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CASE 13.044
REPORT ON MERITS

GUSTAVO FRANCISCO PETRO URREGO
COLOMBIA

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INDEX

I.	SUMMARY	3
II.	POSITIONS OF THE PARTIES ON THE MERITS	4
	A. The petitioners	4
	B. The State	6
III.	PROVEN FACTS	7
	A. About Gustavo Francisco Petro Urrego	7
	B. About the legal framework relevant to the disciplinary-sanctions procedure	7
	1. The Political Constitution	7
	2. The Single Disciplinary Code.....	8
	3. Law 1437 of 2011.....	10
	C. Background of the first disciplinary proceeding.....	10
	D. About of the first disciplinary proceeding	12
	1. Disciplinary Charges	13
	2. Sanctioning ruling of sole instance.....	14
	3. Reversal Petition.....	16
	4. Request of nullification and reversal petition	19
	E. About the second disciplinary proceeding	20
	1. Disciplinary Charges	20
	2. Suspension of Decree 364 by the State Council	21
	3. Sanctioning decision of sole instance	21
	4. Adoption of Law 1864 of 2017	22
	F. About the third proceeding for fiscal responsibility	22
	G. About the fine from the Superintendence of Industry and Commerce.....	23
IV.	LEGAL ANALYSIS	23
	A. Political rights in conjunction with Articles 1(1) and 2 of the American Convention	23
	1. General considerations.....	23
	2. Analysis of the present case	25
	B. Right to a fair trial and judicial protection	26
	1. General considerations.....	26
	2. Analysis of the present case	27

C.	Right to equal protection and right to judicial protection	29
V.	CONCLUSIONS.....	30
VI.	RECOMMENDATIONS.....	30

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I. SUMMARY

1. On October 28, 2013, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission”, or “the IACHR”) received a petition filed by the *Colectivo de Abogados José Alvear Restrepo* –CCAJAR– (Lawyers Collective José Alvear Restrepo) and the *Asociación para la Promoción Social Alternativa* –MINGA– (Association for the Alternative Social Promotion) (hereinafter “the petitioners”) alleging the international responsibility of the Republic of Colombia (hereinafter “the State of Colombia”, “the State”, or “Colombia”) for alleged human rights violations to the detriment of Gustavo Francisco Petro Urrego.

2. The petitioners stated that the alleged victim, while in his position as the Mayor of Bogota, was subjected to a series of sanctioning proceedings. In particular, they stated that, pursuant to two disciplinary proceedings initiated by the Inspector General of the Nation, he was disqualified from office, and that said proceedings were pursued in a discriminatory manner and in retaliation for his political ideology, all with the objective to remove him from his elected position. The petitioners stated that a series of violations of due process guarantees were committed in the disciplinary proceedings, and averred that the power of disqualification by means of a disciplinary action initiated by the Inspector General of the Nation contravenes the American Convention. Subsequently, the alleged victim reported that two additional sanctions had been imposed and that the criminal law had been modified to define running for elected office while disqualified due to a judicial, disciplinary or fiscal decision as an imprisonable crime.

3. The State asserted that the officials are liable for violations of the law or exceeding their functions, and that the alleged victim was the subject of disciplinary proceedings due to a series of complaints filed against him. The State contended that the power of the Inspector General of the Nation to impose a disqualification sanction does not contravene the American Convention, and that the sanctions imposed on the alleged victim were the result of proceedings conducted with full respect for procedural guarantees that permit a full jurisdictional control.

4. On March 18, 2014, the IACHR requested the adoption of precautionary measures in favor of Gustavo Francisco Petro Urrego, then-Mayor of the city of Bogota D.C., Colombia, and requested that Colombia “suspend immediately the effects of the decision of December 9, 2013, issued and endorsed by the Office of the Inspector General on January, 13, 2014, to ensure the exercise of the political rights of Mr. Gustavo Francisco Petro Urrego and that he remains in office as Mayor of the city of Bogotá D.C. during the term for which he was elected on October 30, 2011, until the Commission has made a decision on the individual petition P-1742-13.” Since then, both parties have provided up-to-date information to the IACHR on various occasions.

5. The Commission approved Admissibility Report No. 60/16 on December 6, 2016. On December 14, 2016, the Commission notified this report to the parties and offered its good offices with the objective of reaching a friendly settlement. While the petitioners expressed interest in a friendly settlement, the State did not comment. On March 9, 2017, the petitioners submitted additional observations on the merits. These observations were transmitted to the State of Colombia on April 21, 2017. As of this date, the State has not submitted any additional observations on the merits. All the information gathered was duly transferred to the parties.

¹ In accordance with the provisions of Article 17(2) of the Rules of Procedure of the Commission, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the debate or in the decision of this case.

6. Based on the analysis of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles 8(1), 8(2)(h), 23(1), 23(2), and 25(1) of the American Convention in conjunction with the obligations set forth in Articles 1(1), and 2 of the same, to the detriment of Gustavo Francisco Petro Urrego. The Commission also issues corresponding recommendations.

II. POSITIONS OF THE PARTIES ON THE MERITS

A. The petitioners

7. The petitioners affirmed, by way of context, that Gustavo Petro has had a political career since 1981, holding various positions of popular representation. The petitioners stated that he presented himself as a candidate for the Office of the Mayor of the City of Bogota D.C., and that on October 30, 2011, he won the election.

8. The petitioners mentioned that, by Order 275 of 2011, the Constitutional Court declared that the department of the Mayor's Office of Bogota – the Special Administrative Unit of Public Services (*Unidad Administrativa Especial de Servicios Públicos –UAESP*) - failed to comply with the orders issued in judgment T-724 of 2003, and the general criteria set forth in Record 268 of 2010 related to the duty of UAESP to define a framework of short-term goals with the objective of formalizing and regulating the recycling population of Bogota.

9. The petitioners stated that, with the objective of complying with the above-mentioned order, the Mayor's Office of Bogota created a public enterprise to take over the provision of sanitation services commencing on November 18, 2012, the date that the concession for this public service held by private operators expired. The petitioners argued that this change had the intent of including the recycling community in the provision of public sanitation services, from which it was historically excluded.

10. The petitioners averred that by mid-December 2012 there was a collapse in the collection of refuse which occurred during the transition between the public and private services. They stated that this occurred after the private operators refused to return trash-compacting vehicles and other equipment, despite being legally bound to do so by the concession contract.

11. The petitioners stated that, as a result of the above, criminal and disciplinary investigations were initiated against the alleged victim. In relation to the criminal proceedings, they stated that it became publicly known on November 21, 2014, that the Prosecutor's Office intended to close the criminal investigation due to a lack of merit.

12. With regard to the disciplinary proceeding, they stated that, on January 16, 2013, the Disciplinary Chamber of the Office of the Inspector General of the Nation issued a decision to open a disciplinary investigation against the alleged victim for three breaches of the Single Disciplinary Code.

13. The petitioners communicated that, on December 9, 2013, the Office of the Inspector General declared that the alleged victim was responsible for serious contraventions of subsections 27, 31 and 60 of Article 48 of the Single Disciplinary Code, and imposed a sanction of dismissal and a general disqualification from office for a period of 15 years.

14. The petitioners indicated that the alleged victim filed a petition against the above decision seeking its reversal, which was rejected on January 13, 2014, and confirmed the original decision.

15. The petitioners mentioned that on March 28, 2014, the alleged victim lodged a nullification and reversal petition against the decisions of December 9, 2013, and January 13, 2014, and, on May 13, 2014, the State Council provisionally suspended both decisions pending its review of the merits.

16. The petitioners said that, on June 27, 2016, the Inspector General of the Nation issued a second sanction against the alleged victim, which consisted of a 12-month suspension and disqualification

from office based on alleged irregularities committed during the issuance of the Decree of the Guidelines of Territorial Planning. They stated that, according to the Office of the Inspector, the alleged victim used an inadequate procedure to approve said plan and disregarded the applicable rules, which confer power on the municipal and district councils to regulate land use.

17. Moreover, they stated that the Director of Fiscal Responsibility and Coactive Jurisdiction of the Comptroller's Office of Bogota D.C. (*Directora de Responsabilidad Fiscal y Jurisdicción Coactiva de la Contraloría de Bogotá D.C.*), issued Resolution 01 on June 27, 2016, which contained a determination of fiscal responsibility against the alleged victim and other persons "for the tariffs of the Transmilenio S.A. public service," and imposed a fine of \$217,204,857,989 (USD 71,677,603). They stated that this fine was the result of the reduction in the tariff of *Transmilenio*.

18. The petitioners stated that on July 15 and 16, 2016, nullification requests were made against the above decision. These requests were denied on July 25, 2016. They also noted that a new nullification request was made on July 27, 2016 and that it was denied on August 3, 2016.

19. They stated that, later, the alleged victim lodged reversal petitions, which were denied on October 27, 2016. Likewise, he filed appeals, also denied on November 29, 2016.

20. The petitioners stated that the sanctions imposed on the alleged victim would prevent him from running for office as President of the Republic in the upcoming election on May 27, 2018, despite having a lot of public support according to polls.

21. The details of the facts and proceedings shall be referred to in the Commission's factual analysis, based on the information provided by both parties. This section contains a summary of the main legal arguments made by the petitioners during the merits stage.

22. The petitioners argued that the State violated the **political rights** in relation to the **obligation of domestic legal effect** because Article 227(6) of the Constitution recognizes the power of the Inspector General to discipline public officials and provides for "removal from office." They added that, likewise, Article 44 of the Single Disciplinary Code considers disqualification from office as a disciplinary sanction. They maintained that inter-American standards require that a restriction on political rights determined by a competent judge and by means of a criminal proceeding.

23. The petitioners added that the sanctions imposed on the alleged victim would result in his "political death." In relation to his disqualification, which is currently suspended, they stated that if it is implemented, considering his age, the alleged victim would never be able to be elected to public office. Concerning the fiscal sanction, the petitioners stated that the amount is unpayable and places the alleged victim on a debtors list, which prevents him from taking any public position. They argued that recently a criminal law amendment was approved which considers as a crime the act of being elected for a position whilst being disqualified by judicial, disciplinary, or fiscal decision. They highlighted that this would prevent participation in the presidential elections of May 27, 2018.

24. Likewise, they argued a violation of the **right to equal protection**, considering that the disciplinary proceeding against the alleged victim by the Inspector General of the Nation "has been the result of a discriminatory action for political views alternative to the dominant ones." They stated that the conduct of the then-Inspector was biased against public officials who held different political views, and, on the other hand, that he was lenient towards officials with "parapolitical" links. They stated that the religious and political views of the Inspector General affected the impartiality of his actions in the disciplinary proceedings.

25. They asserted that the State had violated the **right to a fair trial and judicial protection** in conjunction with the duty to respect rights and equal protection, because the process brought against Mr. Petro by the Office of the Inspector General failed to comply with the international obligations of the State.

