matters, because the charge sheet is based on a specific historical context in which each individual allegedly played a particular role with the aim of achieving the same goal within the Government of the time, namely ensuring that the legislative bill designed to make presidential re-election possible would be approved by Congress in the final debate." Decision No. 118, resolution in sole instance No. 39.156 of the Supreme Court, 19 April 2013, p. 48.

<sup>24</sup> With regard to delegation, the Supreme Court, in its arguments, states the following: "Although the delegation of the case, for obvious and basic reasons, means that the matter is not dealt with directly by the Attorney General, this does not per se demonstrate disregard for the principle of the natural judge, because that function continues to be held by the head of the investigative body, who therefore assumes responsibility for the act of delegation, retains control and decision-making power over the delegated function and is able to resume it at any time." (Decision on request for review, 19 April 2013, p. 25.)

<sup>25</sup> Constitutional Court, Judgment SU-279 of 21 May 2015.

that it had not been demonstrated that the alleged irregularity had been brought to the attention of the relevant authority within the appropriate procedural time frame.<sup>26</sup>

2.11 On 15 April 2015, the Criminal Cassation Chamber of the Supreme Court, ruling in sole instance, found the author of the communication guilty of co-perpetrating the offence of giving or offering bribes and sentenced him to 60 months' imprisonment, a fine of 83.5 times the statutory minimum monthly wage and 84 months' disqualification from the exercise of public rights and duties.

2.12 The author claims that domestic remedies have been exhausted since, as stated in the sole instance judgment of the Criminal Chamber of the Supreme Court,<sup>27</sup> no appeal is possible.<sup>28</sup> In addition, the author reports that on 27 October 2015 he lodged a petition for *amparo* with the Civil Chamber of the Supreme Court on the ground that the conviction violated his right to due process and the principle of *in dubio pro reo*. On 11 November 2015, the Civil Cassation Chamber of the Supreme Court rejected his petition for *amparo*.

2.13 The author also indicates that, in a judgment of 29 October 2014, the Constitutional Court urged Congress to introduce comprehensive legislation establishing the right to challenge all convictions, within one year of notification of the judgment. If no such legislation were enacted, it would be understood that all convictions could be challenged before the authority that was hierarchically or functionally superior to the one that had imposed the sentence. On 25 April 2016, after the one-year period had expired, Congress had not complied with the Constitutional Court's order, giving rise to the legal consequence noted in the aforementioned judgment. On 28 April 2016, the Supreme Court, in press release No. 08/16, emphasized that the consequence imposed by 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 to review the judgments of its specialized chambers. On the same day, the Constitutional Court issued a new unifying judgment, SU215/16, stating that the right to challenge convictions handed down in sole instance would be applicable only to cases tried on or after 24 April 2016.<sup>29</sup>

### 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 comply with its obligations under articles 2 and 3, as his status as a senior official has hindered and prevented rather than guaranteed effective access to the rights recognized in the Covenant, in particular under article 14 (5).

3.3 As to 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 set forth in article 14 of the Covenant. The author states that this right was violated, in particular, by the denial of his right to have effective access to house arrest even though he met the relevant legal requirements set forth in domestic law.<sup>30</sup>

<sup>26</sup> Constitutional Court, Judgment SU297/15 of 21 May 2015.

<sup>27</sup> Article 235 (4) of the Constitution stipulates: "The functions of the Supreme Court include trying [...] Cabinet ministers for punishable acts with which they are charged." This means that the author is subject to special jurisdictional arrangements under the Constitution. Likewise, article 32 (6) of the Code of Criminal Procedure (Act No. 906 of 2004) establishes that "the Criminal Cassation Chamber of the Supreme Court is responsible for [...] trying the officials listed in article 235 (4) of the Constitution".

<sup>28</sup> Judgment SP4250-2015 of 15 April 2015, operative paragraph 11, p. 319.

