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REPORT No. 387/20
PETITION 1361-10
REPORT ON ADMISSIBILITY

GONZALO GUILLEN JIMENEZ
COLOMBIA

Approved by the Commission electronically on September 28, 2020.

Cite as: IACHR, Report No. 387/20. Petition 1361-10. Admissibility. Gonzalo Guillen Jimenez.
Colombia. September 28, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Gonzalo Guillen Jimenez
Alleged victim:	Gonzalo Guillen Jimenez
Respondent State:	Colombia
Rights invoked:	Articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention on Human Rights ¹ , in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	September 27, 2010
Notification of the petition to the State:	July 20, 2017
State's first response:	December 5, 2017
Additional observations from the petitioner:	July 15, 2018
Notification of the possible archiving of the petition:	October 13, 2018
Petitioner's response to the notification regarding the possible archiving of the petition:	December 17, 2018

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 on July 31, 1973)

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

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on April 26, 2010
Timeliness of the petition:	Yes

V. FACTS ALLEGED

1. Mr. Gonzalo Guillen Jimenez, practicing journalist and overseer citizen, resorts to the IACHR alleging the international responsibility of the Colombian State for disregarding his right of access to information, insofar as he has not been able to obtain a copy of the of the personal tax reports of the former

¹ Hereinafter, the "Convention" or the "American Convention."

² The observations submitted by each party were duly transmitted to the opposing party.

President of the Republic, Alvaro Uribe Velez, in spite of having filed for rights of access to information to obtain them and of having resorted to a *tutela* action (*amparo*).

2. Mr. Guillén explains that on November 26, 2008, a statement made by then-President Alvaro Uribe was published on the website of the Presidency of the Republic, announcing that he would provide all of his personal tax returns, as well as those of his sons, to the Attorney-General of the Nation (*Procurador General de la Nación*). In view of this statement, on April 28, 2009, Mr. Guillén filed a right of access to information before the President requesting the issuance of copies of his tax returns, and those of his sons, corresponding to the years during which he was President. However, in a communication dated May 5, 2009, the Legal Secretary of the Presidency indicated that the promise made by Alvaro Uribe was to deliver the information to the Attorney General the Nation, and not to any person, given the legal reserve that protects tax returns in the country. In this line, on September 12, Mr. Guillén filed a right of access to information on this subject before the Attorney General's Office, requesting the issuance of copies of the tax returns of President Uribe and those of his sons, and invoking the response provided by the Legal Secretariat of the Presidency. By means of a communication dated September 29, 2009, the Deputy Attorney for Constitutional Affairs replied informing him that Mr. Uribe's tax returns had effectively been received at the Attorney General's Office on November 28, 2008, but that since control over the President of the Republic or his sons is not included within the scope of this authority's competence, the documents were returned. At this point, Mr. Guillén filed a new right of access to information before the Presidency, inquiring about the purpose of making a public promise to deliver tax returns to the Attorney General's Office if the latter lacked competence, and also requesting the Presidency to indicate the competent authority to handle such information. The Legal Secretary of the Presidency replied indicating that his first inquiry had already been solved in the initial response; and that the authority with competence to evaluate tax returns was the Directorate of Taxes and Customs of the Ministry of Finance and Public Credit. Mr. Guillén claims that by then it had become evident that there was no intention of making such information public; and he recalls that his interest in having access to it was due to his dual capacity as public overseer and journalist, which implied the legal responsibility of informing the public and carrying out a the civic monitoring and surveillance of the public administration.

3. Given the negative responses obtained by his requests to access this information, Mr. Guillén filed a *tutela* action against the Presidency of the Republic on December 7, 2009 seeking the protection of his fundamental rights to petition and of access to information. By means of a judgment of January 19, 2010, the Civil Municipal Court No. 39 dismissed his claims, in considering that his constitutional right to petition had not been violated because his requests had been responded -Mr. Guillen challenges this decision and states that his requests were evaded in a disrespectful way-. The judge also considered that his right of access to information had not been violated given that President Uribe's tax information was not public in nature, but rather formed part of his personal and private sphere. This ruling was appealed, and the Circuit Civil Judge upheld it, in a judgment whose date is not specified by the parties. The casefile was sent to the Constitutional Court for eventual review, but the Court decided not to select it. This decision was published on the court notice board on April 26, 2010.

4. Mr. Guillén alleges that these actions violated his right of access to information of public interest regarding the highest-ranking public official of the country, as well as his right to judicial protection, given that the executive authorities responded his requests in an evasive manner, and that the judges who heard the *tutela* actions abstained from protecting his right to information without analyzing the evasive content of the answers to his petitions, "*that is to say, tolerating and validating the behavior of those who disrespectfully violated my constitutional right to petition and consequently my right to freedom of expression, generating a total lack of judicial protection.*" As a form or reparation, he requests the IACHR order the Colombian State to make the tax returns of Mr. Uribe Vélez public, as well as other reparation measures.