26. The petitioners added that the disciplinary proceeding against the alleged victim lacked adequate guarantees for impartiality, the presumption of innocence, right to counsel, evidence, and review. They stated that the Inspector General decides on reversal petitions, and, thus, there is no second instance. Likewise, in relation to impartiality and the presumption of innocence, they stated that, since charges were laid against the alleged victim, there were attempts to impugn and qualify his conduct as a Mayor, such as “improvisation” or “lack of planning,” that undermine the presumption of innocence and call into question the impartiality of the disciplinary authority.

27. Finally, the petitioners alleged a violation of the **right to humane treatment**. They asserted that the arbitrariness of the disciplinary proceeding against the alleged victim affected his and his family’s moral integrity and that he has been a victim of constant personal attacks and threats, and constant stigmatization promoted by the Office of the Inspector General. They also noted persistent risks to the alleged victim’s life and personal integrity, which led to the IACHR to grant precautionary measures in his favor.

B. The State

28. The State did not submit any observations on the merits. Therefore, the present section is based only on the arguments it made during the admissibility stage as these may concern the merits.

29. The State alleged that in December 2012, the Office of the Inspector General of the Nation received “multiple complaints” against Mr. Gustavo Francisco Petro Urrego, related to the provision of the public sanitation services in the city of Bogota.

30. The State mentioned that on January 16, 2013, based on the Single Disciplinary Code, the Disciplinary Chamber of the Office of the Inspector General of the Nation (*Sala Disciplinaria de la Procuraduría General de la Nación*) ordered the initiation of a disciplinary investigation against the alleged victim in relations to his conduct as the Mayor of Bogota.

31. The State also observed that the Disciplinary Chamber decided charges against Gustavo Petro for three violations of the Single Disciplinary Code on June 20, 2013, and on December 9, 2013, the Disciplinary Chamber issued a decision of sole instance declaring the disciplinary responsibility of the alleged victim for contravening Articles 31, 60, and 37 of the Single Disciplinary Code. It also stated that the alleged victim was sanctioned with dismissal as well as a general disqualification from office for 15 years based on these three infringements.

32. It stated that on January 13, 2014, the Disciplinary Chamber fully rejected the evidentiary petitions (*peticiones probatorias*) submitted by the alleged victim. It also confirmed the judgment of sole instance on December 9, 2013, and denied a subsidiary petition to withhold the imposition of the disciplinary sanction.

33. The State averred that the sanction imposed by the Disciplinary Chamber of the Office of the Inspector General was the object of various actions of protection that were resolved in the first instance by the Administrative Tribunal of Cundinamarca and then the Sectional Council of the Judiciary. It stated that after appeal of these decisions, on March 18, 2014, the Presidency of the State Council announced the approval by majority of the decision whereby 23 court-ordered protections in favor of Gustavo Petro were revoked.

34. It asserted that on March 20, 2014, the President of the Republic, by Decree 570 of March 20, 2014, implemented the removal of the alleged victim and appointed Rafael Pardo Rueda as Mayor.

35. It stated that on April 21, 2014, the Civil Chamber – Land Restitution of the Superior Tribunal of the Judicial District of Bogota (*Sala Civil – Restitución de Tierras del Tribunal Superior del Distrito Judicial de Bogotá*) ordered that the President of the Republic annul Decree 570 and adopt measures to comply with the precautionary measures adopted by the Commission in favor of the alleged victim. It stated that on April 23, 2014, via Decree 797, the President of the Republic annulled Decree 570.

36. The State asserted that, on March 28, 2014, the alleged victim filed an action against the Office of the Inspector General of the Nation before the Administrative Tribunal of Cundinamarca in connection with the administrative acts of December 9, 2013, and January 13, 2014. It mentioned that, on March 31, 2014, the Administrative Tribunal of Cundinamarca, Second Section, Subsection B, transferred the action to the State Council because the latter had jurisdiction.

37. The State maintained that the Contentious-Administrative Chamber of the State Council admitted the action on April 10, 2014, and, on May 13, 2014, decreed the provisional suspension of the decisions of the Disciplinary Chamber of the Office of the Inspector General of December 9, 2013 and January 13, 2014. It stated that the State Council in Plenary affirmed the provisional suspension of the decisions on March 17, 2015, by deciding an appeal for reconsideration filed by the Public Ministry. It further stated that by virtue of said measure issued by the Contentious-Administrative Chamber, Gustavo Petro was reinstated to his position as the Mayor of Bogota. It explained that a decision on the merits was pending in said Chamber.

38. In relation to the law, the State asserted that there had been no violation of **political rights or the obligation of domestic legal effect**, referencing the power of the Inspector General of the Nation to impose a disqualification sanction does not ignore Article 23(2) of the American Convention and that the Constitutional Court of Colombia has examined said power and determined its compatibility with said instrument. It stated that the sanction is imposed with full respect to the procedural guarantees and after full jurisdictional control over the sanction with the power to nullify it.

39. It stated that the **right to judicial protection** was not violated because there are judicial mechanisms to appeal disciplinary decisions that affect political rights, such as the nullification and reversal petition before the State Council that allows for provisional suspension of the administrative action when the criteria set forth are met. It added that exceptional actions of protection have been admitted against decisions that impose disciplinary sanctions.

III. PROVEN FACTS

A. About Gustavo Francisco Petro Urrego

40. The alleged victim is currently 57 years old.² As reported by the petitioners and not controverted by the State, Gustavo Petro has participated in the political life of Colombia since 1981, having been Council Member of Zipaquirá, Member of the House of Representatives for the Department of Cundinamarca, and later on two occasions, for Bogota D.C. In 2006, he was elected a Senator of the Republic. In the elections of 2010, he was a candidate for President of the Republic of Colombia. On October 30, 2011, he won the election for Mayor of Bogota D.C.³ as part of the *Movimientos Progresistas* (Progressive Movement).

B. About the legal framework relevant to the disciplinary-sanctions procedure

1. The Political Constitution

41. The Political Constitution of Colombia states in Articles 277 and 278 the following:

Article 277. The National Attorney General, by himself/herself or through his/her delegates and agents, will have the following functions:

(...) 6. To supervise at the highest level the official conduct of those who hold public office, including those popularly elected; exercise on a preferential basis the disciplinary authority;

²*Plaza Capital*, Journalism and Public Opinion Program Informative Portal, del Rosario University, [Profile of the new mayor of Bogotá](#).

³ IACHR, Report No. 60/16. Petition 1742-13. Admissibility. Gustavo Francisco Petro Urrego. Colombia. December 6, 2016, para.8.

initiate the appropriate investigations and impose the appropriate sanctions in accordance with the law.⁴

Article 278. The General Prosecutor of the Nation will exercise the following functions directly:

1. Discharge from office, following a hearing and on the basis of justified reasons, any public officials who are guilty of any of the following deficiencies: violating the Constitution or the laws in an obvious manner; deriving obvious and profitable material advantage from the exercise of their duties or functions; impeding in serious manner investigations carried out by the Office of the Public Prosecutor or by an administrative or juridical authority; performing with obvious carelessness the investigation and sanctioning of the disciplinary deficiencies of employees under their authority or in the denunciation of punishable occurrences that they have cognizance of by virtue of exercising their office.⁵

2. The Single Disciplinary Code

42. The Single Disciplinary Code, Law 734 of 2002, states the following:

Article 3 — Preferential disciplinary power. The preferential exercise of the disciplinary power has been vested to the Office of the Attorney General of the Nation, pursuant of which it can start, follow or remit any investigation or judgment of competence of the public entities' internal disciplinary control bodies. Likewise, it may assume the proceedings in the second instance. (...)

Article 44 — Types of sanctions. The public servant is subject to the following sanctions:

1. Dismissal and general disqualification, for very serious offenses committed with extremely gross negligence.
2. Suspension in the exercise of the position and special disqualification for the serious offenses committed with willful misconduct or extremely gross negligence.
3. Suspension, for the serious offenses committed with gross negligence.
4. Fine, for the minor offenses committed with willful misconduct.
5. Written admonishment, for the minor offenses committed by negligence.

Paragraph. There will be extremely gross negligence when the disciplinary offense is incurred by ignorance, elementary lack of attention or manifest violation of binding rules. There will be gross negligence when the disciplinary offense is committed due to the lack of necessary care that any ordinary person observes in its acts.

Article 45 — Definition of the sanctions.

1. The dismissal and general disqualification implies:

- a) The termination of the relation of the public servant with the administration, whether or not it is of free appointment and removal, of career or election, or
- b) The removal from office, in the cases established in articles 110 and 278, subsection 1, of the National Constitution, or
- c) The termination of the employment contract, and

⁴ Colombia's Political Constitution.

⁵ Colombia's Political Constitution.

d) In all the foregoing cases, the impossibility to exercise the Public Function in any position or function, for the term set forth in the ruling, and the exclusion of the job scale or career.

2. Suspension means the separation from the exercise of the position in the performance of which the disciplinary offense was and the special disqualification, the impossibility of exercising the public function, in any position other than that one, for the term determined in the ruling.

3. The fine is a sanction of a monetary nature. (...)

Article 46 — Limit of the sanctions. The general disqualification will be of between ten and twenty years; the special disqualification will be of no less than thirty days but of no more than twelve months; but when the offense affects the economic equity of the State, the disqualification will be permanent.

(...)

43. Article 47 provides the criteria for the grading of the sanction as follows:

1. The amount of the fine and the term of duration of the suspension and disqualification will be established according to the following criteria:

- a) To have been fiscally or disciplinarily sanctioned within a term of five years prior to the commission of the conduct being investigated;
- b) The diligence and efficiency shown in the discharging of the position or of the function;
- c) To attribute, without grounds, the liability to a third party;
- d) The confession of the offense before charges are pressed;
- e) To have attempted, by his or her own initiative, to cure the damage or to compensate the damage caused;
- f) To have given back, replaced or repaired, as the case may be, the goods affected by the conduct that constitutes the offense, provided that the return, replacement or reparation were not order in other proceedings;
- g) The serious social damage caused by the conduct;
- h) The impact on fundamental rights;
- i) The awareness of the unlawfulness;
- j) The fact that the public servant belongs to the directive or executive level of the entity.

2. To whom, with one or several actions or omissions, violates several provisions of the disciplinary law or several times the same provision, the sanction will be graded according to the following criteria:

- a) If the most serious sanction is the dismissal and general disqualification, the latter will be doubled, without exceeding the maximum legal limit;
- b) If the most serious sanction is the suspension and special disqualification, it will be doubled, without exceeding the maximum legal limit;
- c) If the most serious sanction is the suspension it will be doubled, without exceeding the maximum legal limit;
- d. If the sanctions are of fine the most serious one will be imposed doubled, without exceeding the maximum legal limit; (...)

44. Article 48 of the same instrument describes that the following are considered very serious faults:

31. To take part in the pre-contractual stage or in the contractual activity, to the detriment of the public wealth, or disregarding the principles that regulate State contracting and the administrative function contemplated in the Constitution and in the law.

