



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2922/2016\*, \*\*

<i>Communication submitted by:</i>	J.A.N.C., represented by counsel, Víctor Mosquera Marín
<i>Alleged victim:</i>	J.A.N.C.
<i>State party:</i>	Colombia
<i>Date of communication:</i>	1 August 2016 (initial submission)
<i>Date of adoption of decision:</i>	24 July 2020
<i>Subject matter:</i>	Conviction of senior official at sole instance by the highest judicial body
<i>Procedural issues:</i>	Matter being examined under another procedure of international investigation or settlement; abuse of the right of submission; 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
<i>Articles of the Covenant:</i>	2, 3, 9, 10, 14 (1), (2), (3) and (5), and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (a) and (b)

1.1 The author of the communication is J.A.N.C., a Colombian national born on 25 September 1963. He claims that the State party has violated his rights under articles 2, 3, 9, 10, 14 (1), (2), (3) and (5), and 26 of the Covenant. The Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel.

\* 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 present communication: Tania Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1.2 On 21 December 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to request interim measures to protect the author under rule 94 of the Committee's rules of procedure.<sup>1</sup>

### **The facts as submitted by the author**

2.1 The author served as Director of the Administrative Security Department from 16 August 2002 to 25 October 2005.

2.2 In late 2004, the author was informed by officials of the Administrative Security Department that R.G., the Department's head of information technology, was issuing irregular instructions that threatened national security and that could be classed as offences. The author therefore reported the incident to the Attorney General's Office and set up a team to support it in its investigative work. Once the Office had gathered enough evidence, R.G. was arrested for allegedly having committed the offences of money-laundering, combined with the illegal enrichment of a public servant, criminal conspiracy, material falsification of public documents, destruction, removal or concealment of public documents and procedural fraud.

2.3 On 13 October 2005, R.G., in retaliation against the author, accused him of having placed the Administrative Security Department at the disposal of the criminal group known as the Bloque Norte de las Autodefensas Unidas de Colombia. In view of the lack of evidence, the Attorney General's Office decided not to launch a preliminary investigation. On 13 December 2005, R.G. again accused the author of further criminal acts, including the murder of journalists, human rights activists and trade union leaders. These accusations became known to human rights activists, to the main leaders of the opposition to the Government led by the then President, Álvaro Uribe, and to the media, leading to the eruption of a media scandal in early 2006. The author claims that, for more than two consecutive weeks, the Colombian media repeated R.G.'s accusations, which appeared on magazine covers and the front page of newspapers and were the subject of radio and television programmes and surveys and opinion columns.

2.4 On 17 April 2006, the Attorney General ordered the opening of a preliminary investigation and evidence-gathering in relation to the allegations concerning the author. The author asserts that the Attorney General's Office, by opening the investigation, gave in to pressure from the press to demonstrate its independence from the Government. On 19 May 2006, the Attorney General asked the second prosecutor assigned to the Supreme Court, J.A.M.R., to oversee the criminal prosecution. On 1 June 2006, the second prosecutor tasked the assistant prosecutor, M.L.S., with gathering evidence and obtaining testimonies, statements and inspection reports.

2.5 On 20 October 2006, after having confessed to and acknowledged the offences with which he had been charged, R.G. was sentenced to 18 years' imprisonment.

2.6 On 22 January 2007, the second prosecutor, having analysed the evidence, opened an investigation in accordance with article 331 of the Code of Criminal Procedure (Act No. 600 of 2000) in order to establish whether the author had in fact committed offences against life, personal integrity and public security.<sup>2</sup>

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<sup>1</sup> The author requested interim measures consisting of: (a) monitoring and follow-up by the Committee of the judicial proceedings that are still under way against him and in which he has decided not to appear; (b) the temporary stay of the conviction; (c) changing his place of detention from La Picota prison in Bogotá to the military garrison known as the Cantón Norte Infantry Academy, to which an official transfer request has been made, in order to protect his life and personal safety, which are in imminent danger, and to preserve the family unit concerned; and (d) any other interim measures that the Committee deems appropriate.