<sup>29</sup> The author argues that, under existing case law, he has been denied the right to challenge convictions handed down in sole instance.

<sup>30</sup> Article 38 of the Criminal Code (Act No. 599 of 2000), which was in force at the time the acts were committed, states: "the sentence of imprisonment shall be served in the place of residence or abode of the convicted person, or, in the absence thereof, in a location determined by the judge, provided that the following conditions are met: 1. The sentence must have been imposed for punishable conduct for which the minimum penalty provided for by law is 5 years' imprisonment or less. 2. The judge must

3.4 The author also claims that, in the context of the criminal proceedings against him, he was not treated equally before the law owing to the application of legislation enacted after the events occurred,<sup>31</sup> which allowed the investigation and prosecution of his case to be delegated to an official who lacked jurisdiction. The author states that there was no equality of arms in the proceedings because any challenges to the prosecutor's decisions would have had to be brought before the same prosecutor. He claims that there was a violation of the right to be tried by a competent tribunal, as provided for in article 14 (1) of the Covenant, since under domestic law the Attorney General alone had the authority to conduct criminal investigations and prosecutions. However, the Attorney General delegated that authority to a subordinate. He also claims that he was not allowed to be tried in an individual trial, which restricted his right to a fair trial, 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, since, firstly, the judges who tried him influenced the choice of the prosecutor in charge of investigating him during the criminal investigation stage<sup>32</sup> and, secondly, the judges allowed themselves to be swayed by personal biases and held preconceived ideas about the case. The author claims that independence was compromised, given that in the ruling containing the decision to convict him the judges made references to the political implications of their decisions. He also states that the reporting judge had advised one of the judges who convicted Ms. Medina Padilla and, lastly, that, Prosecutor No. 6 became an assistant judge to one of the judges who acted in his trial. The author claims that the trial judges had already made known their opinion on the case.

3.6 The author considers that his right to be presumed innocent, as set forth in article 14 (2), was violated given that 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 forth in article 14 (3) were violated for the following reasons: (a) the author and the other senior officials incriminated by Ms. Medina Padilla were prevented from having the opportunity to testify at her trial and contest the allegations made against them,<sup>33</sup> and he was not allowed to challenge the body of evidence transferred from other trials;<sup>34</sup> (b) his counsel was not given the necessary time to study the case; and (c) the criminal investigation and his trial lasted almost seven years, with an undue delay between the formal indictment and the beginning of the trial.

3.8 Lastly, the author claims that the State party has violated his right to have his conviction reviewed by a higher tribunal, as provided for in article 14 (5) of the Covenant,

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be satisfied, on well-founded and motivated grounds, that the sentenced person's personal, work, family or social conduct will not endanger the community and that he or she will serve the sentence."

<sup>31</sup> The author claims that under article 235 of the Constitution in force at the time of the commission of the acts, the Attorney General alone had the authority to bring charges, while the law that was applied, which had entered into force on 24 November 2011, extended that power to the Deputy Attorney General and the prosecutors assigned to the Supreme Court.

<sup>32</sup> The author points out that in October 2015, several Colombian media outlets released recordings which revealed that the decision to appoint the Deputy Attorney General rather than an ad hoc prosecutor was based more on reasons of political expediency than on legal grounds and was designed to ensure that the senior officials under investigation were convicted.

<sup>33</sup> The author explains that the type of offence that Ms. Medina Padilla admitted and for which she was convicted inevitably required there to have been an active and a passive participant, with the active participant being criminally liable for offering or giving a bribe and the passive participant for accepting it. In addition, he states that in the final judgment convicting Ms. Medina Padilla, the senior government officials in question were held directly criminally responsible by the court.