37. To proffer administrative acts outside the compliance with the duty, in breach of the constitutional or legal provisions related to the protection of the ethnic and cultural diversity of the Nation, of the natural resources and of the environment, originating a serious risk for the ethnic groups, the indigenous peoples, human health or the preservation of natural ecosystems or the environment.

60. To exercise the powers that his / her employment or function grant for an ultimate end other than the one established in the granting provision.

45. Article 66 of the same instrument states that “[t]he disciplinary procedure established in this law must be applied by the respective internal disciplinary control offices, District and Municipal Attorneys, the disciplinary jurisdiction and the Office of the Attorney General of the Nation.”

46. Article 162 states the following in relation to the disciplinary procedure when it is applied by the Office of the Attorney General of the Republic: “Appropriateness of the decision to press charges. The trial officer will formulate a statement of charges when the offense is objectively proven and there is evidence that compromises the liability of the investigated. No remedies can be filed against this decision.”

47. In relation to the remedies, the referenced legal framework states the following:

Article 110 — Classes of remedies and their formalities. Against disciplinary decisions it is possible to lodge the legal remedies of reversal petition, appeal and complaint, which will be filed in writing unless express provision to the contrary. Paragraph. Against decisions that are merely procedural, no legal remedy can be filed.

Article 113 — Reversal Petition. The reversal petition will only proceed against the decision made regarding nullification and the refusal of a request for copies or evidence to the investigated person or to his / her attorney, and against the single instance ruling.

3. Law 1437 of 2011

48. Law 1437 of 2011 states the following:

Article 137. Nullification. Every person may request by themselves, or through a representative, a declaration of nullification of administrative acts of general character. It will proceed when these have been issued with an infringement of the norms whereupon these shall be based, or without competence, or irregularly, or with ignorance of the right to hearing and counsel, or through false motivation, or with a deviation of the powers of the person who issued these (...)

Article 138. Nullification and restoration of rights. Every person who believes they were injured in a subjective right based on a legal norm, may request a declaration of nullification of the specific administrative act, express or alleged, and the restoration of rights; also, he / she may request reparations for the damage. Nullification shall proceed for the same causes provided in section two of the previous article. (...)

C. Background of the first disciplinary proceeding

1. Constitutional Court Decision T-724 of 2003

49. On August 20, 2003, the Constitutional Court decided a protection action filed by the *Asociación de Recicladores de Bogotá* (Recycler's Association of Bogota) in relation to a lack of access to public bidding for the provision of public sanitation services. In said decision, the Court considered that,

(...) the Executive Unit of the Public Services of the Capital District of Bogota (*Unidad Ejecutiva de Servicios Públicos del Distrito Capital de Bogotá*), did not abide by the constitutional mandate that constrains it to adopt measures in favor of marginalized or discriminated groups, such as recyclers, as will be shown below (...)

(...) it urges the Council of Bogota, in relation to its jurisdiction, to include affirmative actions in the process of administrative contracting, in favor of those groups that, as a result of marginalization and discrimination, require special protection from the State (...).⁶

50. On July 30, 2010, the Constitutional Court issued Order 268, outlining the criteria to guarantee participation by the recycling association (*recicladora*) in bidding processes for sanitation services.⁷

51. On December 19, 2011, via Order 275, the Constitutional Court declared UAESP's failure to comply with the orders provided in judgment T-274 of 2003, and the general criteria provided in Order 268 of 2010, and ordered the Mayor's Office of Bogota, through the UAESP, "to determine a plan of goals in the short term with the aim of formalizing and regulating the recycling population, which contains concrete, qualified, measurable, and verifiable actions, and which must be delivered to the Constitutional Court, as well as the Office of the Inspector General of the Nation by March 31, 2012, at the latest."⁸

2. The signature of contracts 017 and 809 of 2012

52. On October 11, 2012, considering the previous decisions, as well as other reasons, the UAESP signed contract 017 with the *Empresa de Acueducto y Alcantarillado de Bogotá E.S.P.* (Water and Sewers Company of Bogota E.S.P), a public company, which committed to provide "the refuse collection, sweeping, and cleaning of public areas and transportation of waste to the final dumping site in the Capital District of Bogota;" likewise, it will support the UAESP "to guarantee the inclusion of the recycler population in sanitation services (...) paying through tariffs for the work that this population does in collection and transportation of solid waste (...)."

53. Said contract records that the contractor would implement it with its own technological, economic, financial, human, and material means" (...) "except for the equipment or buildings owned by the Capital District, provided by the UAESP for the implementation of the contract." Likewise, it states that "the contractor may contract suitable Public Sanitation Companies to provide the service in activities or areas of the city."⁹

54. On December 4, 2012, the Water and Sewers Company of Bogota signed contract 809 with the company Water of Bogota (*Agua de Bogotá*), whereby the latter committed to provide sanitation services in public areas of Bogota.¹⁰

3. Issuance of Decree 564 of December 2012

⁶ Constitutional Court of Colombia, Judgment T-724/03, August 20, 2003.

⁷ See Constitutional Court of Colombia, Order 268, July 30, 2010.

⁸ Constitutional Court of Colombia, Order 275/11, October 11, 2012.

⁹ Inter-administrative Contract Number 017 of 2012 signed between UAESP and the Bogota Water and Sewers Company (Empresa de Acueducto y Alcantarillado de Bogotá E.S.P.) October 11, 2012.

¹⁰ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Inspector General of the Nation, December 9, 2013, p. 453. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

55. On December 10, 2012, the Mayor of Bogota issued Decree 564, which outlined the rules of the provision of the public sanitation services in the city.

56. In pertinent part, said Decree provided the following:

Article 6. Compliance with the power to supervise, coordinate and control of sanitation services. In accordance with Article 116 of the District Agreement 257 of November 30, 2006, for a public or private individual to provide, in the City of Bogota Capital District, public sanitation services, shall accredit before the Special Administrative Unit of Public Services [*Unidad Administrativa Especial de Servicios Públicos - UAESP*] the requirements provided by law and sign with said Unit, or the Water and Sewers Company of Bogota E.S.P-EAAB, a contract that details the scope of their obligations and, particularly, how the activities of supervision, coordination, and control of the service in charge of the Special Administrative Unit of Public Services UAESP will be fulfilled.

Article 9. Access to the Landfill. The access and dumping of solid waste in the Doña Juana Landfill, owned by the Capital District, is conditioned on the prior signing of a contract for access to the public sanitation service in the complementary activity of final dumping, with the operator contracted for this purpose, with prior authorization of the Special Administrative Unit of Public Services UAESP, under the terms provided in National Decree 838 of 2005.¹¹

4. Issuance of Decree 570 of December 2012

57. On December 14, 2012, the Office of the Mayor of Bogota declared a state of prevention or yellow alert for a period of 4 months in the entire Capital District, taking into consideration, *inter alia*, the following: 1) by November 30, 2012, the UAESP identified 636 critical locations in the city, i.e. public spaces affected by the temporary or permanent presence of solid waste that could affect the environment; 2) on December 12, 2012, “in some areas of the Capital District, there were delays in the collection of solid waste by some providers of sanitation services contracted by UAESP”; and 3) considering that in the adaptation to the new scheme potential risk situations may arise.”

58. Likewise, and by virtue of the above, the Decree issued by the Mayor authorized “the use of dump trucks, with the objective of guaranteeing the continuity of public sanitation services, and, as a precautionary measure, to minimize eventual environmental and sanitary impacts.”¹²

5. The crisis in Bogota

59. According to the information provided by the parties as well as public information, on December 18, 19, and 20, 2012, there was a crisis in Bogota due to a lack of trash collection during the transition between the public and private schemes. According to the petitioners, the crisis occurred because prior service providers refused to return trash-compacting vehicles and other equipment that they were required to return under the terms of their contracts.¹³ For its part, the State stated that the crisis came about because of the actions of the alleged victim.

D. About of the first disciplinary proceeding

60. According to the casefile, in 2013, the Office of the Inspector General of the Nation received complaints against the alleged victim by the General Secretary of the Regional Worker’s Federation, a council

¹¹ Decree Law 564 of December 10, 2012, issued by the Mayor of Bogota, District Capital.

¹² Decree Law 570 of December 14, 2012, issued by the Mayor of Bogota, District Capital.

¹³ Petition of October 23, 2013.

member of the District of Bogota, a representative of Bogota, and the Ombudsman, all in relation to Bogota's sanitation system. In response, the Office of the Inspector General of the Nation initiated a disciplinary investigation.

1. Disciplinary Charges

61. On June 20, 2013, the Disciplinary Chamber of the Office of the Inspector General of the Nation brought charges against the alleged victim and stated that he may have committed serious offenses under subsections 31, 37 and 60 of Article 47 of the Single Disciplinary Code in relation to three separate acts.

62. The first charge was based on the signature of the inter-administrative contract 017 of October 11, 2012 by the Special Administrative Unit of Public Services (UAESP) with the Water and Sewers Company of Bogota (EAAB), "without the company having the minimum experience and required capacity." Likewise, because said contract meant that the EAAB signed a contract with the company *Aguas de Bogota* (S.A.E.S.P) on December 4, 2012, "without the company having the minimum experience and required capacity."

63. The second charge was made for "issuing Decree 564 of December 10, 2012, through which a scheme for the provision of public sanitation services for the city of Bogota was adopted, which was totally contrary to the legal system, and which violated the constitutional principle of freedom of enterprise, preventing companies, other than entities of the District of Bogota, to provide, under equal conditions, the sanitation services in the capital city, from December 18, 2012."

