

OEA/Ser.L/V/II.168
Doc. 87
21 June 2018
Original: Spanish

REPORT No. 75/18
PETITION 442-07
REPORT ON ADMISSIBILITY

JOSÉ HUMBERTO GÓMEZ HERRERA *ET AL.*
COLOMBIA

Approved electronically by the Commission on June 21, 2018.

Cite as: IACHR, Report No. 75/18. Petition 442-07. Admissibility. José Humberto Gómez Herrera *et al.* Colombia. June 21, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	José Humberto Gómez Herrera and Lyda Esperanza Martin
Alleged victim:	José Humberto Gómez Herrera <i>et al.</i> ¹
State denounced:	Colombia ²
Rights invoked:	Articles 4 (life), 8 (fair trial), 11 (privacy), 14 (reply), 17 (family), 19 (rights of the child), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights ³ in conjunction with its Article 1(1) (obligation to respect the rights) and other international treaties ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	April 11, 2007
Additional information received at the stage of initial review:	April 27, 2007; April 30, 2009, and October 6, 2011
Notification of the petition to the State:	August 29, 2013
State's first response:	January 30, 2014
Additional observations from the petitioner:	February 8 and 18, April 4, May 27, June 3, July 2, September 4, October 24 and 28 and November 18, 2014; April 17 and 28, July 8 and December 2, 2015; February 8, March 14, and June 1, 2016; January 15, February 19, 20, 22, 25 and 26, 2018
Additional observations from the State:	February 4 and April 24, 2015

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited July 31, 1973)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 22 (movement and residence), 25 (judicial protection), and 26 (economic, social and cultural rights) of the Convention in relation to its Articles 1(1) (obligation to respect the rights) and 2 (domestic legal effects)

¹ The alleged victims are identified individually in an attachment. The initial petition included 88 alleged victims and their families; during the proceedings before the IACHR a total of 226 alleged victims and their family members were incorporated.

² In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the deliberations or decision in the instant matter.

³ Hereinafter "Convention" or "American Convention."

⁴ Article 11 of the International Covenant on Economic, Social and Cultural Rights.

⁵ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of section VI
Timeliness of the petition:	Yes, in the terms of section VI

V. ALLEGED FACTS

1. The petitioners file the petition, in representation of 226 alleged victims and their families. They indicate that they are persons from several regions of Colombia who, due to the armed conflict, had to displace to Bogotá to safeguard their lives. They argue that in response to the refusal of the state authorities to provide protection and assistance, on December 14, 1999, they were among the 500 displaced families that occupied the facilities of the International Committee of the Red Cross (ICRC) for the purpose of securing a dialogue with the authorities. They note that said group of families included pregnant women, children, adolescents, and older adults. They indicate that after weeks in extremely precarious conditions and overcrowding, without having access to hospitals or schools, the Ombudsperson (Defensor del Pueblo) filed a *tutela* action (motion for constitutional protection) to obtain immediate protection for the fundamental rights of 208 of the displaced families who participated in the occupation.

2. They state that the *tutela* action was rejected by the 37th Criminal Judge of the Bogotá Circuit on March 24, 2000. They indicate, however, that the court expressly recognized that the children were suffering from a nutritional deficit, that they lived in very precarious conditions, and that they had physical and psychological impacts. They indicate that the denial was upheld by the Criminal Chamber of the Superior Court of Bogotá on May 16, 2000, a resolution that was reviewed on November 27, 2000 by the Constitutional Court, which granted the *tutela* by judgment T-1635-00. In that judgment the Court declared that the omission on the part of the public authorities had violated several constitutional rights of the persons included in the *tutela*, ordering the President of the Republic and several authorities that within 30 days they should come up with a definitive, effective, and peaceful solution to the situation created by the occupation of the ICRC. The judgment ordered the authorities to relocate the families and address their needs for food, work, clothing, health care, housing, and education. They indicate that in carrying out what was ordered by the Court, on January 29, 2001, the state authorities presented them an “institutional offer” consisting of the payment of up to \$762,547 Colombian pesos (approximately US\$ 331.54 at the time) per family in humanitarian aid, payments that were arbitrarily halted on August 21, 2001.

