

OEA/Ser.L/V/II.
Doc. 191
7 July 2020
Original: Spanish

REPORT No. 181/20
PETITION 380-10
REPORT ON ADMISSIBILITY

GUSTAVO EMILIO GOMEZ GALEANO AND FAMILY
COLOMBIA

Approved electronically by the Commission on July 7, 2020.

Cite as: IACHR, Report No. 181/20, Petition 380-10. Admissibility. Gustavo Emilio Gomez Galeano and family. Colombia. July 7, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Javier Leonidas Villegas Posada
Alleged victim:	Gustavo Emilio Gomez Galeano and family ¹
Respondent State:	Colombia
Rights invoked:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 23 (right to participate in government), and 25 (judicial protection) of the American Convention on Human Rights ² ; and Articles I (life, liberty, security and integrity of the person), XI (preservation of health and well-being) and XVIII (justice) of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	March 16, 2010
Notification of the petition to the State:	April 12, 2016
State's first response:	January 19, 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 4 (life), 5 (humane treatment), 8 (fair trial), 23 (right to participate in government), and 25 (judicial protection) of the American Convention in relation to its article 1.1 (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exceptions of Article 46.2 (b) and (c) of the American Convention are applicable
Timeliness of the petition:	Yes, in the terms of Section VI

¹In the petition, the following persons are identified as the immediate relatives of Mr. Gustavo Emilio Gómez: (1) Luz Estrella López Rendón, wife; (2) Valentina Gómez López, daughter; (3) Simón Gómez López, son; and (4) Mateo Gómez López, son.

² Hereinafter "the American Convention" or "the Convention".

³ Hereinafter, "the American Declaration".

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioner claims the international responsibility of the Colombian State for its alleged omission to protect Mr. Gustavo Emilio Gómez Galeano, who was assassinated by members of the National Liberation Army (ELN) guerrilla in the department of Antioquia in 1993.

2. The petition holds that Mr. Gómez was a member of the Municipal Council of San Roque, Antioquia, a position for which he was elected by popular vote in two successive elections. In 1991, during his first term as council member, Mr. Gómez began to receive threats against his life and he reported this risk to the authorities, including the Municipal Police Inspector at the time, without obtaining protection; the threats came from the ELN, which was criminally active in that area. During his second term, in which he held office as president of the Council, the threats continued and intensified, which Mr. Gómez once again brought to the attention of the authorities, specifically the Municipal Ombudsman and the National Police, despite which he received no protection for his safety. The Council denied him the possibility of being absent from the sessions and participating in them from the city of Medellín. Mr. Gómez had his family residence in Medellín and traveled there by land from San Roque every weekend, without having any State protection during those round trips. On February 14, 1993, on the stretch of the road between Barbosa and Santo Domingo (Antioquia), the vehicle in which he was traveling along with other San Roque public officials was stopped by ELN guerrillas who had established an illegal checkpoint. The guerrillas forced the other passengers to get out of the car, boarded the vehicle and forced the driver to take them along with Mr. Gómez to the Molino Viejo sector on that same road, where they ordered Mr. Gómez to get out, instructing the driver to return alone to the checkpoint. In that place, the guerrillas killed the councilman with a shot to the head, and his body was found later by law enforcement officers. In the petitioner's view, the Colombian security forces' failure to protect the integrity of Mr. Gómez facilitated the commission of the murder, which was motivated by the active exercise of his political rights as member and president of the San Roque Council, an exercise he sought to continue despite the threats he had received. Petitioner claims that the State should have guaranteed the enjoyment and exercise of his political rights by providing him with security measures, especially considering that the threats he had received sought to obstruct his performance as a Council member, and were ultimately directed against the Council as a democratic institution and not against him as a person. The petitioner reports that Mr. Gómez's murder deeply traumatized his wife and children, who suffered serious and lasting material and psychological damage from his death.