<sup>34</sup> Decision of the Supreme Court, 19 April 2013, p. 17: "Unlike in the oral accusatorial procedure set out in Act No. 906 of 2004, in the procedure provided for in Act No. 600 of 2000 the principle of continuity of the evidence prevails. The evidentiary stage of the trial is not a repetition of the investigation, but rather a chance to present new or additional elements that the parties have not previously had the opportunity to include or challenge. On this basis, the Chamber evaluated the requests presented by the various parties to the proceedings in this regard." The author "claims that it is the witness who decides whether or not the prosecution's assessment is correct, when that task in fact falls to the defence and the Court" (p. 52).

since Colombian law confers on the Supreme Court jurisdiction to hear and rule on such cases in sole instance, with no possibility of appeal.<sup>35</sup>

3.9 With regard to article 26 of the Covenant, the author notes that the State party has discriminated against him throughout the course of his trial, 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) (a) 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 in notes verbales G/SO215/1COL222 of 22 September 2015 and G/SO215/1COL222 of 22 May 2016, the Human Rights Council transmitted two communications submitted against Colombia by the Centro Democrático (Democratic Centre) party regarding claims of persecution of the party and its members and containing specific allegations concerning the author of the present communication. In note verbale G/SO215COL222 of 22 August 2016, the Human Rights Council pronounced itself satisfied with the State party's claims regarding the case submitted by the Centro Democrático party and its members and declared that the communication seemed to be politically motivated.

4.3 The State party also contends that the author did not exhaust domestic remedies. On 15 April 2015, the nine judges of the Criminal Cassation Chamber of the Supreme Court found the author of the communication guilty of co-perpetrating offences relating to the giving or offering of bribes. Although the author was sentenced in sole instance owing to his status as a public official subject to special jurisdictional arrangements under the Constitution, he did not exhaust all remedies since, although in his case there can be no appeal to a court of second instance, he would legally have the opportunity to request a review of the judgment in accordance with the provisions of the Code of Criminal Procedure.<sup>36</sup>

4.4 The State party further argues that the Constitutional Court itself stressed that "in the criminal law tradition, the review procedure is intended as an instrument to protect the fundamental rights of the convicted person, given the nature of the interests that are at stake in this area, particularly with regard to personal freedom".<sup>37</sup>

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

5.1 On 11 December 2017, the author stated that his communication meets the admissibility criteria established in the Optional Protocol and reiterated the claims made in his initial communication.

5.2 With regard to the State party's arguments of inadmissibility, the author notes that the Human Rights Council does not undertake adversarial proceedings and its findings are not binding, and it cannot therefore be considered an international remedy that has been exhausted. Neither the Human Rights Council nor the special procedures are considered to be international quasi-judicial bodies, and their procedures therefore cannot be invoked as grounds for inadmissibility of the communication.<sup>38</sup>

5.3 The author repeats his allegation 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

<sup>35</sup> Decision of 15 April 2015, SP4250-2015.

<sup>36</sup> Article 32 of the Code of Criminal Procedure (Act No. 906 of 2004) states: "The Supreme Court. The Criminal Cassation Chamber of the Supreme Court has jurisdiction over: [...] 2. Reviews of executory judgments and rulings preventing further investigation that have been pronounced in sole or second instance by this or another court."

<sup>37</sup> Constitutional Court, Decision C 979/05.

<sup>38</sup> The Human Rights Committee has established that it can consider communications that have been submitted to other quasi-judicial bodies, provided that those bodies have not examined the merits. 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 *Chhedulal Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011).

rule of criminal procedure invoked by the State party<sup>39</sup> is not the one applied in his case.<sup>40</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; however, they do not constitute a challenge to definitive judgments already handed down. Furthermore, such reviews are conducted by the same court that rendered the sole instance ruling and therefore cannot be considered a suitable remedy.

5.4 The author points out that the Supreme Court itself states in its own judgment that “no appeal is possible” against the verdict. Therefore, there is no adequate and effective remedy that might allow for a review of his conviction and sentence by the Supreme Court, acting as sole instance. The author argues that the remedy referred to by the State party is not adequate or effective. The author reiterates that the rules governing criminal proceedings brought against senior officials subject to special jurisdictional arrangements by the Supreme Court, in sole instance, without any 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.