64. The third charge was made for "having issued Decree 570 of December 14, 2012, by which the use of dump trucks was authorized, to guarantee continuity in sanitation services as a precautionary measure and to minimize the eventual environmental and sanitary impacts, because said authorization violated constitutional and legal dispositions in relation to the protection of the environment, which created a grave risk for the health of the inhabitants of the city of Bogota and for the environment."¹⁴

65. The record of the disciplinary proceeding registers that a report was submitted by the District Secretariat of Environment of Bogota (*Secretaría Distrital de Ambiente de Bogotá*). It was entitled "Environmental Monitoring and Control," concerned the situation of solid waste in Bogota in December 2012, and concluded the following:

- There was a visual impact due to the non-collection of waste.
- There was a persistent bad smell in some areas of the city.
- In relation to disease vectors, impact on drainage, and the impact on the EEP (Main Ecological Structures), no environmental impacts were caused, rather, these were potential threats.
- Street sweeping and cleaning. No environmental impacts were caused, rather, these were potential threats.
- Transport. No environmental impacts were caused, rather, these were potential threats.¹⁵

66. The report's author, Julio Cesar Pulido, declared during the trial that "he did not have the methodology to measure magnitude, and that there was no technical basis to determine those environmental impacts."¹⁶

¹⁴ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation's Inspector General, December 9, 2013. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

¹⁵ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation's Inspector General, of January 13, 2014, p.158. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

¹⁶ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation's Inspector General, of January 13, 2014, p.161. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017. He also stated that "1. Vectors were not developed: vectors, such as flies, were not detected as having developed. In a city with the conditions of Bogotá, with temperatures usually below 18C, it is required between 23 to 41 days of waste processes and decomposition to have elapsed so that an egg is produced, gone into larval stages and became a fly. There was no trash on the streets for so long, as the timeframes were less than that and the climate conditions were not present for them to develop in 3 days. There was no evidence detected with regards to the

67. The Commission notes that throughout the process that the alleged victim maintained that the disciplinary proceeding was retaliation for his political views and ideology and sought to punish him in order to impose the political will of superiors in the hierarchy, and that the outcome had been pre-determined from the outset of the investigation.¹⁷

2. Sanctioning ruling of sole instance

68. On December 9, 2013, the Disciplinary Chamber of the Office of the Inspector General of the Nation, through two appointed Procurators,¹⁸ ruled against the nullification petitions filed by the alleged victim and determined that the three charges brought against him had been proven. It also determined that “as a consequence of the declaration of responsibility for the three disciplinary offenses stated above, to impose as a sanction on the disciplined person DISMISSAL AND GENERAL DISQUALIFICATION for a period of FIFTEEN (15) YEARS, for the reasons noted in the analysis of this decision.”¹⁹

69. The Chamber considered that the two first offenses were committed with malice, and the third was a very serious offense.²⁰

70. In relation to the first charge, the Chamber stated that it was proven that, in the second semester of 2012, the UAESP and the EAAB signed the inter-administrative contract 017 of October 11, 2012, without the latter having the minimum experience and required capacity. In relation to the type of conduct, it stated that:

Subsection 31 of Article 48 of the Single Disciplinary Code “determined as a very serious offense, that a public official takes part in a pre-contractual stage or in a contractual activity that disregards the principles regulating State contracting and the administrative function contemplated in the Constitution and the law. In the present case, the signature of the inter-administrative contract 017 of October 11, 2012, and 809 of December 4, 2012, signed between the Special Administrative Unit of Public Services (UAESP) and the Water and Sewers Company of Bogota (EAAB) and the *Aguas de Bogota* company (S.A.E.S.P), respectively, where totally irregular because neither of these two District companies had the required knowledge, experience, and capacity to take responsibility for the provision of sanitation services (...).

(...) Mr. GUSTAVO FRANCISCO PETRO URREGO, in the second semester of 2012, and in his position as Mayor of Bogota, and chief of the district administration, took a decision that District companies should take over public sanitation services in Bogota, specifying the

development of other vectors that could generate diseases, nor was there concrete evidence of illnesses that took place during that period of time due to the trash in the streets. 2. There was no poor air quality. The quality of the air was permanently monitored and there was control of the drag material and dust, especially, of that generated by the sweep of public roads. They even found that the quality of the air during that time frame in 2012, compared to the same days in 2011, was much better. 3. There was no pollution due to leachate: they are a product of putrefaction and decomposition of waste and require certain conditions to be produced. This because the leachate results of the percolation of water and the pressure on the organic mass followed by decomposition processes that, when being dragged, produce these leachates. See: Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p.300. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

¹⁷ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, pp. 27, 30 and 70. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

¹⁸ According to record, the decision was rendered by the Prosecutor Adjunct First, Juan Carlos Novoa Buendía and the Prosecutor Adjunct Second *ad hoc*, Carlos Arturo Ramírez Vásquez.

¹⁹ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 484. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁰ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 480. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

Director of the UAESP and the managers of the EAAB, and the *Aguas de Bogota* company, to sign the respective inter-administrative contracts.²¹

71. In particular, the Chamber stated that the signature of contract 017 of October 11, 2012, violated various principles of State contracting. It also stated that the principle of transparency has been violated because the UAESP did not comply with public bidding rules and chose a company that had no knowledge, experience, or technical capacity. It added that the principle of economy was violated because “they used a direct contracting provision to contract a company without the necessary experience,” and “neither did they carry out the prior required studies to determine that the ideal contractor (sic) and that it met the conditions of experience and technical capacity.”²²

72. On the other hand, in relation to the inter-administrative contract 0809 of December 4, 2012 signed between EAAB and the *Aguas de Bogota* company, the Chamber stated that “(...) the endless list of contracts that *Aguas de Bogota* had to sign to attempt to get the minimum required equipment and the lack of experience, and the financial situation of the company, were the reasons for which it was determined that with the signature of said contract the contracting norms in force were disregarded, particularly, the principle of objective selection, thus placing at risk the continuity of the provision of the public sanitation service in the city of Bogota.”²³

73. In relation to culpability, it added that the alleged victim “acted voluntarily and with knowledge of the facts and the illegality of his conduct, and more so, because in many of his explanations he stated that one of the reasons behind his decision was to break the cartel formed by a group of contractors, a reason that did not bear any relationship to the contractual norms in force and the guarantee of the provision of the public sanitation in the city of Bogota.”²⁴

74. On the other hand, in relation to the second charge, and consistent with the disciplinary offense provided in subsection 60 of Article 48 of the Unified Disciplinary Code, the Chamber stated that the conduct is typical because said article establishes that it is a very serious disciplinary offense for a public servant to use the powers inherent in his job or function for another end than that provided for in his mandate, and in the present case:

The Mayor of Bogota used the norms of the legal system to issue administrative acts related to public sanitation and to violate the principle of freedom of enterprise, [...].²⁵ In particular, it recalled that, according to Article 333 of the Political Constitution of Colombia, “free economic responsibility is a right of everyone, entailing responsibilities.”²⁶ It added that in the present case, “the principles of public service such as objectiveness, legality, and impartiality were seriously undermined due to the adoption of a sanitation scheme for the City of Bogota outside of the legal system (legality) and which resulted in the violation of the principle of freedom of enterprise, preventing other companies, different from the entities of

²¹ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 447. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²² Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 447. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²³ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 454. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁴ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 459. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁵ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 459. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁶ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 463. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

the District of Bogota, to provide, after December 18, 2012, and under equal conditions, public sanitation services in the capital city (objectiveness and impartiality).²⁷

75. In relation to culpability, it stated that the alleged victim “knew and wanted companies, different from those of the District, to be unable to provide sanitation services in the city of Bogota under equal conditions. To this end, in July and August 2012, he gave precise instructions to the then-manager of EAAB, Diego Bravo. In addition, days before issuing Decree 564 of December 10, 2012, it was known that the district administration would prevent private companies from providing sanitation services, as was known to some witnesses and as it was recorded in the media, given the notoriety of these facts [...]”²⁸

76. In relation to the third charge, and consistent with the disciplinary offense contained in subsection 37 of Article 48 of the Single Disciplinary Code, the Chamber stated that in the present case “the mayor of Bogota acted outside of his remit and duty by imposing an administrative act that authorized the use of dump trucks for sanitation in the city of Bogota, contrary to existing legislation, particularly provisions of Article 41 of Decree 948 of 1995, and Article 49 of Decree 1713 of 2002.”²⁹

77. On the other hand, the Chamber recalled that, according to the expert assessment submitted in the proceeding, “it was determined that there were considerable environmental impacts and threats, because in the city of Bogota between 6.000 and 9.000 tons of solid waste were not collected on 18, 19, and 20 of December 2012.”³⁰ It added that “the occurrence of this incident was mainly due to the authorization by the Mayor of Bogota for the public operator in the new sanitation model to use dump trucks, when the regulations clearly and precisely required compacting vehicles, a situation that was even irregularly extended until the month of July 2013, while slowly and progressively the compacting vehicles were being obtained by the public operator.”³¹ It added that the disciplinary offense committed by the alleged victim affected the duty of his function without having demonstrated any reason for it in the proceedings, and that they found no elements to demonstrate that this was malicious conduct.”³²

78. Finally, with regard to the sanction, it stated that “article 46 of the same regulation provided that general disqualification would be from ten to twenty years, a sanction that would imply a prohibition to hold any charges or position for the term that is determined in this decision in accordance to the grading criteria contained in article 47 of Law 734 of 2002;” and considered that “taking into consideration that Mr. GUSTAVO FRANCISCO PETRO URREGO occupied the high level position of Mayor of Bogota, that in the offenses committed there was knowledge of the illegality, and that with various actions he contravened three dispositions of the disciplinary law, the Chamber shall impose as a disciplinary corrective measure DISMISSAL AND GENERAL DISQUALIFICATION for the PERIOD of FIFTEEN (15) YEARS.”³³

3. Reversal Petition

²⁷ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 466. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁸ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 469. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

²⁹ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 471. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

³⁰ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 475. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

³¹ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p.475. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

³² Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 479. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

³³ Annex 1. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, December 9, 2013, p. 481. Annex 1 to the additional observations from the petitioners on the merits of March 9, 2017.

79. Following the above-described decision, the alleged victim filed a petition for reversal, requesting that the judgment be revoked and, additionally, that the Inspector General refrain from imposing sanctions that would contravene Article 23 of the American Convention.

80. With respect to the first charge, he maintained that he had not participated in the pre-contractual stage or in the contractual activity that led to the administrative implementation of the “cero trash” (*basura cero*) public policy, and that his actions did not result in any detriment to the public or disregard State contracting principles.

81. In relation to the second charge, he stated that Decree 564 of 2012 seeks to comply with the orders of the Constitutional Court. Finally, in relation to the third charge, he stated that he did not commit the attributed offense. Finally, he stated that the “Office of the Inspector General does not have competence to restrict, limit, or suspend the exercise of political rights of a popularly elected public servant.”³⁴

82. On December 31, 2013, the alleged victim requested that certain assessments be performed, including: i) in relation to Decrees 564 and 570 of 2012, “to request the State Council to list the number of decrees, of this rank or of national order, declared null because of illegality or unconstitutionality in the last (20) years; and ii) that the Office of the Inspector General of the Nation certifies in how many of these proceedings or in how many *motu proprio* did it advance sanctioning proceedings; and in how many or in which did it issue a sanction and what type of sanction was imposed;” likewise, he requested the testimony of epidemiology experts to explain potential risks to the human health that could be caused by the alleged trash crisis of 18, 19, and 20 of December, 2013.³⁵

83. On January 13, 2014, the Disciplinary Chamber of the Office of the Inspector General of the Nation rejected the requested assessments “given the extemporaneous nature of the requests and the absence of the need to undertake them” considering that “the undertaking of assessments during the trial stage is during the proper procedural opportunities (*término de traslado*) [...]” and that “if this was regarding assessments derived from other assessments undertaken during the trial, the adequate procedural opportunity lasted until concluding arguments were made, because then it could have been reasoned why it was necessary to undertake other assessments to resolve some issues that eventually were not clarified [...]”³⁶ He added that “the possibility of undertaking assessments after issuing the judgment of first or sole instance follows an *oficiosa* power, circumscribed by the need to resolve some issue that could substantially change the merits of the matter.”³⁷

84. In the same decision, the Disciplinary Chamber of the Office of the Inspector General of the Nation, through the two Procurators appointed and that issued a decision on December 9, 2013,³⁸ overruled the reversal petition, confirming the judgment of sole instance.³⁹

85. In relation to the first charge, it was stated that “it is true that the Mayor of Bogota did not have direct participation in the precise activities that comprised the pre-contractual and contractual stages of the two inter-administrative contracts, for instance, in the drafting of the studies and very specific activities.