3. The death of Mr. Gómez led to the *ex officio* initiation of a criminal investigation by the Regional Directorate of Prosecutors of Medellín, for the crime of homicide with terrorist purposes, filed under number 10.914, which was later transferred to the Antioquia Specialized Prosecutor's Office. This office, by resolution of June 12, 1996, decided to suspend and provisionally archive the preliminary investigation, given the failure to identify those responsible and the circumstances of the manner, time and place of the murder. Since then the process has not been reactivated, and the crime remains unpunished. Mr. Gómez's wife filed a petition to access the materials that were in the file, but the Prosecutor's Office denied her access, alleging that the preliminary investigation was legally classified information. The petitioner therefore asks the IACHR to request a copy of the investigative file from the Colombian State. On the other hand, the petitioner reports that due to the profound psychological effects of the murder of Mr. Gómez, his next of kin did not resort to the administrative jurisdiction in order to obtain compensation for the damages they had suffered due to the lack of State protection that allowed the consummation of the crime, within the two-year statute of limitations period that they had to do so. They did not receive any type of support or protection from the authorities either, and in this sense, they claim that the State did not provide them the conditions to access justice, thus violating their right to judicial protection.

4. The State, in its response, opposes the admissibility of the petition for two reasons: failure to exhaust domestic remedies, and the "fourth instance" argument. It also holds that the IACHR does not have competence to hear this case under the American Declaration, but must rather evaluate it in light of the American Convention; and it specifies that in the military archives consulted by the Ministry of Defense there is no information concerning the events reported in the petition. The State also reports that in the National Police files, no record was found of requests for protection presented by Mr. Gómez or his family members, and that the National Prosecutor's Office also found no records of criminal complaints filed by Mr. Gómez by virtue of

the threats he had received; likewise, the Municipal Mayor's Office of San Roque reported not having found annotations about threats against Mr. Gómez in their "filing" books, and the Municipal Ombudsman submitted identical information.

5. Regarding the "fourth instance" allegation, the State confirms that the Medellín Regional Prosecutor's Office ordered, by a decision of May 12, 1996, the provisional suspension and provisional filing of the investigation, which was in the preliminary investigation phase, given that the circumstances of the manner, time and place of the crime could not be established, nor was the perpetrator identified for prosecution; the State also holds that Mr. Gómez's relatives did not file a request for civil damages in the course of the criminal procedure. It therefore considers that the decision of the Regional Prosecutor's Office to suspend and archive the preliminary investigation is an internal decision protected by the presumption of legality and adopted with full respect for due process and the rights of those affected, which the IACHR cannot contest or review, for in doing so it would be acting as a court of fourth instance. The State argues in this regard that *"the fact that the Prosecutor's Office was forced to provisionally archive the investigation, after having carried out all the procedures that were within its reach, is not an obstacle to understand that the case has already been definitively resolved by the State, in having been conducted with the full guarantees of due process"*. In this same line, it alleges that the seventeen years that had elapsed as of the date of the petition without obtaining a final judicial resolution of the matter are justified by the complexity of the process, for which reason it considers that the judiciary has responded to these events within a reasonable period of time. The State also justifies this conclusion based on the evidence-gathering activity of the Prosecutor's Office during the first year of the investigation before its suspension -which consisted in ordering some testimonies and requesting certain certifications-, and on the alleged inactivity of the surviving victims. In this line, the State regards Mr. Gómez's relatives' decision not to ask for civil damages during the criminal process as a lack of collaboration with the authorities on their part.

6. Regarding the lack of exhaustion of domestic remedies, the State alleges that the adequate remedy that the petitioners should have pursued was the administrative action to claim civil damages before the administrative jurisdiction (*acción de reparación directa*), especially given the fact that the full reparations granted through this judicial channel meet the parameters set by the Inter-American Human Rights System. The State argues, in relation to this suitable remedy that the petitioners refrained from exhausting, that none of the exceptions enshrined in Article 46.2 of the American Convention is applicable.

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

7. The Inter-American Commission has consistently held that in cases where violations of the right to life are claimed, the adequate remedy that must be exhausted at the domestic level is the criminal justice route, through the *ex officio* and diligent conduction of investigations which can identify those responsible for the violation, prosecute and punish them in accordance with the American Convention⁵. This burden must be assumed by the State as its own legal duty, and not as a management of private persons' interests, or as a task that depends on private initiative or on the provision of evidence by others.⁶ The IACHR also has a consolidated position in the sense that the judicial route of seeking administrative responsibility -for example, through the "direct reparation" judicial action before the administrative jurisdiction in Colombia-, or of seeking civil damages, are not the appropriate judicial remedies for events of this nature.