#### **State party’s observations on the merits**

6.1 On 11 July 2017, the State party reiterated that the communication does not meet the admissibility criteria established in the Optional Protocol. It further stated that the author had failed to substantiate his allegations.

6.2 The State party reiterates that the criminal proceedings instituted against the author before the Supreme Court do not constitute a violation of article 14 (5) of the Covenant. The author was convicted by the highest court and can legally challenge the judgment before the same court, which is the highest court in the State, by requesting a review.<sup>41</sup> The State party also points out that the constitutional case law<sup>42</sup> in force at the time of the trial had given legal standing to the Supreme Court as “the highest guarantee of due process” in trying senior officials and had justified restricting such persons to a hearing at second instance insofar as such restriction was counterbalanced by the fact of being tried by the highest criminal court, which issues unifying judgments and is collegiate in nature. In addition, the Constitutional Court, under the *amparo* remedy, had clarified that the rules in the constitutional body of law relating to the possibility of challenging any judgment were not strictly applicable when the Criminal Cassation Chamber of the Supreme Court issued rulings of that nature.<sup>43</sup> Similarly, the Constitutional Court established that, in the trials of senior officials, the application of the general rules provided for in the constitutional body of law should take into account the position the officials occupy within the institutional architecture, the specific nature of their authority and their place in the hierarchy: “the applicable international rules must be of a general nature that respects the particular forms of trial that may derive from the type of State, the model of democracy and the specific form of republic of the State party in question.”<sup>44</sup>

6.3 With regard to the allegations of a lack of impartiality, the State party points out that disagreement with the evidential assessment or a wish to contest the evidence presented by the prosecution is not a valid argument and that the author’s legal representatives should have raised, at the appropriate point in the proceedings,<sup>45</sup> any defects in the investigation or trial and any grounds for disbarring or disqualifying the judicial officials involved.

6.4 Likewise, neither the criminal trial nor the conviction and sentence handed down constitute a violation of the right to equality before the courts and before the law, as

<sup>39</sup> Act No. 906 of 2004.

<sup>40</sup> Act No. 600 of 2000.

<sup>41</sup> Ibid.

<sup>42</sup> Judgments C-142 of 1993, C-411 of 1997 and C-934 of 2006.

<sup>43</sup> Judgments T-146 of 2010 and SU-198 of 2013.

<sup>44</sup> Ibid.

<sup>45</sup> The State party states that the legality of the evidence, the legal characterization of the offence, the scope of the offence, the determination of the sentence and the denial of house arrest were not challenged at the appropriate time. It also indicates that the claims regarding the delegation of the trial to the prosecutor, the delay in certifying documents and the violation of the right to challenge the evidence do not reflect reality, and recalls that the defendant was convicted.

established in articles 14 (1) and 26 of the Covenant. Lastly, the State party maintains that the rights recognized in articles 1, 2, 3 and 9 of the Covenant were observed and respected throughout the criminal proceedings.

#### **Author's comments on the State party's observations on the merits**

7.1 On 11 December 2017, the author reiterated his previous allegations and noted that he was investigated by a prosecutor who did not have jurisdiction over the case, since the law that was applied had entered into force after the events in question.

7.2 The author states that, on 19 January 2016, after his petition for *amparo* had been denied, the file was sent to the Constitutional Court. On 13 September 2016, the Constitutional Court, in Judgment SU 489/16, upheld the ruling on *amparo* issued by the Civil Cassation Chamber of the Supreme Court. On 14 October 2016, the author was officially notified of the decision. On 10 November 2016, he submitted a request for annulment to the Constitutional Court; the request was denied on 31 January 2017.

7.3 The author adds that the principle of *non bis in idem* set forth in article 14 (7) was violated with respect to the disciplinary penalty.