<sup>2</sup> The author explains that Act No. 600 of 2000, under which he was tried, regulates an inquisitorial procedure whereby the Prosecutor conducts the investigation, brings charges and decides on deprivation of liberty, while the Court merely issues a judgment. The author states that, with a view to guaranteeing the human rights and fundamental freedoms of defendants in criminal trials, Act No. 600 of 2000 was substantially amended by Act No. 906 of 2004 to incorporate public, oral, adversarial, concentrated, immediate and expedited proceedings into the Colombian criminal justice

2.7 On 27 February 2007, the second prosecutor ordered the author's pretrial detention and, given his status as a former senior official, requested that he be held in a maximum-security cell in order to ensure his safety.<sup>3</sup> On 23 December 2008, the author was transferred to La Picota prison in Bogotá.

2.8 On 6 May 2009, the Attorney General brought formal charges against the author for having allegedly co-perpetrated the offences of aggravated criminal conspiracy, aggravated homicide, use of confidential information and destruction, removal or concealment of public documents; the author was also charged with the offences of abuse of authority, for having carried out arbitrary and unfair actions, and of extortion and bribery.

2.9 On 14 September 2011, the Criminal Appeals Division of the Supreme Court, sitting as a court of sole instance, found the author of the communication to be criminally responsible for aggravated criminal conspiracy, indirect involvement in murder, indirect involvement in the unlawful destruction, removal or concealment of public documents and the disclosure of confidential information. The Court sentenced him to 25 years' imprisonment, fined him 6,510 times the statutory minimum wage and barred him from exercising rights and holding public office for 20 years.

2.10 The author claims that domestic remedies have been exhausted because no appeal may be filed against convictions handed down by the Criminal Division of the Supreme Court when it sits as a court of sole instance, as explained in the conviction itself, which states that "no appeal may be lodged against this ruling".<sup>4</sup> He points out that the Criminal Appeals Division of the Supreme Court is the only body empowered to try him as a former director of the Administrative Security Department. In addition, the author asserts that the State party's domestic law and its respective case law do not allow persons who enjoy constitutional privilege to have that privilege withdrawn for the purpose of obtaining the right to a second hearing.

2.11 In a ruling dated 30 November 2012, the Constitutional Court decided not to review the author's application for *amparo*. The author maintains that the claims contained in his communication have not been submitted for examination under any other procedure of international investigation or settlement.

### The complaint

3.1 The author claims to be a victim of violations of his rights under articles 2, 3, 9, 10, 14 and 26 of the Covenant.

3.2 The author claims that the State party has failed to fulfil its obligations under articles 2 and 3 of the Covenant, since his status as a senior official has hindered and prevented, rather than guaranteed, the exercise of his right to have his conviction and sentence reviewed by a higher tribunal in accordance with article 14 (5) of the Covenant.

3.3 The author also claims that, during the legal proceedings, he found himself in a position of inequality as a result of national procedural rules, in violation of the first sentence

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system (which Act No. 600 did not). However, the final provision of the new Act stipulates that it applies only to offences committed after 1 January 2005. The author explains that Act No. 600 of 2000 has been widely criticized in the writings of Colombian jurists and cites various publications to support this claim.

<sup>3</sup> The detention order dated 27 February 2007 stipulated that the author was to be detained in La Picota prison, in a special wing where his safety and personal integrity would be guaranteed. He remained there until 23 March 2007, when he was released after an application for habeas corpus had been filed because his detention had been ordered by an official who was not competent to act. On 6 July 2007, the Attorney General's Office ordered the author's pretrial detention in La Picota prison, where he remained until 11 June 2008, when the decision was overturned (see para. 6.8 below). On 12 December 2008, the Attorney General's Office again ordered the author's pretrial detention. He was detained in the Office's holding facility until 23 December 2008.