5. In its response, the State requests that the petition be declared inadmissible because, in its view, it is manifestly groundless, it does not describe facts that characterize possible violations of the American Convention, and in any case, the petitioner's claims call for the IACHR to act as a "fourth instance". As for the manifestly groundless nature of the petition, the State holds that it is not true that the judge of first instance hearing the *tutela* action limited himself to declare that the right of access to information had been answered without delving into the merits of the matter, given that the judgment did indeed rule on the issue of access to

information, and classified Alvaro Uribe's tax returns as documents pertaining to his personal sphere, and not as public information. In this line, the State holds that "*given that the petitioner's allegations are based on mistaken factual assessments, the instant petition lacks sufficient seriousness to be analyzed.*"

6. With regard to the lack of characterization of violations of the American Convention, the State affirms that the alleged lack of delivery of the tax returns to Mr. Guillén, as well as the lack of fulfillment of the promise to send such tax returns for monitoring to the Attorney General of the Nation, even if proven in their occurrence, would not characterize violations of the right to freedom of expression, given that: (a) the right to know the tax returns of the Presidents of the States Parties does not stem from Article 13 of the American Convention, nor is there any ruling by the inter-American Human Rights System indicating that this type of information is public and that citizens can have access to it. The State claims that "*the petitioner effectively does not invoke any legal source that may establish that this information is public,*" but rather on the contrary, the State's interpretation of some of the judgments of the Inter-American Court would indicate that it is not public information; moreover, this is tax information which is confidential under domestic law. (b) On the other hand, the information requested was not in any way related to the fulfillment of the functions of a State organ, but rather "*the petitioner's purpose was to receive personal information about the President of the Republic and his family.*" (c) In addition, "*even if the groundless hypothesis by which the statements of President Uribe created an 'appearance of transparency' is accepted, such fact does not amount to a violation of the rights enshrined in the American Convention. In fact, the mere creation of an 'appearance of transparency' related to the provision of personal information by a public officer does not represent an internationally wrongful act.*"

7. Lastly, as regards the configuration of an international "fourth instance formula," the State argues that the Colombian judges hearing the *tutela* action have already ruled in a definitive, substantial and justified manner on the issue of access to information presented by the petitioner, for which reason the IACHR lacks competence to review their decisions, in relation to which no violations of due process or denial of justice have been alleged.

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

8. The IACHR notes that the claim made by the petitioner refers to the lack of access to information that he considers to be of public interest, and to the lack of judicial protection that such right received. The IACHR also notes that after filing three rights of access to information before administrative authorities, Mr. Guillén resorted to a judicial action in order to request the protection of his constitutional rights to petition and of access to information, namely, the *tutela* action, which is a modality of the *amparo* action, and therefore has been regarded in the past by the IACHR as an effective remedy within the Colombian legal system to achieve such purpose of protecting infringed fundamental rights³. Consequently, the IACHR considers that Mr. Guillén effectively activated the domestic legal channel that was appropriate to hear his claim. Said *tutela* action was denied in first and second instance, and the Constitutional Court expressly decided not to select the judgments for review, for which reason the IACHR considers that this judicial channel was duly exhausted once the decision of such high court became firm. The State does not challenge the exhaustion of domestic remedies.

9. The Constitutional Court's decision to not select the judgment was notified on April 26, 2010, and the petition was received at the Executive Secretariat of the IACHR on September 27, 2010, in compliance with the six-month period established in Article 46.1.b) of the American Convention.

³ IACHR, Report No. 126/19. Admissibility. Eduardo Enrique Dávila Armenta. Colombia. August 2, 2019, par. 13; Report No. 108/19. Petition 81-09. Admissibility. Anael Fidel Sanjuanelo Polo and family. Colombia. July 28, 2019, par. 11, 14; Report No. 121/17. Petition 70-07. Admissibility. José Fernando Montoro Alvarado. Peru. September 7, 2017, par. 10.

VII. ANALYSIS OF COLORABLE CLAIM

10. The State alleges that the petition is manifestly groundless given that it is based on false factual grounds, namely, the argument by which the judges hearing the *tutela* action did not resolve the merits of the matter presented by the petitioner. However, after analyzing the petitioner's position, the IACHR finds that the object of his claim does not refer to the way in which his right of access to information was resolved, nor to the way in which the judges hearing the *tutela* action ruled on the matter, but rather to the impossibility of having access to certain information that he considers to be of public interest, and to which he claims he has the right of access as a journalist and overseer citizen. Mr. Guillén's claim is not for the IACHR to review the sense, the grounds nor the arguments expressed in the decisions of the judges hearing the *tutela* action that denied the protection of his allegedly violated right of access to information -which the State refers to as a "fourth instance" claim-. He asks the Commission to declare that such right of access to information of public interest was disregarded by depriving him of having access to the tax information of former President Alvaro Uribe.

11. The State has also indicated that the petition does not set forth possible violations of the Convention, because in its opinion, public access to the tax information of the President of the Republic is not part of the right to freedom of expression protected by the American Convention, given that such information is classified by the Colombian domestic legislation as confidential, and it had no relation to the performance of public functions. However, in this regard, the IACHR recalls that at the admissibility stage the Commission applies a *prima facie* evaluation criterion, which in this sense differs from the criterion applied at the merits stage of the proceedings. This determination about a colorable claim of violations of the American Convention constitutes a primary analysis that does not imply a prejudgment of the merits of the matter⁴.

12. In view of these considerations, and after examining the legal and factual elements submitted by the parties, the Commission considers that the petitioner's allegations are not manifestly groundless and require a study on the merits, because the alleged facts, should they be corroborated, could characterize violations of Articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention, in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 13 and 25 of the American Convention in connection with Articles 1.1 and 2 thereof; and

2. 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 28th day of the month of September, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.

⁴ IACHR, Report No. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, par. 48.