7.4 The author reiterates that, as a former senior official, he was denied the possibility of house arrest despite meeting all the requirements for it.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

8.1 Before examining 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.

8.2 The Committee takes note of the State party's argument that the Human Rights Council found its claims with respect to the case submitted by the Democratic Centre party and its members to be satisfactory and declared that the communication seemed to be politically motivated. The Committee also notes the author's arguments that the Human Rights Council does not undertake adversarial proceedings, that its findings are not binding and that it cannot therefore be considered an international remedy that has been exhausted. The Committee notes that the Human Rights Council is not a court of law for the adjudication of cases or the settlement of disputes within the meaning of article 5 (2) (a) of the Optional Protocol and that, in any event, the proceedings before the Council appear to have been concluded.<sup>46</sup> The Committee therefore finds that there is no obstacle to the admissibility of the communication under article 5 (2) (a).

8.3 The Committee takes note of the State party's argument that the author has not exhausted all available domestic remedies because judicial review was available to him as a means of challenging the conviction handed down by the Supreme Court on 15 April 2015. The Committee also notes the author's allegations that that remedy was neither appropriate nor effective and that the Supreme Court, in its own judgment, had established 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 enabling a review of the author's conviction and sentence.<sup>47</sup> In the circumstances, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee notes that although the author has claimed violations of articles 2, 3 and 26 of the Covenant, he has not provided sufficient reasoning or explanation to support his allegation that he has been treated differently from other individuals in similar circumstances. The Committee therefore declares those claims inadmissible owing to lack of substantiation, in accordance with article 2 of the Optional Protocol.

<sup>46</sup> *Moreno de Castillo v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2610/2015), para. 8.3.

<sup>47</sup> See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 48.

8.5 The Committee notes the author's allegations relating to article 9, in that his freedom was restricted, forcing him to endure an arbitrary punishment on the grounds that the characterization of the offence and the determination of the sentence were inappropriate and that he was denied effective access to house arrest, which was his prerogative as a former senior official. However, the Committee further notes that these allegations are of a general nature and have not been sufficiently substantiated. The Committee therefore concludes that the author has failed to sufficiently substantiate this claim for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8.6 The Committee takes note of 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, as established in article 14 (1) of the Covenant, since there was no equality of arms; that because the law that was applied came into force after the events in question, the prosecutor who indicted him lacked jurisdiction, which infringed his right to a natural judge; that the judges in his trial had already formed an opinion on his case; and that the prosecutor who indicted him eventually became his judge. The Committee also takes note of the State party's arguments that the criminal proceedings brought against the author followed the procedure used for trials involving citizens who, because of the duties they perform as senior officials, are subject to special jurisdictional arrangements; that there is no basis for questioning the authority or impartiality of the Supreme Court; and that the indictment was issued by the competent prosecutor. The Committee notes that the author has not substantiated his claim of a violation of his right to equality before the courts, nor has he shown how the appointment of the prosecutor in charge of the investigation and prosecution gave rise to a violation of his right to be heard by a competent, independent and impartial tribunal, particularly given the fact that he was able to appeal these decisions before the courts. In view of the foregoing, the Committee concludes that the author has failed to sufficiently substantiate these claims for purposes of admissibility and therefore declares them inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's allegations that his right to be presumed innocent and his right to contest evidence were violated; that he did not have adequate time and facilities for the preparation of his defence; that the authorities denied him access to evidence; that the Supreme Court did not admit evidence essential to his defence; and that he was not tried without undue delay. The Committee also notes the State party's observations that the author was given every opportunity to prepare his defence and provide evidence in the criminal proceedings; that the evidence was duly assessed by the judicial authorities; and that the author had opportunities to challenge the evidence during the proceedings. With regard to the author's allegations with respect to the Supreme Court's examination of the evidence, the Committee recalls its case law according to which it is incumbent on the courts 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 such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>48</sup> In the present case, the Committee notes that the author has not specified which evidence essential to his defence was not admitted, nor the nature of the evidence to which he was denied access. Neither does this information emerge from the Supreme Court judgment made available to the Committee. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claim of a violation of his right to a defence as enshrined in article 14 (2) and (3) (a)–(c) and (e) of the Covenant and therefore declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.8 The Committee takes note of the author's claims under article 14 (7) of the Covenant that he was tried twice for the same acts. The Committee notes, however, that, from the information before it, it is not possible to conclude that the author's exoneration by the Counsel General's Office in disciplinary administrative proceedings constitutes a decision on a criminal matter. It recalls that the guarantee afforded under this provision of the Covenant applies to criminal offences only, and not to disciplinary measures that do not constitute punishment for a criminal offence within the meaning of article 14 of the