3. They indicate that they did not receive effective housing solutions, as they were pressured by officials of the Government to receive insufficient subsidies from the former Colombian Institute of Housing and Social Interest and Urban Reform (INURBE), which is now the National Housing Fund, for the sum of \$7,150,000 Colombian pesos (approximately US\$ 3,108.69 at the time), under threats that the supplemental benefits included in the “institutional offer” would be suspended. They explain that at least three of the beneficiary families had their benefits revoked because they had not accepted it. They argue that the INURBE demanded a series of additional requirements for the acquisition of properties through the subsidy; they indicate that the properties had to be free of any lien, had to be situated in safe and legalized zones, and the transfer had to be made on one’s own by the seller. They argue that those requirements together with the meager amount of the subsidy made it impossible for them to purchase dignified housing in the terms ordered by the Constitutional Court. They add that they were coerced to take out loans from the Land Bank (Banco Agrario) for \$3,600,000 Colombia pesos (approximately US\$1,565.22 at the time), which were delivered in installments and in some cases were not delivered in their entirety. They argue that those loans were granted to initiate productive projects without performing appropriate feasibility studies of the business undertakings in question, and therefore only generated additional debts.

4. The petitioners argue that even though the Constitutional Court ordered that a peaceful exit from the former headquarters of the ICRC headquarters be agreed upon, on December 21, 2002 more than 3,000 police agents raided the facility, attacking and evicting the occupying families. They indicate that after the filing of seven motions for contempt (*incidentes de desacato*) before the 37th Court for failure to enforce Judgment T-1635-00. They indicate that the Court, after denying the request to hold hearings and according value exclusively to the reports of the state agencies, rejected the motions, arguing that the alleged victims

received final solutions. The last rejection was issued on June 1, 2005, and the petitioners assert that these were unappealable rulings.

5. In addition, the petitioners filed several complaints with the Office of the Attorney General for fraud in a judicial ruling, joined under numbers 5829 and 707926. They argue that the prosecutor in charge refrained from pursuing the investigations, decisions that were appealed in timely fashion and, after the decisions were confirmed by the Attorney General, the complaints were archived, the last of them by ruling of February 23, 2004. In respect to those results, they filed a *tutela* action against the 37th Court, the Office of the Procurator General (Procuraduría), the Office of the Ombudsperson (Defensoría) and the Office of the Attorney General (Fiscalía), which was rejected by the Superior Court of the Judicial District of Bogotá on May 2, 2006. This decision was appealed before the Chamber of Criminal Cassation of the Supreme Court of Justice, which ruled against them on August 15, 2006. They state that on September 29, 2006, the Constitutional Court decided not to review the *tutela* action that was dismissed, thus on October 12 and 31, 2006, they filed motions of insistence and petition, the last of these dismissed on December 12, 2006. The petitioners emphasize that due to the failure to enforce Judgment T-1635-00, they live in unsafe areas lacking in basic services, they are threatened and assaulted where they have been placed, the debts they have taken on with the Land Bank (Banco Agrario) continue to grow, and some of the alleged victims have been attached and their scant property auctioned off. Based on the foregoing, the petitioners argue that the actions of the State constitute a violation of the rights to life, due process, honor and dignity, rectification, the family, the rights of the child, equality before the law, and judicial protection.

6. They also indicate that in the wake of a complaint filed by them on April 18, 2007, the Constitutional Court handed down Judgment C-278-07, which expanded the time limit for delivering humanitarian assistance to the displaced population. The petitioners argue that in the wake of this judgment, the harassment of and threats against their leaders increased, especially through intimidating communications, efforts to carry out false searches by officials of the Departamento Administrativo de Seguridad (DAS). The petitioner presented documentation on complaints made to the Office of the Attorney General for threats suffered by José Sayas Jiménez, which were archived, the last on September 29, 2014. They also argue that Víctor Manuel Ochoa Martínez, who was a leader of the occupation and whose family was a beneficiary of Judgment T-1635-00, received continuous threats, which they denounced to the authorities, who refused to provide him protection. They indicate that Mr. Víctor Ochoa was assassinated in the presence of his family on August 2, 2006. They argue that although the authorities characterized his death as a violent homicide as a result of his work as a leader of the displaced population, an investigation continues on the part of the Office of the 47th Prosecutor of Bogotá. They argue that for years they have denounced these unlawful acts to the Ministry of Interior, the National Police, the Ministry of Defense, and the Department of Social Action without any measures of protection being adopted, and to date no one has been held criminally liable. Finally, with respect to the request of the State for the petitioners to identify individually all the alleged victims and members of their family groups, they argue that while they have made an effort to provide as much information as is at their disposal, it is the State that has that information, especially the Unit for Attention and Integral Reparation for Victims of the Violence.