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

of article 14 (1) of the Covenant. He explains that the Act under which he was tried (No. 600 of 2000) provides that the prosecutor responsible for investigating the defendant is also responsible for deciding whether he or she should be deprived of his or her liberty. He also claims that his right to a hearing by a competent tribunal provided for in the second sentence of article 14 (1) was violated because, even though domestic law stipulated that only the Attorney General was competent to conduct the investigation and criminal prosecution, the Attorney General nevertheless transferred his competence to subordinates. The author points out that this violation was acknowledged in part by the Supreme Court, which ruled to dismiss the charges against him but not the evidence collected by the prosecutors who lacked the necessary competence to act. In addition, the author considers that the State party violated his right to a hearing by an independent and impartial tribunal, since he was prejudged by the trial judge, who, from when he considered the facts set out in the complaint, “continued to show prejudice” in the proceedings against the author and took subjective decisions that were not properly reasoned. Furthermore, M.L.S., who participated in the criminal investigation of the case as an assistant prosecutor, was also actively involved in the prosecution of the case as an assistant judge.

3.4 The author claims that he was also a victim of a violation of his rights under articles 14 (1), (2) and (3), 3 and 9 of the Covenant, since he was tried and convicted on the basis of a false witness, R.G., who habitually “lied to the authorities” and “made up fanciful stories”. The author states that, even after numerous irregularities were detected in the first psychiatric evaluation of R.G., the Attorney General’s Office made no effort to ensure that he underwent a second evaluation. Had such a test been conducted, the author would not have been unfairly convicted because it would have shed light on the psychopathic behaviour of the main witness for the prosecution.

3.5 The author also considers that the views expressed by the media and the length of his pretrial detention constituted a violation of his right to be presumed innocent under article 14 (2) of the Covenant. He also claims that, during the proceedings against him, his rights provided for in article 14 (3) were violated for the following reasons: (a) he was convicted of offences for which no charges had been brought; (b) several requests for adjournment, which were necessary due to the size of the case file, were rejected; (c) the criminal investigation and the trial lasted over four years; (d) at certain stages of the proceedings, he did not have a lawyer of his own choosing;<sup>5</sup> and (e) his lawyer was not allowed to question a witness relevant to his defence.

3.6 The author asserts that the State party has also violated his right to have his conviction reviewed by a higher tribunal, as provided for in article 14 (5) of the Covenant, since, under Colombian law, the Supreme Court, sitting as a court of sole instance, is responsible for hearing and ruling on cases against persons who enjoy constitutional privilege, and no appeal may be lodged against its judgments.

3.7 With regard to the violation of articles 9 and 10 of the Covenant, the author states that he was deprived of his liberty in pretrial detention for 4 years, 6 months and 20 days.<sup>6</sup> This deprivation of liberty was not necessary, since, under Colombian law, there was no need to detain the author to ensure his appearance at the proceedings, preserve evidence or protect the community. He explains that he was detained by order of a prosecutor who was not competent to act, which left him in a particularly vulnerable position. He also alleges that he was held in pretrial detention in a place that was not suitable for this purpose, as it was a prison where detainees serve sentences after having been tried and convicted.

3.8 With regard to article 26 of the Covenant, the author points out that the State party discriminated against him before, during and after his trial because of his social status, notably by restricting his right to appeal his conviction before a higher court.

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<sup>5</sup> The author claims that his lawyer stopped representing him after having been threatened by R.G. Following the resignation of the lawyer of his choosing, he was assigned several court-appointed lawyers who did not have sufficient time to prepare a proper defence.

<sup>6</sup> While the author claims that he was held in pretrial detention for 4 years, 6 months and 20 days, according to the information in the case file, he actually spent around 3 years and 9 months in pretrial detention. See para. 2.7 above.

### State party's observations on admissibility and the merits

4.1 In a note verbale dated 2 February 2017, the State party submitted its observations on the admissibility of the communication and requested the Committee to declare it inadmissible.

4.2 The State party asserts that the author's communication constitutes an abuse of the right of submission, as the same matter has been submitted for examination under another procedure of international investigation or settlement. It argues that the author's petition (No. P-1331-11), which was received by the Inter-American Commission on Human Rights on 30 September 2011, contains the same facts and claims as those submitted to the Committee. The State party submits that the petition was transmitted to it in its entirety on 26 April 2016 and is at the admissibility stage. The State party encloses a communication from the coordinator of the group responsible for following up on the decisions of international bodies, dated 19 January 2017, according to which the facts of the case relate to the alleged violation of the right to judicial guarantees (art. 8) and to judicial protection (art. 25), and the non-fulfilment of the obligation to adopt domestic legal provisions (art. 2), all of which relates to the obligation to respect and guarantee the rights provided for in the American Convention on Human Rights (art. 1 (1)). This stems from alleged irregularities in the investigation into his conduct carried out by the Attorney General's Office and in criminal trial No. 32000 brought by the Criminal Division of the Supreme Court, in which he was found criminally responsible for the offences of aggravated criminal conspiracy; the murder of Alfredo Rafael Francisco Correa de Andreis; the destruction, removal or concealment of public documents; and the disclosure of confidential information.

