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**REPORT No. 108/17**  
**PETITION 562-08**  
REPORT ON ADMISSIBILITY

PEDRO HERBER RODRÍGUEZ CÁRDENAS  
COLOMBIA

Approved by the Commission at its session No. 2098 held on September 7, 2017.  
164<sup>th</sup> Special Period of Sessions.

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**PETITION 562-08**  
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 SEPTEMBER 7, 2017

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Pedro Herber Rodríguez Cárdenas
<b>Alleged victim:</b>	Pedro Herber Rodríguez Cárdenas
<b>State denounced:</b>	Colombia
<b>Rights invoked:</b>	Articles 5 (Humane Treatment), 8 (Fair Trial), 11 (Privacy), 17 (Rights of the Family), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention on Human Rights; <sup>2</sup> Article 6 (Work) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; <sup>3</sup> and several articles of the American Declaration of the Rights and Duties of Man <sup>4</sup>

**II. PROCEDURE BEFORE THE IACHR<sup>5</sup>**

<b>Date on which the petition was received:</b>	May 7, 2008
<b>Additional information received at the initial study stage:</b>	May 16, 2008
<b>Date on which the petition was transmitted to the State:</b>	January 27, 2014
<b>Date of the State's first response:</b>	May 31, 2014
<b>Additional observations from the petitioning party:</b>	July 3 and 7, 2014; March 3, 2015
<b>Additional observations from the State:</b>	January 23, 2015

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (the instrument of ratification was deposited on July 31, 1973) and American Declaration (the OAS Charter was ratified on December 13, 1951)

<sup>1</sup> In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not participate in the discussion or the decision on this matter.

<sup>2</sup> Hereinafter "Convention" or "American Convention."

<sup>3</sup> Hereinafter "Protocol of San Salvador."

<sup>4</sup> Hereinafter "Declaration" or "American Declaration."

<sup>5</sup> The observations presented by each party were duly transmitted to the opposing party.

**IV. ANALYSIS OF 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 5 (Humane Treatment), 8 (Fair Trial), 24 (Equal Protection), 25 (Judicial Protection) and 26 (Progressive Development) of the American Convention, in relation to its Articles 1 and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; under the terms of Section VI
Timeliness of the petition:	Yes; under the terms of Section VI

**V. ALLEGED FACTS**

1. The petitioner indicates that on August 8, 1987, when he was a lieutenant of the National Police in the municipality of *Támesis (Antioquia)*, he suffered an injury to his spinal cord during a clash with the FARC, as a result of which he had to undergo surgery. He alleges that in view of his health condition, it was ordered he be relocated in administrative posts, but that as this order was disobeyed, he had to continue performing operational duties. In 1990 and 1998, he suffered two other injuries and his spinal cord was compromised (neck injury C1-C2-C3-C4), which caused him major mobility impairments, permanent functional damages and severe pains. He asserts that on June 16, 1998, while hospitalized in “*Nuestra Señora de Los Remedios*” clinic in Cali and in very bad health due to the recent injury, he was notified of Decree 1048, by which his dismissal from the National Police was ordered as of June 10, 1998, due to purported irregularities in the service.

2. The petitioner submits that by the time of the facts it was only two months since he had been working in Cali and that after surgery, he moved back to his home in Bogota, where his family was living. He indicates that he requested to have his clinical records transferred from Cali to Bogota in view of his inability to afford transportation every fifteen days to Cali for postoperative follow-up sessions, in addition to the serious risks of such trips. He claims that the Police denied said request, and that he was therefore unable to timely start his physiotherapy and rehabilitation treatment. The petitioner claims that, in view of said denial, he requested the Police to pay for the abovementioned trips, and that they denied his request. He indicates that said situation was solved when –thanks to remedy he filed on September 11, 1998– Decree No. 2095 of October 14, 1998 was enacted. According to him, the decree established that his date of removal be changed to December 2, 1998 on the grounds that he had been granted one hundred seventy-five days of holidays and that his removal had to be effective after said benefit.

3. He asserts that on October 2, 1998 he filed proceedings for nullification and the restoration of rights before the Administrative Court of *Valle del Cauca*, in which he requested that said decrees be annulled for groundlessness, untimely notification and the violation of his rights. The Court dismissed these claims through the judgment of January 30, 2004, on the basis that the power of removal was of a discretionary nature and could be used by the National Government after receiving a recommendation from the assessment commission of principal officers and an opinion from the advisory board to the National Police. He submits that he was notified of the corresponding decision on September 30, 2005; that is to say, twenty months after the decision was issued.

4. On October 10, 2005, the petitioner appealed against the above judgment, and this appeal was settled through an unfavorable ruling on November 4, 2005 based on the fact that Law 945 of 2005 had already come into effect and thus the proceedings were deemed of single instance of jurisdiction in light of the bill of damages. The petitioner impugned said judgment through an appeal for nullification, claiming that when he filed the appeal for nullification and the restoration of rights, the abovementioned Law was not yet in force; and that as the untimely notification of the decision prevented him from filing the appeal before the

Law came into effect. This remedy was settled through the resolution of December 9, 2005, which confirmed the impugned ruling in full, on the grounds that the new legislation was applicable.