8. In line with the foregoing criteria, the IACHR notes that the National Prosecutor's Office initiated a criminal investigation into the murder of Mr. Gustavo Emilio Gómez, through the Regional Directorate of Prosecutors of Medellín, which was subsequently transferred to the Specialized Prosecutor's Office of Antioquia. After gathering some testimony and documentary evidence, this Prosecutor's Office decided to

⁵ IACHR, Report No. 72/18, Petition 1131-08. Admissibility. Moisés de Jesús Hernández Pinto and family. Guatemala. June 20, 2018, para. 10. IACHR, Report No. 70/14. Petition 1453-06. Admissibility. Maicon de Souza Silva. Renato da Silva Paixão and others. July 25, 2014, para. 18; Report No. 3/12, Petition 12.224, Admissibility, Santiago Antezana Cueto et al., Peru, January 27, 2012, par. 24; Report No. 124/17, Petition 21-08, Admissibility, Fernanda López Medina et al., Peru, September 7, 2017, paras. 3, 9-11.

⁶ IACHR, Report No. 159/17, Petition 712-08. Admissibility. Sebastián Larroza Velázquez and family. Paraguay. November 30, 2017, para. 14.

provisionally suspend the process at the preliminary investigation phase, as it was not possible to determine the circumstances of the crime nor identify those responsible for the murder, and it ordered the casefile to be provisionally sent to the archive. From that moment, and until today, the investigation is on hold, filed and awaiting a culmination which can allow the process to advance to the trial and punishment stage. In the Commission's opinion, these facts constitute the two exceptions enshrined in paragraphs (b) and (c) of Article 46.2 of the American Convention to the duty of exhaustion of domestic remedies. Indeed, on the one hand, in previous cases related to Colombia, the Inter-American Commission has considered that when a criminal investigation is unilaterally closed and filed by the prosecutor, it is understood that the victim has not been allowed access to internal remedies or has been prevented from exhausting them⁷. In the case under study, that was precisely what occurred, given that the unilateral decision by the prosecutor to provisionally suspend and file the preliminary investigation were not communicated to Mr. Gómez's family, who were consequently left without any possibility to act. On the other hand, the murder of Mr. Gómez took place in February 1993, that is, twenty-seven years ago, a time lapse that constitutes, from any point of view, an excessive and unjustified delay in determining those responsible for the crime and imposing the corresponding responsibilities.

9. As for the time that has elapsed from the moment of the crime until today, the State has argued that it is a reasonable period of time, given the complexity of the case, the actions of the judicial authorities and the supposed inactivity of Mr. Gómez's relatives in the proceedings. In this regard, the IACHR observes, in the first place, that the investigative actions of the Prosecutor's Office ceased in 1996, and since then the process has been filed and provisionally suspended, without any activity tending to complete the investigation and administer justice for the murder of Councilman Gómez, as reported by the State itself. Secondly, the State has accused the relatives of Mr. Gómez of not having claimed civil damages within the criminal proceedings, which would prove their lack of interest or inactivity; however, it is clear under the rules of the criminal procedural legislation in force in Colombia at that time –i.e. Decree 2700 of 1991, Code of Criminal Procedure- that during the preliminary investigation phase it was not possible to claim civil damages, given that the law expressly established that such civil damages could only be claimed after there was a decision to initiate the criminal investigation⁸, and such a decision to open the criminal investigation actually finalized the preliminary investigation phase⁹. In other words, it was legally impossible for the relatives of Mr. Gómez to claim civil damages in the criminal procedure initiated in relation to his murder, since those proceedings did not advance beyond the preliminary investigation phase. Third, the State has not explained why an investigation into a homicide in relation to which there are strong indications of its perpetration by members of the ELN guerrilla, and which was committed in an area of the country where said guerrilla was criminally active, would be particularly complex. This conclusion is reached without prejudice to any findings that may be made during the merits stage of the present procedure.