4.3 The State party adds that the author's case has also been submitted to the Human Rights Council. In note verbale G/SO 215/1 COL 222 of 22 May 2016, the Council referred to a communication submitted by the Centro Democrático party accusing the State party of persecuting that group and its members and containing specific claims relating to, inter alia, the author's situation. In the note verbale, the Working Group on Communications of the Human Rights Council upheld the claims made by Colombia regarding the complaint and found that it appeared to be politically motivated. The Working Group informed the State party that it had decided to discontinue its consideration of the communication.

4.4 The State party also argues that the author's communication constitutes an abuse of the right of submission. The Committee is of the view that undue delay in the submission of a complaint may constitute an abuse of the right of submission, bearing in mind the difficulties that such a time lag may cause the Committee and the State party when they come to consider the evidence. In the present case, the judgment against the author is dated 14 September 2011, meaning that more than five years elapsed between the issuance of the court decision that is the subject of the communication and the latter's submission.

4.5 The State party also considers that the communication should be declared inadmissible because domestic remedies have not been exhausted. The author was convicted at sole instance, as he was an official who enjoyed constitutional privilege, and he was indeed unable to appeal the judgment. However, the author has not exhausted all domestic remedies because, legally speaking, he can still apply for judicial review of the judgment under article 32 of the Code of Criminal Procedure. The Constitutional Court has described this procedure in the following terms: "In the tradition of criminal law, the remedy of judicial review was conceived as an instrument of protection for the fundamental rights of the convicted person, in view of the range of legal assets that are adversely affected in this regard, particularly that of personal liberty."<sup>7</sup> The State party adds that, as the author was convicted of conduct unrelated to his public duties, he had the opportunity to waive his constitutional privilege and submit to the jurisdiction of ordinary, lower courts. The concept of privilege has been maintained as a safeguard to enable senior officials to be tried by the most suitable and experienced judges and to have their fate decided in a collegial decision. In criminal matters, these are the judges of the Criminal Appeals Division of the Supreme Court.

4.6 The State party asserts that it is for the national courts to decide cases such as the author's with certainty and in keeping with the universal, constitutional and legal principles

<sup>7</sup> Constitutional Court, Judgment No. C-979/05.

of due process, judicial guarantees and self-defence. It argues that the State party's institutions ensure that all judicial bodies respect the premises of due process and judicial guarantees, through the self-monitoring exercised by the judicial bodies themselves in their public administration role and through the legal supervision provided by oversight bodies, especially the Public Legal Service, which undertakes the sacred duty of administering justice with rigour, transparency and impartiality.

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

5.1 In his comments of 2 April 2017, the author submits that, contrary to the State party's assertion, the communication should be declared admissible, as none of the criteria for inadmissibility have been met. He states that there has been no duplication of procedures, since the matter dealt with in the present communication has not been submitted to the regional mechanism of the Inter-American Commission on Human Rights. The individual petition submitted by the author to the Commission in September 2011 concerns different facts and claims, and is still at the initial stage of processing. This demonstrates that the procedure in question has been unjustifiably drawn out, as over 64 months have passed without the Commission having declared admissible and considered the merits of the case, and over 13 months have passed without the State party having responded.<sup>8</sup> The State party therefore wrongly claims that the communication submitted to the Committee concerns the same facts and claims as the communication submitted to the Inter-American Commission. In accordance with the principle of *onus probandi*, the author considers that the State party has not submitted any evidence to the Committee in this respect. He submits that the State party has not acted in good faith, that it cited an erroneous date in connection with the submission of the complaint to the Inter-American Commission on Human Rights<sup>9</sup> and that it concealed from the Committee the fact that the facts and claims are different. He adds that it is untrue that the State party has responded to the Inter-American Commission. According to the author, it has been proven that "the Human Rights Committee offers broader protection because of the efficiency of its procedures".