5. The petitioner indicates that he filed a complaint that was settled by the Second Court of the Council of State on July 6, 2006, which claimed that the denial of the appeal was well-grounded. In view of this, he lodged an appeal of nullification that, on September 28, 2006, was rejected for being out of order. The petitioner filed an appeal for legal protection, alleging that the judgment of January 30, 2004 violated his rights and that the other appeals, complaints, and appeals for nullification filed by him had been rejected. By a resolution of July 5, 2007, the Fourth Court of the Council of State dismissed the above constitutional appeal on the grounds that it was out of order, noting that by means of a short and summary procedure like a constitutional appeal it was impossible to repeal the proceedings underway, since that would lead to a violation of due process, judicial autonomy and independence, *res judicata* and legal certainty. The petitioner challenged this ruling; and by the resolution of August 15, 2007, the Council of State confirmed the decision again. On September 28, 2007, he requested the Constitutional Court to review the proceedings concerning the constitutional appeal; and on November 22, 2007, the Constitutional Court ruled not to review the case because appeals for legal protection in view of a judicial ruling are exceptional in nature. The petitioner filed another appeal for legal protection on September 7, 2010, which was rejected for being out of order on September 16 of that same year.

6. Furthermore, the petitioner lodged a claim for damages on December 1, 2000 in order that the State would be found administratively and materially responsible for the damages caused to him. He submitted that after suffering “an injury while performing regular duties, despite strict medical orders, he was appointed to work in law-enforcement sites; and that these decisions aggravated his injury to the extent that he was impaired.” In the judgement of May 4, 2004, the State was found responsible for an error on the part of the Police.

7. The parties impugned the aforementioned ruling: the petitioner claimed that the Court had groundlessly discounted an amount of money recognized for social security benefits; the National Police indicated that there was no error on its part. On June 11, 2014 –ten years later–, the Third Court of the Council of State decided to overturn the impugned judgment by dismissing all the claims of the petitioner, as it considered that there was no proved causal relationship between the injury suffered and the purported duties of service in disregard of the medical instructions, based on the fact that before the petitioner’s health worsened, there was no proof that he had performed duties involving significant physical effort.

8. The petitioner alleges the violation of due process and free access to justice, in the framework of the proceedings for nullification and the restoration of rights, in view of the fact that twenty months passed since the issuance of the judgment and its notification. He adds that had he been duly notified, he would have been able to file an appeal. Likewise, he submits that the decree of his removal is null and void, since its notification was irregular, because he was “completely impaired and hospitalized” when he was notified of it. He alleges lack of evidentiary appraisal of the documents presented by him in the proceedings for nullification and the restoration of rights, as well as the lack of judgment on the violation of his rights by administrative bodies. Moreover, he asserts that in the proceedings concerning his claim for damages ten years elapsed from the moment he filed the appeal until it was settled; therefore, he claims that his rights to due process and a fair trial were violated.

9. The petitioner concludes by indicating that since his accident back in 1998 he has been 81 percent impaired due to a permanent spinal injury, as a result of which he is unable to carry out simple daily tasks, and he needs constant help. Likewise, he alleges that due to his mobility impairments, he is unable to work in posts requiring movements that are natural for people his age. He asserts that he was discriminated, since the concept of “discretionary removal” was invoked to dismiss him from the National Police for the simple reason of his impairment; thus, according to him, the State violated his right to equal protection and dignity.

10. The State alleges that the petition is inadmissible, as the petitioner intends to have the Commission work as a court of fourth instance to review the administrative law proceedings by which he was

removed from the National Police. It indicates that the different rulings issued in the domestic framework are based on the justified appraisal of the evidence gathered, as well as on an appropriate interpretation and application of the rules of the Colombian legal framework. It underlines that the power of removal is a discretionary competence, although not arbitrary, that can be used by the military forces. As to the exclusion of the double instance, the State asserts that it applied the provisions of Article 1 of Law 954 of 2005.

11. It indicates that the date of the petitioner's removal from the National Police was June 10, 1998, with a period of service of fourteen years, six months and ten days. Subsequently, time of service was added for a total of fifteen years, three months and five days, as one hundred seventy-five days of holidays were added; therefore, his removal took place after he received the benefit of authorized holidays; likewise, an addition was made in recognition of a seniority bonus. The State asserts that, as a result, with such amount of time the petitioner was eligible for a retirement allowance. It also submits that on July 9, 2001, the alleged victim waived the retirement allowance he had and chose disability annuities instead, which represented 75 percent of wages, and compensation was settled for his reduced medical fitness.