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<sup>48</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.

Covenant.<sup>49</sup> Accordingly, the Committee considers that these claims have not been sufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers, however, that the author has sufficiently substantiated his claims under article 14 (5) of the Covenant, in that he was tried in sole instance without the possibility of a review of his conviction and sentence. The Committee therefore finds that the author's claim under article 14 (5) is admissible and proceeds to examine it on the merits.

#### *Consideration of the merits*

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

9.2 The Committee takes note of 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 that would have enabled him to appeal his sentence 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.

9.3 The Committee also takes note of the State party's arguments that the constitutional case law in force at the time of the trial had given authorization to the Supreme Court to act as "the highest guarantee of due process" in trying senior officials and had justified restricting such persons to a hearing at second instance insofar as they were tried by the highest criminal court, which was collegiate in nature and offered such advantages as procedural economy and the avoidance of potential errors by lower judges or courts; and that the trial of such persons, as senior officials subject to special jurisdictional arrangements, by the highest criminal court was in itself a full guarantee of due process.

9.4 The Committee recalls that article 14 (5) of the Covenant provides 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>50</sup> In the present case, the Committee notes that there was no effective remedy available to the author to enable him to request a review of his conviction and sentence by a higher instance.<sup>51</sup> Accordingly, the

<sup>49</sup> General comment No. 32 (2007), para. 57.

<sup>50</sup> *Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4, *I.D.M. v. Colombia* (CCPR/C/123/D/2414/2014), para. 10.4, and *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.4. See also general comment No. 32 (2007), paras. 45–47, and Constitutional Court, Judgment SU146/20 of 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>51</sup> The Committee also notes that although the Constitutional Court urged Congress to introduce comprehensive legislation establishing the right to challenge all convictions, Congress did not comply with the ruling. Furthermore, on 28 April 2016, 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. The Committee takes note of Unifying Judgment SU215/16 handed down by the Constitutional Court on 28 April 2016, 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, with the consequence that any appeal brought by the author against his conviction before the Criminal Cassation Chamber of the Supreme Court would be inadmissible. See press release No. 08/16 of the Supreme Court and Decision No. 39.156 of 18 May 2016 of the Criminal Cassation Chamber of the Supreme Court.

Committee finds that the State party violated the author's rights under article 14 (5) of the Covenant.<sup>52</sup>

10. 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.

11. 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 Covenant rights have been violated. The State party has an obligation to provide suitable 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, the legislature, by Legislative Act No. 01 of 2018, amended the Constitution to guarantee the right to a second hearing in criminal matters for senior officials,<sup>53</sup> a measure which the Committee considers to be a guarantee of non-repetition.<sup>54</sup>

12. 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 for 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 on the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to disseminate them widely.

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<sup>52</sup> *Arias Leiva v. Colombia*, para. 11.4, *I.D.M v. Colombia*, para. 10.4, and *Gómez Vásquez v. Spain*, (CCPR/C/69/D/701/1996), para. 11.1.

<sup>53</sup> Namely the Vice President of the Republic, Cabinet ministers, the Counsel General, the Ombudsman, officials 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, court judges and generals and admirals of the security forces.

<sup>54</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).