5.2 With regard to the complaint submitted to the Human Rights Council, the author maintains that the State party has not demonstrated that the person who made the complaint did so on his behalf or that the complaint concerned issues addressed in this communication. It stated only that the author's name was mentioned, along with the names of other officials of the former President of the State party, in order to show a persistent and credible pattern of denial of the right to a second hearing. The State party concealed from the Committee that this complaint explicitly stated that the complaint to the Human Rights Council was without prejudice to any individual complaints that members of the Centro Democrático party might choose to submit, on an individual basis, to international quasi-judicial bodies. He further points out that the Human Rights Council, unlike the Committee, is limited to making recommendations to States, offering policy guidance or urging the government concerned to change its approach to implementing human rights standards. Therefore, as none of the actions that it can take are binding on States, its recommendations can never be considered an exhausted international remedy. The author asserts that the State party is unfamiliar with the decisions and well-established jurisprudence of the Committee, according to which the Human Rights Council, special procedure mandate holders and working groups are not considered to be quasi-judicial international bodies and may not be invoked to support a claim of inadmissibility on the ground that the same matter is being examined under another procedure of international investigation or settlement under rule 96 of the Committee's rules of procedure.<sup>10</sup>

5.3 According to the author, the State party's claim that the communication was submitted more than five years after the court decision is false, since he submitted his communication on 1 August 2016 – that is, 4 years and 11 months after the court decision. Therefore, this inadmissibility criterion may not be invoked, as the complaint was submitted within the time limit and does not constitute an abuse of the right of submission. He states that, although no

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<sup>8</sup> The author does not provide any further information about the facts and claims contained in this communication.

<sup>9</sup> See para. 4.2 above.

<sup>10</sup> *Chhedulal Tharu et al. v. Nepal* (CCPR/C/114/D/2038/2011), para. 9.2.

domestic remedies are available because the judgment was issued at sole instance, he filed an application for *amparo*, on which a final decision was taken on 30 November 2012. In accordance with the most-favourable-law principle, this is the date that should be taken into account. According to the author, the State party's claim that he abused the right of submission because of when he submitted the communication reveals a lack of awareness of the Committee's well-established jurisprudence.<sup>11</sup>

5.4 The author points out that it is the same court that issued the sole instance judgment that decides on the special remedy of judicial review and that, under Act No. 600 of 2000, applications for that remedy are usually rejected because review is deemed appropriate in only a strictly limited number of cases.

5.5 As for the State party's assertion that the author could have waived his constitutional privilege, the author states that this is unrealistic and not in keeping with the case law in force at the time. He states that the Supreme Court, in a decision dated 1 September 2009, determined that the act of resigning from a post that confers constitutional privilege is not sufficient to trigger the loss of the Court's competence to investigate and try the person, even if the act in question was committed prior to the person's having taken up his or her duties or is unrelated to the performance of those duties. This decision served as the basis for trying and convicting all those persons who enjoyed constitutional privilege, despite their having waived it. To argue, as the State party does, that they have recourse to higher courts in respect of the Supreme Court's judgment is contrary to the legal and constitutional framework in force in the State party.<sup>12</sup> As the Supreme Court is the highest court, it is obvious that no other body has authority over it and that no appeal may be lodged against its judgments, since appeals, by their very nature, must be submitted to a higher court.

5.6 He points out that an application for *amparo* is not an appeal as such, but a new, different remedy that may not be exercised to challenge court judgments. While an appeal is filed during proceedings to allow for the discussion of a particular aspect of the judgment being challenged, an application for *amparo*, by contrast, is a new remedy whose purpose is to determine whether the judgment violates the person's fundamental rights; it does not, however, constitute an appeal against the judgment itself. Furthermore, that a remedy challenging a decision of the Supreme Court should be ruled on by the Court itself is not ideal, as the remedy then becomes a mere formality rather than a genuine appeal.