³⁴ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 71. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

³⁵ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 50. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

³⁶ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 50. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

³⁷ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 50. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

³⁸ Según consta la decisión fue emitida por el Procurador Primero Delegado Juan Carlos Novoa Buendía y el Procurador Segundo Delegado ad hoc Carlos Arturo Ramírez Vásquez.

³⁹ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

But, it is logical to consider that in an administrative structure countless officers intervene, all of these fulfill specific roles designated to them, but with the indisputable characteristic that their functions are exercised add follow the orders of their respective superiors. In the present case, this situation is evident because the assignment of sanitation services to the public entities of the District was always within the domain and subject to the decision of the Mayor of Bogota, who also had a second position as the member of the Board of Directors of EAAB, as demonstrated by all the evidence in the process (...).⁴⁰

86. In relation to the second charge, it stated that “the prevalence of the principle of freedom of enterprise and freedom of competition is not an assumption as argued by the defendant; to the contrary, it is a principle of mandatory compliance under the Constitution and the law, and its only restriction or adaptation is in the implementation of Areas of Exclusive Service (*Áreas de Servicio Exclusivo*), in accordance with the requirements and parameters provided in the legal framework (...).⁴¹ It also considered that “Decree 564 of 2012 did restrict the principle of freedom of enterprise in the field of public domestic services, because it repeats that the entire administration and responsibility of this service was transferred to the Water and Sewers Company of Bogota (EAAB), and that the only possibility for private operators to participate was via subcontracts with the UAESP, which was in accordance with the conditions and percentages that the District determined, this, because the public operator was unable to take the entire operation of the city as was initially decided by the disciplined individual.” It added, as evidence, that the percentage of the provision of the service by the public operator, between December 18, 2012, and April 22, 2013, was 52.62% of the city, whereas on April 22, 2013, and afterwards, the percentage of the provision of the service was 63.15% where, for example, the private operator ATESA S.A., no longer provided the service.⁴²

87. In relation to the third charge, the Chamber stated, by issuing Decree 570, the Mayor committed a very serious offense because “he knew that compacting vehicles were needed for the sanitation service,” and because his high rank would convey a message that “it was a duty to comply with the norms contained in the legal framework, among these, Decrees 948 of 1995, and 1713 of 2002.”⁴³ It stated that “it was not the exceptional and unforeseen circumstances of the transition in the entry into operation of EAAB or the denial of the private operators to return equipment, rather, it was the incapacity of the District to take over the sanitation service, and this situation arose because of decisions adopted by the Mayor of Bogota.”⁴⁴

88. Finally, it referred to the imposed sanction, indicating that,

(...) three disciplinary offenses were committed, and considering that the last one was not committed with malice, rather as a very serious offense, the Disciplinary chamber imposed a sanction of 15 years. In other words, it could be stated that it was twelve years for the first offense; two more years for the second; and for the third, another year; a graduation of the sanction adjusted proportionally as provided in subsection 2 of Article 47 of the Single Disciplinary Code, for those cases known as *concurso material heterogéneo*.⁴⁵

89. In a January 15, 2014, interview with the newspaper “El Tiempo”, the Inspector General of Nation was asked if Mayor Petro was leaving because of his leftist political views or because he is a bad mayor,

⁴⁰ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 145. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

⁴¹ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 64. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

⁴² Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 203. to the additional observations from the petitioners on the merits of March 9, 2017.

⁴³ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 373. to the additional observations from the petitioners on the merits of March 9, 2017.

⁴⁴ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 363. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

⁴⁵ Annex 2. Decision on the petition seeking reversal of the Disciplinary Chamber of the Office of the Nation’s Inspector General, of January 13, 2014, p. 15. Annex 2 to the additional observations from the petitioners on the merits of March 9, 2017.

to which he replied “doctor Petro is leaving because he is a bad mayor, for not fulfilling his duties with great seriousness. For conduct that squandered the public budget and must be investigated. For disregarding the constitution that limits his functions. He placed at risk the health of the people of Bogota and of the environment.”⁴⁶

90. On March 18, 2014, the IACHR granted precautionary measures in favor of the alleged victim and requested that the State of Colombia “suspend immediately the effects of the decision of December 9, 2013, issued and endorsed by the Inspector General’s Office on January 13, 2014, to ensure the exercise of the political rights of Mr. Gustavo Francisco Petro Urrego, and that he remains in office as Mayor of the city of Bogotá D.C. during the term for which he was elected on October 30, 2011, until the Commission has made a decision on individual petition P-1742-13.”⁴⁷

91. On March 20, 2014, through Decree 570, the President of the Republic decreed the removal of the Mayor of Bogota, Gustavo Francisco Petro Urrego, to comply with the Office of the Inspector General of the Nation’s judgment of December 9, 2013, and designated Rafael Pardo Rueda as Mayor of Bogota.⁴⁸

4. Request of nullification and reversal petition

92. On March 31, 2014, the alleged victim filed a request for nullification and reversal before the Administrative Court of Cundinamarca. This was in relation to the administrative decisions issued by the Disciplinary Chamber of the Office of the Inspector General of the Nation, through which the alleged victim was sanctioned with dismissal and general disqualification from exercising public positions and functions for fifteen years. The request was transferred to the Chamber of the Contentious-Administrative of the State Council, for reasons of competence.⁴⁹

93. On April 21, 2014, the Civil Chamber of Lands Restitution, when deciding an order of protection, suspended the dismissal and ordered the President of the Republic to annul Decree 570 of March 20, 2014, and to comply with the precautionary measures granted by the IACHR.

94. On April 23, 2014, the President of the Republic issued Decree 797, voiding Decree 570 of March 20, 2014.⁵⁰

95. On May 13, 2014, the Chamber of the Contentious-Administrative of State Council, decreed the provisional suspension of the decisions of the Disciplinary Chamber of the Office of the Inspector General of the Nation of December 9, 2013, and January 13, 2014.⁵¹ In the decision, this Chamber of the State Council stated:

First. **DECREE** the PROVISIONAL SUSPENSION of the legal effects of the following administrative acts: 1.- Decision of sole instance issued by the Disciplinary Chamber of the Office of the Inspector General of the Nation of December 9, 2013, imposing a dismissal and general disqualification for 15 years on Mr. Gustavo Francisco Petro Urrego. 2.- Decision of January 13, 2014, issued by the Disciplinary Chamber of the Office of the Inspector General of

⁴⁶ Press article published at: eltiempo.com on January 15, 2014, [Petro se va por mal alcalde: Ordóñez \(Petro is out for being a bad Mayor: Ordóñez.\)](#)

⁴⁷ Inter-American Commission on Human Rights, Order 5/2014, Gustavo Francisco Petro Urrego (Colombia), Precautionary Measure No. 374-13, March 18, 2014.

⁴⁸ Decree Law 570 of March 20, 2014, issued by the President of the Republic Colombia.

⁴⁹ State Council, Contentious Administrative Chamber, Sub-section B, Decision of May 13, 2014.

⁵⁰ [Decree Law 797 of April 23, 2014 issued by the President of the Republic of Colombia.](#)

⁵¹ State Council, Contentious Administrative Chamber, Sub-section B, Decision of May 13, 2014.

the Nation, which decided not to reverse and, consequently, confirmed the decision of sole instance of December 9, 2013.⁵²

96. By virtue of said measure, the alleged victim was re-instated to his position as Mayor of Bogota. The Office of the Inspector General of the Nation filed an application for reconsideration against the decision of May 13, 2014. On March 17, 2015, the Plenary Chamber of the Contentious-Administrative of the State Council dismissed said application and confirmed the decision “that ordered the precautionary measure of provisional suspension of the administrative acts issued.”⁵³

97. To date, the request for nullification and the reversal petition has not been resolved.

E. About the second disciplinary proceeding

98. According to public information, on August 26, 2013, the Mayor of Bogota decreed the “exceptional modification of the urban regulations on the Guidelines of Territorial Planning of Bogota” through Decree 364.⁵⁴

99. He stated that, according to a Decree of 2004, the exceptional modification of the urban regulations on the Guidelines of Territorial Planning by the Municipal or District Mayor is possible as long as the reasons underlying the modifications are technically justified and demonstrated, and stated that the reasons that motivated the modification are: i) changes in the projection and composition of the population in Bogota; ii) the need to develop impact projects in the mobility of the city; iii) to integrate risk management and adaptation to climate change to territorial planning, incorporating the provisions of Law 1523 of 2012; iv) to harmonize rural land planning with national norms provided in Decree 3600 of 2007; and v) the simplification of regulations.⁵⁵

1. Disciplinary Charges

100. On September 26, 2013, a council member of the District of Bogota denounced the alleged victim before the Inspector General of the Nation asserting that he had exceeded his powers by issuing Decree 364. Later, the Regional Chamber of Construction of Bogota D.C. joined the complaint.⁵⁶

101. Based on this, the Office of the Inspector General of the Nation initiated a disciplinary proceeding against the alleged victim for irregularities committed during the issuance of the Decree on the Guidelines of Territorial Planning.⁵⁷

102. On August 10, 2015, the Office of the Inspector General of the Nation laid charges against the alleged victim because “he failed to comply with constitutional, legal, and regulatory norms imposing an obligation to comply with the decision of the District Council,” which denied his project.⁵⁸ Nevertheless, he

⁵² State Council, Contentious Administrative Chamber, Sub-section B, Decision of May 13, 2014.

⁵³ State Council, Plenary of Contentious Administrative Chamber, Decision of March 17, 2015.

⁵⁴ Decree Law 364 of August 26, 2013, issued by the Mayor of Bogotá.

⁵⁵ Decree Law 364 of August 26, 2013, issued by the Mayor of Bogotá.

⁵⁶ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁵⁷ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁵⁸ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017. He particularly mentioned five laws that had been violated: Article 313 of the Colombian Constitution, Article 12(5) of Decree Law 1421-1993, Article 26 of Law 388-1997, Article 12 of Law 810-2003 and Article 1 of Decree Law 2079-2003.

