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REPORT No. 214/24
PETITION 1717-18
REPORT ON ADMISSIBILITY

L.J.S.H. & FAMILY
COLOMBIA

Approved electronically by the Commission on November 27, 2024.

Cite as: IACHR, Report No. 214/24. Petition 1717-18. Admissibility. L.J.S.H. and family. Colombia. November 27, 2024.

I. PETITION DETAILS

Petitioner:	Óscar Humberto Gómez Gómez
Alleged victim :	L.J.S.H ¹ . and family ²
Reported status:	Colombia ³
Rights invoked:	Articles 5 (humane treatment), 8 (right to a fair trial), 11 (protection of honor and dignity), 17 (protection of the family), 24 (equality before the law) and 25 (judicial protection) of the American Convention on Human Rights ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	August 24, 2018
Additional information received during the study stage:	February 26, 2020, and March 18, 2020
Notification of the petition to the State:	December 27, 2021
The State's Response:	May 18, 2022
Warning about possible archiving:	June 20, 2023
Response of the petitioner to the warning of possible archiving:	July 19, 2023

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, the American Convention (deposit of instrument made on July 31, 1973)

IV. DUPLICATION OF PROCEEDINGS AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIME LIMIT FOR SUBMISSION

Duplication of proceedings and international res judicata:	No
Rights declared admissible:	Articles 5 (humane treatment), 8 (right to a fair trial), 11 (protection of honor and dignity), 19 (rights of the child), 24 (equality before the law), and 25 (judicial protection) of the American Convention
Exhaustion of domestic remedies or admissibility of an exception:	Yes, on February 27, 2018
Submission within the deadline:	Yes

¹ Since this was a complaint regarding acts of sexual violence against a girl, the Inter-American Commission decided to apply the restriction on the identity of the alleged victim to avoid her revictimization and negative impacts on her private life.

² The petitioner identified as relatives of the child L.J.S.H. the following: L.M.H.A. (mother) and J.V.S.D. (father).

³ In accordance with the provisions of Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the debate or decision in this case.

⁴ Hereinafter "the American Convention" or "the Convention."

⁵ The observations of each party were duly forwarded to the opposing party.

V. POSITION OF THE PARTIES

The petitioner

1. The petitioner alleges the violation of the rights to humane treatment, access to justice, equality, and protection of the family; due to the judicial refusal of the Colombian State to compensate L.J.S.H. and her family for the rape perpetrated against her by an army non-commissioned officer.

2. The petitioner relates that on September 9, 1995, an army sergeant raped the child L.J.S.H., who was then seven years old. He states that she and her parents sued the State before the contentious-administrative jurisdiction in order to obtain compensation for the damage caused. However, he contends that, both in the first instance in the Administrative Court of Santander and in the second instance before the Council of State, the domestic courts acquitted the defendant entity – the Ministry of National Defense – because they considered that the perpetrator committed the rape outside his hours of service, and, therefore, he was solely personally liable.

3. The petitioner emphasizes that the Ombuds Office submitted an opinion to the Council of State requesting that it revoke the acquittal of the defendant entity, since the aggressor was not "*on leave or vacations, events in which his actions are detached from the service,*" in addition to the fact that, upon studying his resume, it observed that the perpetrator had committed offenses against the morale and prestige of the Military Forces on several occasions, without having been dismissed from service, "*which highlights the lack of vigilance of the public entity with respect to its officials.*" However, the petitioner maintains that these arguments were not mentioned in the judgment of the second instance, nor were they considered as relevant evidentiary aspects.

4. Faced with the rejection of the lawsuit in both instances, the family filed an extraordinary appeal for review on September 13, 2013, before the Plenary Chamber of the Council of State. The appeal was admitted, but denied on the merits by judgment of September 6, 2016, since, according to the petitioner, the Plenary Chamber considered that the avenue to challenge that decision was the tutela action (a writ of constitutional protection), through which the Corporation had already reversed a similar ruling.

5. The petitioner asserts that he had not previously filed a tutela action because the Council of State had a jurisprudential tendency to reject this type of action against judicial decisions. However, due to the rejection of the appeal for review, the petitioner indicates that he filed an action for protection on behalf of the child L.J.S.H. and her family, which was also denied in both instances.

6. Thus, he asserts that the family requested the Constitutional Court to review the tutela judgments, since they are automatically sent to that Corporation, but by order of February 27, 2018, notified on March 13, 2018, to the petitioner, he reports that the Constitutional Court decided not to select the tutela of L.J.S.H. for review. In doing so, he maintains that the alleged victims have exhausted domestic remedies.