5.7 The author welcomes the fact that, unlike in other communications concerning other cases, the State party has not resorted to justifying the denial of the right to a second hearing and/or claiming that *amparo* is a domestic remedy. He submits that, for certain persons under the State party's jurisdiction, the lack of a second criminal hearing constitutes discrimination involving restrictions and limitations. In order to safeguard his right to appeal his conviction, the author refers to the Committee's jurisprudence in this regard.<sup>13</sup>

5.8 The author reiterates that the State party has violated his rights under article 3 of the Covenant, as it has failed to ensure the equal enjoyment by men and women of all the civil and political rights enshrined in it, in particular, equal enjoyment of the right provided for in article 14 (5). He also reiterates that, by denying certain categories of public official the right enshrined in article 14 (5), the State party has also violated the author's right to equality before the law and equal protection of the law under article 26.

5.9 On 12 June 2017, the author stated that senior officials of the Government of the State party had acknowledged that the right to a second hearing for persons enjoying constitutional privilege had been violated. The author submits that the Minister of Justice, Enrique Gil Botero, has publicly stated that the need to introduce second hearings for persons who enjoy constitutional privilege "is felt very strongly in Colombia, since it is a universal right that is bound up with due process and the principle of equality. In international terms, our country is lagging behind. Article 8 of the American Convention on Human Rights enshrines the second hearing principle. Therefore, the Inter-American Court and the inter-American

<sup>11</sup> The author cites, for example, *Jaroslav et al. v. Czech Republic* (CCPR/C/96/D/1574/2007), para. 6.3.

<sup>12</sup> The author cites articles 234 and 235 of the Constitution (powers of the Supreme Court).

<sup>13</sup> *Gomaríz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 7.1.

system may require the Colombian State to implement it.”<sup>14</sup> He adds that the Minister stated that this situation put persons who enjoyed constitutional privilege at a disadvantage and that he had warned the Congress of the Republic that “the Inter-American Court will, in the near future, rule on the violation of the second hearing principle and that judgments, together with any consequences arising from them, may be reviewed as a result”. The author also points out that the Deputy Minister of the Interior, Guillermo Rivera, has stated that: “This is not a handout or a concession to Congress or to persons who enjoy constitutional privilege, but a right that we were failing to recognize.”<sup>15</sup> The Attorney General, Néstor Humberto Martínez, said that: “The lack of a right to a second hearing troubles many academics and jurists who consider that, without second hearings, the integrity of the investigations carried out into members of Congress is compromised.”<sup>16</sup>

5.10 In the author’s view, these statements amount to a clear acknowledgement of the ongoing violation of article 14 (5) of the Covenant, which enshrines the right to have a judgment reviewed by a higher tribunal. The State party has no choice but to admit that its domestic legal system fails to recognize the right in question and to take the measures necessary to ensure its realization.

### **State party’s additional observations**

6.1 In a note verbale dated 14 June 2017, the State party reiterated its request for the Committee to reject the author’s communication on the grounds that it is clearly inadmissible. It asserts that the author’s latest comments downplay the legal dispute involved. Insinuations to the effect that the State party is not acting in good faith or is attempting to mislead the Committee, conceal information from it or make false claims, are completely unacceptable and denote the author’s lack of substantive arguments. It requests the Committee to disregard such comments, which are an affront to the dignity of the State, its institutions and representatives.

6.2 The State party reiterates that the author has previously submitted his complaint to the Inter-American Commission on Human Rights and to the Human Rights Council. It also reiterates that the communication constitutes an abuse of the right of submission, as it was submitted to the Committee more than five years after the last court decision that gave rise to the communication was issued. It states that, under rule 99 (c) of the Committee’s rules of procedure, a communication may constitute an abuse of the right of submission when it is submitted five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication.

6.3 In a note verbale dated 22 June 2017, the State party points out that the criminal proceedings brought against the author before the Supreme Court were wholly legitimate and conducted within the framework of the Colombian legal system, in strict compliance with the Constitution, Colombian law and case law, and with due regard for the author’s human rights as a citizen and a defendant.<sup>17</sup>

6.4 As for the lack of a second hearing in the proceedings brought against the author, the State party asserts that, according to constitutional case law, the trial of senior officials by the Supreme Court has always been considered the ultimate guarantee of due process, since the Supreme Court is the highest court in the legal jurisdiction and its collegial nature, in the words of the Constitutional Court, conveys certain advantages, such as enabling defendants

<sup>14</sup> *Vanguardia*, 7 April 2017, available at <https://www.vanguardia.com/politica/proyecto-de-doble-instancia-para-congresistas-sigue-avanzando-CQVL394204>.