“decided to voluntarily issue Decree 364 [...]”⁵⁹ The charges were determined the conduct of the alleged victim to be a very serious offense for the degree of culpability, as he was the Mayor of Bogota and because they were of social importance given that “the use of land is an issue that affects “the general conglomerate.””⁶⁰

103. In the context of the proceedings, the alleged victim filed a series of requests for dismissal. He particularly stated that he had the power to issue Decree 364 pursuant to Article 12 of Law 810 of 2003, because on June 7, 2013, the Project of Agreement 118, which had proposed modifications to territorial planning, was “not approved.” He stated that the natural and obvious meaning must be given to the words “not approved” in Article 12 of Law 810 of 2003, i.e. it must mean “not agreeing with the project.”⁶¹ Likewise, he argued that there is no typical conduct, and that even though such classification is open in the disciplinary field, the existence of a disciplinary offense must be unequivocally stated, which had not occurred in this case, where there are other legal and reasonable interpretations of the norms invoked.⁶²

2. Suspension of Decree 364 by the State Council

104. On March 27, 2014, the Chamber of the Contentious-Administrative of the State Council decreed the provisional suspension of Decree 364, considering that, while the Mayor has the power to exceptionally modify the Guidelines of Territorial Planning, “this is only possible when the Council does not adopt any decision on the Agreement Project for revision, in the sense of approving or rejecting it in a timeframe of 90 calendar days, which did not happen *sub lite*, because, as seen, the Edilicea Corporation of Bogota decided against Agreement Project 118 of 2013, and, thus, the Mayor could not adopt it via a Decree.”⁶³

3. Sanctioning decision of sole instance

105. On June 27, 2016, the Inspector General of the Nation declared that “the stages within the disciplinary process” had been exhausted and issued a decision of sole instance deciding “TO SANCTION Mr. GUSTAVO FRANCISCO PETRO URREGO (...) for the serious offense, with malice, to TWELVE MONTHS OF SUSPENSION AND SPECIAL DISQUALIFICATION for the same period, in accordance with the considerations of this office.” Likewise, he decided “NOT TO RE-INSTATE the decision of March 30, 2016, which resolved a request for nullification by the representative of the disciplined, warning that administrative recourses cannot proceed against this decision.”⁶⁴

106. On the other hand, the Inspector General qualified the offense as serious, taking into consideration “the level of culpability,” and “the hierarchy and the position of the public servant,” as the District Mayor of Bogota, “which must generate in the administration an example of the compliance with the constitutional, legal, and regulatory provisions comprising the legal system,” as well as “the social transcendence of the offense,” referencing with respect to the latter “land use [...] that affects the collective in a general way.”⁶⁵ Thus, it decided to impose the sanction of twelve months of suspension from the position and

⁵⁹ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁶⁰ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁶¹ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁶² Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁶³ State Council, Administrative Chamber, Decision of March 27, 2014.

⁶⁴ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017.

⁶⁵ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017, p.78.

general disqualification for the same period “in accordance with the grading criteria contained in Article 47 of Law 734 of 2002” and taking into consideration the previous elements “that make part of the consideration of proportionality and reasonableness, taking as reference a minimum and maximum term to impose the sanction, under the terms of Article 46 of Law 734 of 2002, which prevents it from being less than 30 days and not more than 12 months.”⁶⁶

4. Adoption of Law 1864 of 2017

107. On August 17, the Congress of Colombia adopted Law 1864 that provides in article 5, the following:

Article 389 A. Illicit election of candidates. He/she who is elected for a position by popular vote while being disqualified from performing that position by a judicial, disciplinary, or fiscal decision shall be punishable by imprisonment for four (4) to nine (9) years and a fine from two hundred (200) to eight hundred (800) minimum legal salaries in force.⁶⁷

108. The Commission highlights that throughout the two disciplinary proceedings that imposed disqualifications, the alleged victim argued that the Inspector General of the Nation did not have the power to disqualify popularly elected officials, in accordance with Article 23 of the American Convention. Nonetheless, his arguments were dismissed, on the basis that the Constitutional Court has previously ruled that the power to disqualify was constitutional, taking into account national and international standards.

F. About the third proceeding for fiscal responsibility

109. According to public information, on July 23, 2012, the Mayor of Bogota issued Decree 356 establishing “the fare of the service of massive urban transportation of passengers of the Transmillennium System and the zoning component of the Integrated System of Public Transportation (SITP), in the Capital District.”⁶⁸ Said Decree reduced the amount of the fares collected by Transmillennium.⁶⁹

110. On June 27, 2016, the Director of Fiscal Responsibility and Co-active Jurisdiction of the Comptroller’s Office of Bogota D.C. (*Directora de Responsabilidad Fiscal y Jurisdicción Coactiva de la Contraloría de Bogotá D.C.*) issued Order 01, declaring Gustavo Francisco Petro Urrego’s fiscal responsibility for the reduction in fares received by the Transmilenio S.A., transportation company.⁷⁰

111. On July 15 and 16, counsel for the alleged victim filed a series of nullification requests against Order 01, all of which were dismissed on July 25, 2016. The alleged victim filed another nullification request on July 27, 2016, and this was dismissed on August 3, 2016. He also filed appeals for reconsideration against these decisions, which were dismissed on October 27, 2016. Finally, he appealed.

112. On November 29, 2016, the Comptroller of Bogota ruled against the appeals filed by the alleged victim and decided “TO CONFIRM in all its parts, the judgement of Fiscal responsibility No. 01 of June 27, 2016, in accordance with the elements presented in the *consideranda*”⁷¹ Said decision stated that “it is fully demonstrated that the generalized reduction in the fares resulted in a detriment to the patrimony in the

⁶⁶ Annex 3. Final Judgement of the Sole-Instance Disciplinary Chamber of the Office of the Nation’s Inspector General, June 27, 2016. Annex 3 to the additional observations from the petitioners on the merits of March 9, 2017, p.78.

⁶⁷ [Congress of the Republic of Colombia, Law 1864 of August 17, 2017.](#)

⁶⁸ [Decree Law 356- 2012 issued by the Mayor of Bogotá, D.C.](#)

⁶⁹ [Decree Law 356- 2012 issued by the Mayor of Bogotá, D.C.](#)

⁷⁰ Annex 4. Comptroller of Bogotá D.C, Order No. 4501 of November 29, 2016, p.1.

⁷¹ Annex 4. Order No. 4501 of November 29, 2016. Annex to the communication from the petitioners of March 13, 2017.

amount of \$217.204.847.989 for the transfer of funds from the Capital District through the Treasury Secretariat, to cover the difference in fares that resulted from the general reduction of said fares.”⁷²

113. On March 31, 2017, the petitioner filed a judicial action of nullification and reversal before the State Council, which remains unresolved at this time.⁷³

114. The Commission observes that Article 60 of Law 610 of 2000 provides that:

Bulletin of fiscally liable persons. [...] The legal representatives, as well as the designating individuals and other competent officers, shall refrain from naming, giving possession to, or concluding any type of contract with those who appear in the bulletin of fiscally liable persons, at the risk of committing the causal of bad conduct, in accordance with the provisions of Article 6 of Law 190 of 1995.⁷⁴

G. About the fine from the Superintendence of Industry and Commerce

115. In 2014, the Superintendence of Industry and Commerce fined Mr. Petro Urrego \$410.256.000.00 pesos; it also fined other individuals, the Water, Sewers, and Sanitation Company of Bogota (EAB), the Special Administrative Unit of Public Services (UAESP), and *Aguas de Bogota*, for “commercial activities that are restrict free competition in the market for sanitation services in Bogota.”⁷⁵

IV. LEGAL ANALYSIS

A. Political rights⁷⁶ in conjunction with Articles 1(1)⁷⁷ and 2⁷⁸ of the American Convention

1. General considerations

116. Article 23 of the American Convention recognizes and protects political participation through the right to active and passive suffrage, the latter understood as the right to run for elected office, and the establishment of an adequate electoral regime that considers the political process and the conditions in which that process unfolds, in order to ensure the effective exercise of that right without arbitrary or discriminatory exclusions.⁷⁹ Article 23(2) provides that the exercise of the rights can be regulated “only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”

⁷² Annex 4. Order No. 4501 of November 29, 2016. Annex to the communication from the petitioners of March 13, 2017.

⁷³ Observations from the petitioners of April 12, 2017.

⁷⁴ Congress of the Republic of Colombia, Law 610 of August 18, 2000.

⁷⁵ Annex 5. Order 53.788 from the Industry and Commerce Superintendence of September 3, 2014. Annex 2 to the communication from the petitioners of March 13, 2017.

⁷⁶ Article 23 of the American Convention states that: 1. Every citizen shall enjoy the following rights and opportunities: a) to take part in the conduct of public affairs, directly or through freely chosen representatives; b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c) to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

⁷⁷ Article 1(1) of the American Convention states that: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

⁷⁸ Article 2 of the American Convention states: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

⁷⁹ IACHR, Report No. 92/09, Case 12.668, Merits, Leopoldo López Mendoza, Venezuela, August 8, 2009, para.64.

117. The IACHR considers that the right to be elected to public office, as well as to fulfill the corresponding mandate, constitutes one of the essential attributes of political rights, because restrictions to said right must be aimed to protect the fundamental legal basis, therefore, these must be carefully and rigorously scrutinized. In a case, such as the present case, of a person elected to office by popular vote, it must be taken into consideration that a restriction on the right to active suffrage may not only affect the respective person but also the free expression of the people through universal suffrage.⁸⁰ Therefore, an arbitrary restriction of political rights that impacts on the right of a person to be elected by popular vote not only affects the rights of that person, it also implies a curtailment of the collective dimension of those rights, and, in sum, significantly influences the democratic system.

118. In relation to the collective dimension of restrictions on political rights, the European Court of Human Rights in *Paksas v. Lithuania* (concerning the ousting of a President of the Republic, and his later disqualification to become a member of Parliament), stated that:

In the Court's view, it is understandable that a State should consider a gross violation of the Constitution or a breach of the constitutional oath to be a particularly serious matter requiring firm action when committed by a person holding that office (...) [h]owever, that is not sufficient to persuade the Court that the applicant's permanent and irreversible disqualification from standing for election as a result of a general provision constitutes a proportionate response to the requirements of preserving the democratic order.

(...) Nevertheless, the decision to bar a senior official who has proved unfit for office from ever being a member of parliament in future is above all a matter for voters, who have the opportunity to choose at the polls whether to renew their trust in the person concerned.⁸¹

119. Both the Commission and the Inter-American Court ruled on the sanction of disqualification to hold elected office in light of Article 23 of the American Convention in the Case of *Lopez Mendoza v. Venezuela*.

120. In that case, the Inter-American Court analyzed Article 23(2) of the American Convention, particularly, the phrase "conviction by a competent court in criminal proceedings," concluding that restrictions on political rights must be based on the criteria of Article 23(2) of the Convention, and, therefore, that disqualification through an administrative procedure, instead of a criminal one, is prohibited by the American Convention.⁸² The Court stated that:

[W]hich is about a restriction imposed by way of a sanction, it should be about a "conviction by a competent court in criminal proceedings." None of these requirements have been fulfilled, given that the body that imposed the sanctions was not a "competent court," there was no "conviction," and the sanctions were not applied as a result of a "criminal proceeding," where the judicial guarantees enshrined in Article 8 of the American Convention should have been respected.