7. Similarly, they indicate that they have filed, on May 16, 2016, an application (acción de petición) before the National Agency for the Legal Defense of the State requesting its intervention before the National Housing Fund so that the alleged victims characterized by that institution and benefited by Judgment T-1635-00 may accede to a housing solution, a petition with respect to which they had not obtained any response. In addition, they allege that the Constitutional Court, in response to the requests transmitted by the directors of the Victims Unit and the National Agency for the Legal Defense of the State, had resolved by order of April 28, 2017, to urge all the judges of the Republic, in matters of administrative compensation for victims of displacement, to refrain from giving orders related to economic recognition, and to suspend the procedures and lift the sanctions for contempt, which were ordered in the wake of the *tutela* actions that have protected the rights of the victims of violence. Finally, they report that during the processing of this petition several applications (acciones de petición) have been filed with the Procurator General of the Republic, who, in keeping with Judgment T-1635-00, should be entrusted with overseeing compliance with what was ordered. They indicate that on not obtaining an adequate response they filed a *tutela* for violations of their rights to

petition, due process, and access to the administration of justice; that *tutela* action was dismissed by the Administrative Tribunal of Cundinamarca on February 19, 2018.

8. For its part, the State argues that the actions carried out to ensure the eviction from the offices of the ICRC were aimed at recovering the organization's building so as to guarantee the integrity of the headquarters and its staff. It states that it took the corresponding measures for humanitarian assistance, re-establishment of socioeconomic conditions, support for transportation, productive projects and loans from the Land Bank (Banco Agrario), and a housing subsidy, favoring each beneficiary of Judgment T-1635-00. It states that the alleged failure to enforce the judgment of the Constitutional Court was duly evaluated and ruled upon within the constitutional jurisdiction on two different occasions. It notes that the Chamber for Criminal Decision of the Superior Court of the Judicial District of Bogotá and the Chamber for Criminal Cassation of the Supreme Court of Justice concluded that the State made an effort to pay the emoluments to carry out the commitments of humanitarian assistance, thus, if the petition were admitted, the Commission would be sitting as a court of fourth instance. It adds that if the petitioners considered that the benefits were insufficient, they should have filed the relevant administrative or judicial actions, with which the responsibility of the State is excused. In addition, it requests a detailed individual identification of all the alleged victims and not only of the representatives of each family.

9. With respect to the death of Víctor Ochoa, the State considers that this addition is not related to the petition and asks that the matter be separated from this one. Finally, with respect to the criminal proceedings and as regards the criminal complaints that the alleged victims had attempted to bring for fraud upon a judicial order in the face of the failure to enforce Judgment T-1635-00, the State argues, in general terms, that based on the documents attached by the petitioners it is not possible to clearly establish whether domestic remedies were exhausted.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. The petitioners alleged that they pursued the following remedies against the failure to enforce Judgment T-1635-00 of the Constitutional Court, of November 27, 2000: (1) several criminal complaints for fraud upon a judicial order, which were archived by the Office of the Attorney General from 2002 to 2005; (2) seven contempt motions (*incidentes de desacato*) before the 37th Court, which were dismissed, the last one on June 1, 2005; and (3) a *tutela* action, dismissed on May 2, 2006, by the Superior Court of Bogotá. This last decision was challenged and on August 15, 2006, the Supreme Court of Justice upheld the dismissal and referred the case to the Constitutional Court, which on September 29, 2006, decided not to select the judgment for review. In response to this decision, the petitioners filed various motions of insistence, all of which were dismissed, the last reported on December 12, 2006; with which the petitioners considered domestic remedies exhausted as of that date. They state that the alleged acts of harassment and threats were reported to the Ministry of Interior, the National Police, the Ministry of Defense, and the Department of Social Action; the response obtained in April and May 2011 was that the facts were being investigated by the competent authorities. They add that during the processing of the instant petition, they have taken several actions before the Office of the Procurator General of the Republic and filed a *tutela* action, which was dismissed by the Administrative Tribunal of Cundinamarca on February 19, 2018. The State argues that if the petitioners considered that the benefits granted were insufficient they should have initiated the relevant administrative and judicial actions. They argue that according to the information produced by the petitioners, it cannot be established whether they have exhausted domestic remedies in the form of criminal proceedings

11. With respect to the alleged failure to enforce Judgment T-1635-00, for the purposes of the exhaustion analysis, the Commission distinguishes two groups of alleged victims: (1) beneficiaries of Judgment T-1635-00⁶ and subsequent orders; and (2) occupants of the ICRC headquarters who were not expressly included in that judgment, some due to the fact that they were not included – in allegedly arbitrary fashion – in the Single Registry of Victims.⁷ With respect to the first group, the IACHR concludes that the

⁶ Alleged victims identified in Annex 1.