10. Thus, taking into account that the murder of Mr. Gómez was perpetrated in February 1994, that the criminal investigation was suspended and filed in 1996, and that the effects of the impunity of the case have continued to date, the IACHR considers that the petition was presented within a reasonable time in the terms of Article 32.2 of the Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

11. Firstly, concerning the "fourth instance" argument presented by the State, the Commission reiterates that within the framework of its mandate it is competent to declare a petition admissible when it refers to internal proceedings that may have violated rights guaranteed by the American Convention. In this sense, it is *prima facie* observed that the petition has clearly raised possible violations of several human rights protected in the American Convention, derived both from the State's failure to protect Mr. Gómez which allegedly facilitated his murder, and from the impunity which currently surrounds the case, as well as from the lack of State support for the relatives of the fatal victim.

⁷ IACHR, Report No. 108/19. Petition 81-09. Admissibility. Anael Fidel Sanjuanelo Polo and family. Colombia. July 28, 2019, paras. 17-19.

⁸ Code of Criminal Procedure of 1991, Article 45.

⁹ Code of Criminal Procedure of 1991, Articles 324 and 325.

12. Likewise, in the case under examination it is clear that there is still no judgment in the criminal proceedings surrounding the murder of Gustavo Emilio Gómez. There is a decision to provisionally suspend and file the preliminary investigation, adopted by the Antioquia Specialized Prosecutor's Office in 1996, which does not have the nature of a judgment -that is, of a judicial decision defining the criminal responsibility of a defendant at the end of a judicial process respectful of the basic judicial guarantees-. Furthermore, the suspension and filing decision adopted by the Prosecutor's Office is, in its own terms, "provisional" and not final in nature. Therefore, this is not a scenario in which it can be argued that a pronouncement by the IACHR would be tantamount to reviewing domestic judicial decisions that definitively resolve a certain matter.

13. The State has also claimed that in the documentary archives reviewed by the Security Forces, the National Prosecutor's Office, the Municipal Ombudsman and the Municipal Mayoralty of San Roque, there is no written record of any requests for protection made by Mr. Gustavo Emilio Gómez before of his death. However, the petition indicates that those requests for protection were indeed made on more than one occasion, before several authorities at the municipal and national levels; the petitioner has also argued that the situation of risk for the exercise of political rights which was consubstantial to an area of the country where the ELN guerrilla was present and active, was a sufficient reason for the State to have ex officio protected Mr. Gómez. Thus, a factual and evidentiary controversy between the parties has been established, which must be resolved at the merits stage of this proceeding, since this exceeds the prima facie valuation standard appertaining to the admissibility phase.

14. In light of these considerations and after examining the factual and legal elements presented by the parties, the Commission considers that the petitioner's allegations are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, could characterize violations of Articles 4 (life), 5 (humane treatment), 8 (fair trial), 23 (right to participate in government) and 25 (judicial protection) of the American Convention, in relation to its Article 1.1 (obligation to respect rights).

15. Finally, the Inter-American Commission agrees with the State that the legal standard for evaluating this petition must be the American Convention, and not the American Declaration. The IACHR has previously established that, once the American Convention enters into force in relation to a State, it is the American Convention, and not the Declaration, which becomes the primary source of law applicable by the Commission, provided that the petition refers to the alleged violation of rights which are identically enshrined in both instruments, and that it is not a situation of continuous violation initiated prior to the entry into force of the American Convention for the State in question.¹⁰

VIII. DECISION

1. To declare this petition admissible in relation to Articles 4, 5, 8, 23, and 25 of the American Convention, in connection with its Article 1.1; and

2. To notify the parties of this decision; to continue with the analysis of the merits of the matter; 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 7th day of the month of July, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.

¹⁰ IACHR, Report No. 180/18, Petition 1616-07, Admissibility, A.G.A. and relatives, Colombia, December 26, 2018, para. 17; Report No. 27/19, Admissibility, Miguel Ángel Córdoba, Argentina, March 16, 2019, para. 18.