121. In its merits report in the same case, the Commission analyzed the sanction of disqualification in relation to the express meaning of Article 23(2) of the American Convention. It concluded that "imposing a disqualification from competing for popularly elected office for a period of time is, by nature, a criminal penalty and so the authority imposing it must be required to uphold certain procedural guarantees inherent to

⁸⁰ ECHR, Case of *Hirst v. The United Kingdom*, Grand Chamber, October 6, 2005, para.62; See also Article 3 of the Inter-American Democratic Charter.

⁸¹ ECHR, Case of *Paksas v. Lithuania*, Grand Chamber, Judgment of January 6, 2011, paras. 104-105.

⁸² I/A Court of H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, paras. 105 and following.

criminal proceedings, which are more strict than the guarantees of due process required in administrative procedures.”⁸³

122. The Commission understands that the requirement of a final criminal judgment can be explained because, if the disqualification of an officer is based on solely administrative offenses, which do not constitute a crime, this could prevent some individuals from holding public office. There are less injurious means to accomplish the objective, which must be assessed by fully taking into account, as stated by the European Court, that it is, in principle, the electorate in the democratic system who will be responsible for determining through their right of active suffrage who is a suitable candidate for public office. Disqualification for mere administrative offenses that do not constitute a crime does not satisfy the standard of proportionality, neither in the ranking of effect on political rights, both of the individual and of society as a whole, and it is especially significant in light of guaranteeing the suitability of candidates to hold public office where they may have committed administrative offenses of a certain gravity, by not reaching the level of a crime, that this cannot justify the intense effect on political rights in the terms explained.⁸⁴

123. In sum, both organs of the Inter-American System have reached the same conclusion in their analysis of Article 23(2) that there is a clear rule according to which the sanction of disqualification from being elected by popular vote must be imposed by a final criminal conviction, not through administrative procedures.

2. Analysis of the present case

124. In the present case, the Inspector General of the Nation imposed on the alleged victim a sanction of general disqualification from office for a period of 15 years on December 9, 2013, for signing an inter-administrative contract and for issuing Mayoral Decrees 564 and 570. Likewise, he imposed a new and special disqualification on June 27, 2016, for issuing Decree 4002, which modified the norms of the Guidelines of Territorial Planning. The Commission highlights that the Political Constitution grants disciplinary powers to the Office of the Inspector General of the Nation without expressly mentioning the possibility of imposing a sanction of disqualification. Said sanction is considered in the Single Disciplinary Code among the various sanctions that said entity can impose in the exercise of its disciplinary powers as provided by the constitution.

125. The IACHR observes that the disqualification of Mr. Petro Urrego was not imposed by a final decision of a criminal court as is required by the above-mentioned standards. Additionally, the authority is not the suitable one to impose a sanction of this nature, given that the disciplinary offenses that Mr. Petro Urrego may have committed did not constitute criminal offenses, and it is evident that the sanction of disqualification is incompatible with Article 23 of the American Convention as analyzed above. The Commission highlights that the sanctions of dismissal and disqualification were imposed on the alleged victim, then Mayor of Bogota and elected by popular vote, during his mandate. For the above reasons, the sanction of disqualification imposed on Mr. Petro Urrego constituted an arbitrary restriction and contravenes his political rights.

126. In addition to this conclusion, the Commission is profoundly concerned about the recent adoption of Article 5 of Law 1864, which imposes a prison sentence of 4-9 years on a person elected to office by popular vote while also disqualified due to a “judicial, administrative, or fiscal” decision. This norm, while validating that disqualification may be imposed by “disciplinary or fiscal” decision, contravenes Article 23 of the American Convention, and, therefore, as stated in the recommendations herein, would constitute another violation of the political rights of Mr. Petro Urrego, who has not been disqualified by a final decision of a criminal procedure as required by the Convention.

127. Finally, the Commission is cognizant that the main defense of the Colombian State relies on the prior decision of its Constitutional Court holding that the Inspector General of the Nation may disqualifies

⁸³ IACHR, Report No. 92/09, Case 12.668, Merits, Leopoldo López Mendoza, Venezuela, August 8, 2009, para. 91.

⁸⁴ In similar sense, see also expert witness report from Humberto Nogueira Alcalá in the López Mendoza v. Venezuela Case, p.

person through a disciplinary proceeding and that this is compatible with the American Convention. In this regard, the Commission recalls that the organs of the Inter-American system authoritatively interpret the American Convention, and thus may determine whether said judicial interpretation is in accordance with the Convention. In the present case, the decision of the Constitutional Court, invoking Article 23 of the Convention, is incompatible with said Article; both organs of the system concluded as much in *López Mendoza v. Venezuela*, and this is reaffirmed in the instant case.

128. By virtue of the above considerations, the IACHR concludes that the State of Colombia is responsible for the violation of Articles 23(1) and 23(2) of the American Convention in conjunction with Articles 1(1) and 2 of the same to the detriment of Gustavo Francisco Petro Urrego. Specifically, the violation of the obligation to adopt domestic legal measures is constituted by the entry into force and application to the case of the norms of the Single Disciplinary Code that vest the Office of the Inspector General of the Nation with the power to disqualify, as well as the recent criminalization of being elected while disqualified by a disciplinary or fiscal decision.

B. Right to a fair trial⁸⁵ and judicial protection⁸⁶

1. General considerations

129. The Commission recalls that both organs of the inter-American system have stated that the guarantees provided in Article 8 of the American Convention are not limited to criminal procedures, but also apply to other types of procedures.⁸⁷ Specifically, in relation to proceedings to determine sanctions, both organs of the system have stated that the guarantees provided in Article 8(2) of the American Convention apply.⁸⁸ Taking into consideration that in this case two disciplinary actions to disqualify, a sanction of dismissal, and two fiscal sanctions were imposed, it is evident that these were proceedings to determine sanctions, and, thus, the guarantees of due process apply, as provided in Article 8(2) of the American Convention. For the present case, the following rights become very relevant: the right to a disciplinary authority that is competent, independent and impartial; the principle of presumption of innocence; as well as the right to appeal the sanctioning judgment to a higher and/or judicial instance, in relation to the judicial protection. Next, the Commission shall provide some general considerations related to said guarantees.

130. The IACHR recalls that guarantees of independence, competence, and impartiality must be satisfied by authorities engaged in disciplinary proceedings, as it becomes a materially jurisdictional function and an essential assumption of due process, independent of whether the disciplinary authority is formally a tribunal.⁸⁹ In relation to the impartiality of a disciplinary authority, in accordance with the American

⁸⁵ Article 8 states in the relevant that: "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: h. the right to appeal the judgment to a higher court.

⁸⁶ Article 25 of the American Convention establishes in the relevant that: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁸⁷ IACHR, Report No. 65/11, Case 12.600, Merits, Hugo Quintana Coello *et al.*, "Supreme Court of Justice," Ecuador, March 31, 2011, para. 102; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 126-127; *Case of the Constitutional Tribunal v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, paras. 69-70; and *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C No. 233, para. 111.

⁸⁸ IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. September 7, 2007, paras. 98-123; and Case No. 12.828, Report 112/12, Marcel Granier *et al.*, Venezuela, Merits, November 9, 2012, para. 188; I/A Court of H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 126-127.

⁸⁹ IACHR, Guarantees for the Independence of Judicial Operators. Towards strengthening access to justice and the rule of law in the Americas. OEA/ser.L/V/II.Doc.44, December 5, 2013, para. 188.

Convention, this demands that the authority that intervenes approaches the facts free, in a subjective way, of all prejudice and, offering sufficient guarantees of objectiveness that permit the banishment of all doubts that justice or the community may have with regard to the absence of impartiality.⁹⁰ The impartiality of the court implies that its members do not have a direct interest, a pre-determined position, a preference for one of the parties, and they are not involved in the controversy.⁹¹ The European Court has explained that personal or subjective impartiality is presumed unless there evidence otherwise. For its part, the objective test consists in determining whether there are ascertainable facts which may raise doubts as to the judge's impartiality.⁹²

131. With regard to the right to appeal, the IACHR recalls that said right is part of due process of law in a disciplinary sanctions proceeding,⁹³ and is a guarantee whose purpose is to avoid miscarriage of justice becoming *res judicata*.⁹⁴ In relation to the scope of the right to appeal, both the IACHR and the Court have stated that this requires a review by a different and higher judge or court and on both issues of fact and law of the appealed decision.⁹⁵ The appeal must proceed before the judgment becomes *res judicata*, it must be resolved within a reasonable timeframe, it must be timely and effective, i.e. it must provide a result or answer as required. In addition, it must be accessible, without requiring major formalities, which could render the right illusory.⁹⁶

132. Finally, the IACHR recalls that the State has the general obligation to provide effective judicial remedies to persons alleging human rights violations (Article 25), which must be substantiated in accordance with the rules of due process of law (Article 8(1)). For the existence of an effective recourse it is not enough that it is established by law, it must be truly appropriate to determine whether there has been a violation of human rights and to provide everything necessary to remedy it.⁹⁷

2. Analysis of the present case

133. First, in relation to the guarantee of objective impartiality of the disciplinary authority, in the instant case there were two disciplinary proceedings that imposed the sanction of disqualification against the alleged victim, and in one his dismissal, and both the charges and sanctions were issued by the same organ. With regard to the first process, the charges were laid on June 20, 2013, by the Disciplinary Chamber of the Office of the Inspector General of the Nation and the decision to sanction was issued on December 9, 2013, by the same Disciplinary Chamber. With regard to the second process, the charges were made on August 10, 2015, by the Office of the Inspector General of the Nation and the decision to sanction was issued on June 27, 2016, by the Inspector General of the Nation.

134. The Commission observes that in the present case that the same body exercised in each proceeding the functions of both filing charges and later adopting a decision on the same. This is troublesome *vis-à-vis* the guarantee of impartiality, particularly from the perspective of objectiveness, because it implies that the disciplinary authority would first have an idea of the facts and the way in which they fit the specific

⁹⁰ IACHR, Guarantees for the Independence of Judicial Operators. Towards strengthening access to justice and the rule of law in the Americas. OEA/ser.L/V/II.Doc.44, December 5, 2013, para. 200.

⁹¹ IACHR, Report No. 103/13, Case 12.816, Merits, Adán Guillermo Lopez Lone *et. al.*, Honduras, November 5, 2013, para.136.

⁹² IACHR, Guarantees for the Independence of Judicial Operators. Towards strengthening access to justice and the rule of law in the Americas. OEA/ser.L/V/II.Doc.44, December 5, 2013, para. 200.

⁹³ IACHR, Guarantees for the Independence of Judicial Operators. Towards strengthening access to justice and the rule of law in the Americas. OEA/ser.L/V/II.Doc.44, December 5, 2013, para. 235.; I/A Court of H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 179.

⁹⁴ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein *et al.*, Costa Rica. April 4, 2014, para.186.

⁹⁵ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein *et al.*, Costa Rica. April 4, 2014, para.186.

⁹⁶ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein *et al.*, Costa Rica. April 4, 2014, para.186 and following.