<sup>15</sup> *Noticias Caracol*, 21 March 2017, available at <https://noticias.caracoltv.com/colombia/radicacion-proyecto-para-aforados-tengan-doble-instancia>.

<sup>16</sup> *El Espectador*, 23 March 2017, available at <https://www.elespectador.com/opinion/editorial/welcome-the-double-instance-for-afforados-article-685820>.

<sup>17</sup> In a note verbale dated 11 July 2017, the State party enclosed digital copies of the most important trial documents examined in the proceedings in order to shed light on the facts, procedural developments and decisions taken in the course of those proceedings.

to avoid any mistakes that might be made by judges of lower courts and granting them the opportunity to apply for judicial review once an executory judgment has been issued.<sup>18</sup>

6.5 The State party emphasizes that, at a pretrial hearing, the Criminal Division of the Supreme Court declared null and void some of the offences with which the author had been charged because of violations of due process and the right to a defence. The Division also quashed the aggravating circumstance found to apply to the offence of homicide, thereby disproving the author's sweeping claim that his rights were violated because of this situation. The State party asserts that the procedural law governing the criminal proceedings was Act No. 600 of 2000, since Act No. 906 of 2004 had not yet entered into force and, irrespective of any advantages that the latter might have offered the author, Act No. 600 also upheld the human rights and fundamental freedoms of criminal defendants.

6.6 The State party maintains that, contrary to the author's claims, the judgment was not based on a single testimony. It is clear from a reading of the judgment that a body of evidence (testimonies, documents and judicial inspections) was submitted during the investigation and the trial and assessed in line with the rules of sound judicial discretion.

6.7 Statements to the effect that the assistant prosecutor, who was subsequently appointed assistant judge of the Division, assumed the dual role of prosecutor and judge, or that it is assistant judges who determine the outcome of proceedings, serve only to demonstrate the author's ignorance of the procedural and constitutional issues involved and the operational dynamics of the departments of the Criminal Appeals Division, bearing in mind that assistant judges do not have jurisdiction or competence to rule on cases that are dealt with exclusively by prosecutors, judges and criminal courts in Colombia. The powers of assistant judges are limited to assisting in the conduct of proceedings and to drawing up plans directed and determined by the official responsible for the matter, with the result that such judges are classified as employees and not as judicial officials.

6.8 The State party points out that, as the trial documents submitted to the Committee clearly demonstrate, the author's rights under the Covenant were not violated during the proceedings. It asserts that, when procedural irregularities were detected, invalidity actions were brought to ensure respect for his fundamental rights. The author was afforded every possible benefit under Colombian criminal law. By way of example, the State party cites the decision of 11 June 2008, by which the Criminal Division of the Supreme Court ruled that the proceedings, from the opening of the investigation onward, were null and void because they had been taken by an official who was not competent to act. Consequently, the security measure in question was revoked and the immediate release of the author was ordered.<sup>19</sup>

6.9 The State party claims that there was no violation of articles 2 and 3 of the Covenant, since it respected and upheld the author's Covenant rights without distinction of any kind.

6.10 With regard to the alleged violation of article 9 of the Covenant, the State party considers that it is clear that the author was deprived of his liberty on the grounds and in accordance with the procedure established by law and that any claim to the contrary is therefore entirely unfounded.<sup>20</sup> The State party also considers that there is no basis for the claim that article 26 of the Covenant was violated, since, as the case file shows, the author was clearly afforded dignified, equitable and fair treatment during the criminal proceedings, without discrimination of any kind.

6.11 The State party points out that due process for senior officials brought before the Supreme Court has been described by the Constitutional Court in the following terms: "The

<sup>18</sup> The State party refers to the following Constitutional Court judgments: No. C-142 of 1993, No. C-411 of 1997 and No. C-934 of 2006.

<sup>19</sup> On 12 December 2008, the Attorney General's Office again ordered the author's pretrial detention. See also paragraph 2.7 above.