12. In addition, the State claims that the facts described in this petition do not establish violations of rights, noting that the military forces have a different disciplinary regime and a series of special circumstances for recruitment and removal. It submits that there was no causal relationship leading to conclude that the permanent injury suffered by the petitioner resulted from his performance of duties involving significant physical effort, as he was relocated in administrative posts.

## **VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

13. With regard to the exhaustion of domestic remedies, both parties indicate that on January 30, 2004 the Administrative Law Court of *Valle del Cauca* denied the appeal for nullification and the restoration of rights. Given the rejection of the appeal and that numerous remedies were filed, on September 28, 2006 the Council of State dismissed the appeal for nullification filed against the denial of the complaint. Subsequently, the petitioner presented a constitutional appeal, which was rejected, and on November 22, 2007, the Constitutional Court ruled not to review the constitutional appeal. As to the claim for damages, on June 11, 2014 the Third Court of the Council of State decided to revoke the impugned judgment, thus denying the petitioner's claims. Therefore, the Commission concludes that, in this case, the domestic remedies were exhausted pursuant to Article 46.1.a of the American Convention in both proceedings: through the Constitutional Court's decision of November 22, 2007 concerning the appeal for nullification and the restoration of rights; through the judgment of June 11, 2014 in the proceedings concerning his claim for damages.

14. As to the requirement of timeliness, the petition was filed to the IACHR on May 7, 2008 and the proceedings for nullification and the restoration of rights were settled through the Constitutional Court's decision of November 22, 2007; as a result, the petition meets the requirement set forth in Article 46.1.b of the Convention. Concerning the proceedings regarding the claim for damages, these were settled through the judgment issued by the Third Court of the Council of State on June 11, 2014, while the petition was under admissibility study. Based on the IACHR doctrine, the analysis concerning the requirements established in Article 46.1.b of the Convention must be made in light of the situation existing at the time it rules on the admissibility or inadmissibility of a complaint. Because of this, the requirement is declared met.

## **VII. COLORABLE CLAIM**

15. In view of the elements of fact and law presented by the parties and the nature of the matter brought under its attention, the Commission considers that, if proved, the allegations about the violation of due process caused by the unwarranted delay in the notification in the proceedings regarding the claim for damages, as well as the alleged damages to the petitioner's health presumably caused by his fulfilling duties of service, and his alleged removal for disability reasons may constitute violations of Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 24 (Right to Equal Protection), 25 (Right to Judicial Protection) and 26 (Right to Progressive Development) of the American Convention, in relation to its Article 1.1.

16. In the present case, the Commission notes that the allegations submitted in connection with the application of Law 954 of 2005 (which appears to have established a single instance of jurisdiction in view of the bill of damages for the proceedings regarding the claim for damages) must be analyzed on the merits, since they concern issues about the obligation set forth in Article 2 of the American Convention, in relation to the safeguards provided in Article 8 thereof.<sup>6</sup>

17. As to the alleged violations of the American Declaration, in light of the provisions of Articles 23 and 49 of its Rules, the Commission is in principle competent *ratione materiae* to assess violations of the rights enshrined in said Declaration. However, the IACHR has previously established that once the American Convention comes into effect for a State, it is this instrument –not the Declaration– which becomes the specific source of law that the Inter-American Commission will apply whenever a petition alleges violations of substantially identical rights enshrined in both instruments and provided that an ongoing situation is not involved.

18. Furthermore, in relation to the purported violation of Articles 11 (Privacy) and 17 (Family) of the American Convention and Article XI of the American Declaration, the Commission notes that the petitioner fails to submit arguments or evidence sufficient to determine said purported violation; therefore, said claim is found inadmissible.

19. Lastly, as to the alleged violations of the Protocol of San Salvador, particularly of Article 6, the Commission notes that, pursuant to Article 19.6 thereof, the IACHR is not competent *ratione materiae* under its system of individual petitions to *per se* determine violations of the articles of the Protocol of San Salvador mentioned by the petitioner. Nevertheless, in view of the provisions of Articles 26 and 29 of the American Convention, the IACHR is entitled to consider said Protocol for interpretation purposes concerning other applicable provisions of the American Convention and other instruments concerning which the IACHR is competent *ratione materiae*.<sup>7</sup>

### VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 5, 8, 24, 25 and 26 of the American Convention, in relation to its Articles 1.1 and 2;

2. To find the instant petition inadmissible in relation to Articles 11 and 17 of the American Convention on Human Rights and Article XI of the American Declaration;

3. To notify the parties of this decision;

4. To continue with the analysis on the merits; and

5. 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 in the city of México, on the 7 day of the month of September, 2017. (Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.

<sup>6</sup> IACHR, Report No. 12/12, Petition 858-06, Omar Jesús Lezcano Lezcano, Ángel José Lezcano Vargas *et al.*, Colombia, March 20, par. 37.

<sup>7</sup> IACHR, Report No. 44/04 (Inadmissibility), Petition 2584-02, Laura Tena Colunga *et al.*, Mexico, October 13, 2004, paras. 39-40.