⁹⁷ I/A Court, *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, paras. 125; I/A Court, *Case of Indigenous Community of Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 61; I/A Court, *Case of the "Five Pensioners."* Judgment of February 28, 2003. Series C No. 98, para. 136.

disciplinary proceeding. The applicable legislation determines that the disciplinary authority issues the charges when “the offense is objectively determined” and “there is evidence that compromises the responsibility of the defendant.” This means, evidently, that from the time that the Disciplinary Chamber of the Inspector’s Office formulated a statement of charges, it had already determined a position about the disciplinary liability of Mr. Petro Urrego. In light of said situation, the IACHR observes that these did not act in their materially jurisdictional function free from all prejudice and, consequently, impartially. The Commission observes that the design through which the same authority that files charges is the one that decides culpability, and the manner in which it operated in the present case, with the imposition of severe sanctions i.e., disqualification for 15 years and the dismissal of a popularly-elected Mayor, imposed a disproportionate burden on the defendant to demonstrate, to the same authority that filed the charges, that he did not commit the associated offenses. This also runs contrary to the principle of presumption of innocence applicable to all sanctions proceedings.

135. By virtue of the above, the IACHR concludes that the State of Colombia violated the right that a sanctioning decision is made by an impartial authority as well as the principle of the presumption of innocence.

136. Second, the Commission recalls that the alleged victim filed an appeal for reconsideration against the sanctions decision of December 9, 2013, the only recourse that proceeded against the judgement of sole instance issued by the Inspector General of the Nation as maximum disciplinary authority before the same became *res judicata*. Nonetheless, the Commission observes that said recourse, in accordance with the law, is solved by the same authority that imposed the sanction, as occurred in the present case where the Inspector General of the Nation denied the appeal. The Commission recalls that the right to appeal implies an examination by a different and superior authority, and therefore, the appeal for reconsideration does not satisfy one of the basic, minimum requirements of Article 8(2)(h).

137. On the other hand, the Commission observes that after the denial of the appeal for reconsideration, on March 31, 2014, the alleged victim filed a request for nullification and reversal of the administrative sanctioning act. Nonetheless, over three years and six months the action was filed, it has yet to be resolved.

138. The Commission recalls that to determine the fairness of a timeframe, Inter-American jurisprudence has elaborated four elements: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of the judicial authorities; and d) impairment of the legal situation of the person involved in the proceedings.⁹⁸ In relation to the first element, the Commission observes that the State did not justify the delay, demonstrating that the request of nullification and reversal was complex, and neither can that be determined from the case file. In relation to the second and third elements, the Commission highlights that since the action was filed over 3 years and 6 months have passed, and to-date, the Chamber has only “provisionally” suspended the sanctions decision. The Commission does not have information to demonstrate that the State Council has acted diligently to resolve the action, because, as stated, the State did not attempt to justify the delay. On the other hand, from the case file, there are no elements to indicate that the delay is attributable to Mr. Petro Urrego.

139. In relation to the fourth element, the Commission underscores that the delay had an impact on the juridical situation of the alleged victim, since the disqualifying sanction that was imposed would prevent him from exercising his right to passive suffrage as a presidential candidate in the elections of 2018 as, according to the petitioners, is his interest. This situation is not changed by the provisional suspension of the administrative sanction because Mr. Petro Urrego is still in a situation of uncertainty about the final result of his action, which could be rejected. This uncertainty impacts the possibility of initiating a presidential campaign, while the validity of disqualification sanctions remains pending a judicial decision. On the other hand, even if his participation were allowed, due to the criminal law amendment recently adopted, he could

⁹⁸ IACHR, Report No. 75/15, Case 12.923. Merits. Rocío San Miguel Sosa *et al.* Venezuela. October 28, 2015, para.200; I/A Court of H.R., *Case of Kawas Fernández v. Honduras*, Merits, Reparations and Costs. Judgment of April 3, 2009, Series C No. 196, para. 112.

commit the crime of “illicit election of candidates,” which carries a sentence of 4 to 9 years in prison and a fine of 200 to 800 minimum salaries, if he was elected and if the disqualification is validated by the State Council. The Commission highlights that the actions of the state to dismiss and disqualify the alleged victim are particularly grave, which requires a prompt response in light of this situation.

140. Even though the Commission has information indicating that some decisions of the State Council on nullification and reversal actions would permit integral revisions of sanctions decisions⁹⁹ issued by the Inspector General of the Nation, despite the presumption of legality cloaking administrative acts, the Commission observes that in the present case the alleged victim has not been guaranteed the right to appeal the judgment, because the appeal for reconsideration does not comply with the standards of law to appeal, and the request for nullification and reversal has not been resolved within a reasonable time so as to allow the IACHR to assess if it complies with the requirements of Article 8(2)(h) of the Convention. Additionally, as a consequence of the delay, in addition to rejection of the actions for protection, Mr. Petro Urrego has not had a simple, prompt, and effective recourse to protect him from the violations of due process asserted in his complaint.

141. By virtue of everything stated in this section, the Commission concludes that the State of Colombia is responsible for violation of the rights contained in Articles 8(1), 8(2)(h), and 25(1) of the American Convention in conjunction of Articles 1(1) and (2) of the same, to the detriment of Gustavo Francisco Urrego.

C. Right to equal protection¹⁰⁰ and right to judicial protection¹⁰¹

142. The Commission and the Court have stated that the principle of equality and non-discrimination constitutes a central and fundamental pillar of the Inter-American human rights system. Likewise, they have stated that this “entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.”¹⁰² The Court has stated that at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The whole juridical structure of national and international public order rests on it and it permeates the whole legal system.¹⁰³

143. In their jurisprudence, both the IACHR and the Court have made reference “abuse of power” as the mechanism through which legitimate resources of the administration of justice are used with non-declared and non-evident objectives that, at first sight, establish an “implicit” sanction with an aim different to that provided by law.¹⁰⁴ Under certain circumstances, abuse of power may constitute a violation of the principle of equality in cases of covert discrimination.¹⁰⁵ When alleging covert discrimination, some experts

⁹⁹ See, for example, State Council, Contentious Administrative Chamber, Decision on the annulment request in the case of Piedad Esneda Córdoba Ruiz, August 9, 2016, p.19; State Council, Contentious Administrative Chamber, Sub-section A, Decision on the annulment request in the case of Fabio Alonso Salazar Jaramillo, March 26, 2014.

¹⁰⁰ Article 24 of the American Convention states: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

¹⁰¹ Article 25 of the American Convention reads in the relevant part: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

¹⁰² I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 173 (5).

¹⁰³ Cfr. I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 101 and *Case of Espinoza González v. Peru*. Preliminary Objections, para. 216.

¹⁰⁴ IACHR, Claim before the Inter-American Court of Human Rights in the Case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz (“First Court of Administrative Disputes”) (Case12.489) v. Venezuela, November 29, 2006, para. 124.

¹⁰⁵ See, for example, IACHR, Report No. 75/15, Case 12.923. Merits. Rocío San Miguel Sosa *et. al.* Venezuela. October 28, 2015, paras. 148 and following; I/A Court H.R., *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293.

propose inverting traditional rules of evidence in three ways: 1) applying a presumption that discrimination exists where alleged. In other words, in these cases, there should not be a presumption of the legality of an administrative act; 2) imposing the burden of proof on the defendant to demonstrate that there was no discrimination; and 3) expanding the means of proof, such as the indications of the alleged discrimination, taking into consideration that in such cases it is incredibly difficult to obtain direct evidence.¹⁰⁶

144. The Commission recalls that the alleged victim argued during the domestic proceedings that the disciplinary actions against him by the Office of the Inspector General had a political and discriminatory motivation, and that the objective was to punish him for his political ideology; i.e., these proceedings had a covert purpose. The Commission additionally underscores that after the sanctioning decision of December 9, 2013, on December 31, 2013, the alleged victim requested evidence to demonstrate the selectiveness and covert purpose of the disciplinary proceedings, such as the number of disciplinary proceedings that were advanced by the issuance of decrees similar to those issued by the alleged victim and the type of sanctions imposed. Nonetheless, his requests for that evidence were rejected because of their “untimeliness.”

145. The Commission observes that the alleged selective and discriminatory application of the disciplinary powers based on the political affiliation of Mr. Petro Urrego would have materialized by imposing a disciplinary action on December 9, 2013, thus, the law should have allowed submitting new evidence about this matter after the sanction, either through the same administrative avenue or through a judicial recourse. The IACHR observes that the information that would have supported proof of said allegation is essentially in the power of the State.

146. Thus, in the present case, Mr. Petro Urrego did not have the evidence that would have allowed him to develop, at the administrative level, his allegation of discrimination; whilst through the judiciary, due to the delay already analyzed, he has not had a decision on this matter.

147. By virtue of the above, the Commission concludes that the State of Colombia violated the right enshrined in Article 25(1) of the American Convention in conjunction to Articles 24 and 1(1) of the same instrument to the detriment of Gustavo Francisco Petro Urrego.

V. CONCLUSIONS

148. The Commission concludes that the State of Colombia is responsible for violation of the rights to fair trial, political rights, equal protection, and judicial protection as provided by Articles 8(1), 8(2), 8(2)(h), 23(1), 23(2), and 25(1) of the American Convention in conjunction with the obligations established in Articles 24, 1(1), and 2 of the same instrument, to the detriment of Gustavo Francisco Petro Urrego.

VI. RECOMMENDATIONS

THE INTERAMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF COLOMBIA,

1. To annul the administrative sanctioning acts that imposed sanctions of disqualification on Mr. Gustavo Francisco Petro Urrego, so he may freely exercise his political rights, including the right to passive suffrage.

2. To integrally repair the violations of rights declared in the present report, including their material and immaterial aspects.

¹⁰⁶ See expert witness statement by Roberto Saba at the public hearing in the *Case of Rocío San Miguel et al. v. Venezuela* before the Inter-American Court of Human Rights.

3. To adapt its domestic legislation, in particular, the provisions of the Constitution and the Single Disciplinary Code, which allow respectively the power to dismiss and disqualify elected officials from the Inspector General's Office in the exercise of their disciplinary authority.

4. To adapt its criminal regulations to ensure that references to disciplinary or fiscal procedures are not included in the criminal offences related to the election of disqualified persons. In any case, the State must abstain from applying the criminal offense foreseen in article 5 of Law 1834 of 2017, taking into account the determinations on the unconventionality of the disciplinary or fiscal dismissal, without a final criminal conviction.

5. To adopt legislative or other measures necessary to ensure the impartiality of the disciplinary authority, in such a way that the authority that files the charges is not the same one called to decide disciplinary responsibility.

6. To adopt legislative or other measures necessary to guarantee the effective possibility to appeal disciplinary decisions before a different authority than the one that determined the disciplinary responsibility, ensuring an integral revision of the sanctioning decisions.

7. To adopt the necessary measures to ensure that the judicial requests of nullification and reversal are resolved within a reasonable time, including those within the direct jurisdiction of the State Council.