<sup>20</sup> The State party includes a copy of the three detention orders, dated 27 February and 6 July 2007, and 12 December 2008, respectively. The last detention order indicates that it was issued because the author's release would have endangered the community, given the nature of the offence of aggravated criminal conspiracy, which, according to the State party's doctrine and case law, is a serious crime, and given the author's relationship with the Autodefensas group, particularly in the region of Santa Marta. The two previous orders give similar reasoning.

trial of senior officials by the Supreme Court constitutes the ultimate guarantee of due process, taken as a whole, for the following reasons: (i) because it ensures the conduct of a trial appropriate to the official's hierarchical position, taking into account the importance of the institution to which he or she belongs, his or her responsibilities and the significance of his or her office. For this reason, article 235 of the Constitution identifies the senior State officials who enjoy this privilege; (ii) because such trials take place before a pluralist body, with specialized knowledge of the subject matter, composed of professionals qualified to be the judges of the highest court in the ordinary legal system; and (iii) because such trials are held before the court of final appeal in the ordinary legal system, which is responsible for interpreting criminal law and enforcing it through the appeals procedure."<sup>21</sup>

6.12 The State party reiterates that, legally speaking, the author may challenge the judgment before the same court, the highest court in the State, by applying for judicial review of the judgment, as provided for in the Code of Criminal Procedure. It notes the author's claim that he was tried and convicted on the basis of a false witness and considers that, on that basis, the author should take legal action at the domestic level to challenge his conviction – that is, by applying for judicial review, which, formally speaking, is the appropriate remedy in such cases.

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

#### *Consideration of admissibility*

7.1 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.

7.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes the State party's allegation that, on 30 September 2011, the author submitted a complaint to the Inter-American Commission on Human Rights concerning the same facts and claims as those contained in the complaint before the Committee.<sup>22</sup> In particular, the Committee notes that, according to the communication from the coordinator of the group responsible for following up on the decisions of international bodies of the State party, dated 19 January 2017, the facts of the case submitted to the Inter-American Commission relate to the alleged violation of the right to judicial guarantees and to judicial protection, and the non-fulfilment of the obligation to adopt provisions under domestic law, all of which relates to the obligation to respect and guarantee the rights provided for in the American Convention on Human Rights, and stems from alleged irregularities in the investigation into his conduct in the context of the investigation and criminal proceedings that are the subject of this communication.

7.3 The Committee notes that, when the author submitted his initial complaint, he stated that the facts of his communication had not been submitted for examination under another procedure of international investigation or settlement and that, in his comments of 2 April 2017, the author pointed out that the individual petition submitted to the Inter-American Commission on Human Rights in September 2011 concerned different facts and claims. However, the Committee notes that the author has not provided any specific information or a copy of the petition submitted to the Inter-American Commission to support his claim that it concerned facts and claims different from those submitted to the Committee.

7.4 The Committee recalls its jurisprudence, according to which "the same matter" refers to a petition that concerns the same individuals, facts and substantive rights.<sup>23</sup> Since the State party maintains that the complaint submitted to the Inter-American Commission on Human Rights refers to the same facts and claims as those submitted to the Committee, and since the author has not provided any information on the specific content of the complaint submitted to the Inter-American Commission that could have offered a detailed rebuttal to the State

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<sup>21</sup> Constitutional Court, Judgment No. C-934/06.

<sup>22</sup> See para. 4.2 above.

<sup>23</sup> See, for example, *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 8.4.

party's assertion, the Committee considers that due weight should be given to the State party's claims. The Committee finds it regrettable that the author failed to inform the Committee at the outset that he had submitted a complaint to the Inter-American Commission and that he subsequently failed to provide any information to the Committee to demonstrate that it was in fact a different complaint, as he claims it to be. Accordingly, in view of the particular circumstances of the case, the Committee finds the communication inadmissible under article 5 (2) (a) of the Optional Protocol, as the same matter has already been submitted to the Inter-American Commission on Human Rights, which is a regional dispute-settlement body, and under article 3 of the Optional Protocol, as the author's failure to provide the Committee with information on his complaint before the Commission constitutes an abuse of the right of submission.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 3 and 5 (2) (a) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

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