⁷ Alleged victims identified in Annex 2.

suitable remedies were exhausted with the filing of the motion of insistence (*recurso de insistencia*) the Constitutional Court, notice of the dismissal of which was made on December 12, 2006. Since the petition was filed on April 11, 2007, the Commission concludes that it meets the requirement of Article 46(1)(b) of the Convention. With respect to the second group the IACHR, with special attention to the context of vulnerability⁸ in which one finds the alleged victims of forced displacement, considers that the exception enshrined in Article 46(2)(b) of the Convention applies. In this regard, the Commission observes that the alleged violations of rights that the alleged victims consider stem from the failure to enforce Judgment T-1635-00 were brought to the attention of the state authorities in various judicial forums, giving the State the opportunity to remedy the alleged violations of human rights.

12. As regards the violations reported as a result of the alleged violent eviction, followed by threats and harassment directed against the alleged victims, as well as the reported homicide of Víctor Manuel Ochoa Martínez, the IACHR observes that the alleged victims report having denounced the unlawful acts repeatedly before different authorities. Nonetheless, from the information provided by the parties, it does not appear that to date the facts have been clarified nor have the persons responsible been prosecuted. In this connection, the Commission considers that an unwarranted delay has been verified in the investigation of a crime that by law must be pursued at the initiative of the prosecutorial authorities⁹, thus the exception to the requirement of prior exhaustion of domestic remedies set out at Article 46(2)(c) of the Convention.

13. In the instant case the petition was received on April 11, 2007; the facts that are the subject of the claim began December 14, 1999; and the effects of the facts that are the subject matter of the claim are said to extend to the present day, thus the IACHR concludes that the petition was filed within a reasonable time and deems satisfied the requirement at Article 32(2) of the Rules of Procedure.

14. As regards the arguments of the State in relation to the relation to dividing the petition, the Commission observes that the petition concerns the failure to enforce the decision of the Constitutional Court, and in the context of demanding its enforcement, the beneficiaries allegedly suffered persecution because of their work, a situation with respect to which the State has not taken a position. Therefore, the IACHR concludes that the petition does not meet the requirements established at Article 29(4) of its Rules of Procedure, thus it is not in order to divide the petition, as requested by the State.

VII. ANALYSIS OF COLORABLE CLAIM

15. In view of the elements of fact and law presented by the petitioners and the nature of the matter put before it for its consideration, the IACHR considers that, if proven, the arguments regarding the failure to enforce Judgment T-1635-00 and the effects thereof tend to establish possible violations of the rights protected at Articles 5 (humane treatment), 8 (fair trial), 19 (rights of the child), 22 (movement and residence), 25 (judicial protection), and 26 (economic, social and cultural rights) of the Convention, in relation to Articles 1(1) and 2 of the same instrument. Bearing in mind that Article 26 of the Convention makes a general reference to economic, social and cultural rights, and that these must be determined in connection with the OAS Charter, the Commission considers that in cases where a possible violation of said Article is identified, it will be appropriate to use those instruments in the merits stage in the matter applicable to the State concerned.

16. Moreover, the alleged acts of violence, harassment, and threats perpetrated against the petitioners, and especially the assassination of Víctor Manuel Ochoa Martínez, as well as the lack of an appropriate investigation, if proven, tend to establish possible violations of articles 4 (right to life), 5 (right to humane treatment), 8 (fair trial), and 25 (judicial protection) of the Convention, in relation to its Article 1(1).

17. As regards the petitioners' claim regarding the alleged violation of Articles 11 (honor and dignity), 14 (reply) and 24 (equal protection) of the American Convention, the Commission observes that the

⁸ IACHR, Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia, 2013, para. 553.

⁹ IACHR, Report No. 65/15, Petition 1511/2009, Admissibility, Hollman Morris and family, October 27, 2015, para. 39.

petitioners do not offer arguments or support for their alleged violation, thus there is no need to declare that claim admissible. Given that the allegations referring to the affectation of families will be analyzed within the framework of Article 5, the Commission observes that the petitioners have not offered information that would allow identifying a specific or autonomous content to consider *prima facie* the possible violation of Article 17 (family) of the Convention. With respect to Article 11 of the International Covenant on Economic, Social and Cultural Rights, as per Article 29 of the American Convention, the Commission may consider it for interpreting and applying the American Convention.

18. Finally, with respect to the State's argument regarding the fourth instance formula, the Commission observes that on admitting this petition it does not seek to supplant the jurisdiction of the domestic judicial authorities. The IACHR will analyze, in the merits phase of this petition, whether the domestic judicial proceedings complied with the guarantees of due process and judicial protection; and it offered the guarantees of access to justice to the petitioners in the terms of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 19, 22, 25 and 26 of the American Convention in keeping with Articles 1(1) and 2 of the same instrument;

2. To find the instant petition inadmissible in relation to Articles 11, 14, 17 and 24 of the American Convention; and

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

Approved by the Inter-American Commission on Human Rights on the 21st day of the month of June, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.