7. In subsequent communications, and in response to the State's observations, the petitioner states that L.J.S.H.'s family was not informed of the criminal proceedings against the perpetrator of the rape of the child, did not appear at the proceedings, and were not notified of the conviction of Sergeant Candia Lozano.

The Colombian State

8. The State, for its part, replies that this petition is inadmissible, since the petitioner intends to use the IACHR as an international appellate court to review and revoke the decisions adopted by the domestic courts within the framework of their jurisdiction, and in full respect of judicial guarantees.

9. As to the facts, Colombia indicates that on September 14, 1995, the 33rd Sectional Prosecutor's Office opened a criminal investigation on the occasion of the rape of the girl L.J.S.H., and linked an army sergeant through an investigation. On September 19, 1995, the entity issued a preventive detention measure against him and on January 30, 1996, it issued an indictment for the crime of violent sexual act on a

minor. It explains that the Promiscuous Court of the Chucurí Circuit issued a conviction against him, sentencing him to 22 months in prison. This decision was not appealed and became enforceable on August 23, 1996.

10. However, the State clarifies that the alleged victims filed a lawsuit against the Ministry of National Defense because they allege that they are entitled to full compensation from them because the acts were committed by a member of the National Army. In this way, it understands that the object of the petition is the rejection of the claim for reparation before the contentious-administrative jurisdiction.

11. In this regard, on September 29, 2000, the Administrative Court of Santander issued a ruling denying the claims of L.J.S.H.'s family for compensation on the grounds that the perpetrator did not commit the rape in the exercise of his duties as a non-commissioned officer in the army. The petitioner filed an appeal, and the Third Section of the Council of State upheld the decision on July 7, 2011, since it considered that the act was not attributable to the Ministry of National Defense.

12. It narrates that subsequently, on September 6, 2016, the same tribunal rejected the extraordinary appeal for review exercised by the petitioner against that judgment, in response to which the alleged victims filed a tutela action. However, on September 27, 2017, the Fourth Section of the Council of State declared it inadmissible. This decision was the subject of an appeal and was subsequently upheld on 18 December 2017 by the Fifth Section of the Council of State.

13. With respect to the admissibility of the petition, the State argues that it falls under the so-called "formula of the fourth international instance," since the alleged victims go to the IACHR for a review of the decisions adopted in the contentious-administrative jurisdiction, despite the fact that these judgments respected the judicial guarantees of due process. Colombia recalls that, under the terms of Article 47(b) of the Convention, petitions that request a different evaluation of the evidence are inadmissible, or those that only express their disagreement with the outcome of domestic judicial proceedings notwithstanding the compliance with the rights set forth in the Convention.

14. In this regard, it asserts that the matter under study has already been analyzed at the domestic level and that the courts decided to deny the claims for compensation, since they considered that the facts could not be attributed to the Ministry of Defense. Similarly, it explains that the tutela judgments declared the action inadmissible because it did not meet the requirement of immediacy, that is, having been filed within six months of the conclusion of the direct reparation process, since they rejected the petitioner's argument that the term should be counted from the rejection of the extraordinary appeal for review.

15. Thus, the State contends that there is no evidence of a violation of the guarantees of the Convention, but rather the petitioner's intention to make use of the IACHR as an international appellate court to modify the meaning of the decisions adopted by the contentious-administrative jurisdiction becomes evident. Therefore, it asks the Commission to declare this petition inadmissible, in accordance with the provisions of Article 47(b) of the American Convention.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIME LIMIT FOR SUBMISSION

16. Article 46(1)(a) of the American Convention provides that in order for a petition to be admissible, it is necessary that the remedies under domestic law have been pursued and exhausted, in accordance with generally recognized principles of international law. For the purposes of evaluating the adequacy of the remedies available under domestic law, the Commission usually establishes the specific complaint that has been made, and then identifies the judicial remedies provided by the domestic legal system that were available and adequate to ventilate that particular complaint. This is precisely what the suitability and effectiveness of each remedy means, it consists in providing a real opportunity for the alleged violation of

human rights to be remedied and resolved by the national authorities before resorting to the Inter-American System of Protection.⁶

17. In this understanding, the Commission understands that the main claim of this petition is the judicial refusal to grant compensation for the rape perpetrated to the detriment of L.J.S.H., committed by an army non-commissioned officer. The petitioner alleges that it exhausted domestic remedies by means of the order of rejection of February 27, 2018, of the review of the tutela action, requested from the Constitutional Court. The State does not dispute the exhaustion of domestic remedies by the petitioner.

18. In the instant case, the petitioner chose to make use of the tutela action, which culminated in the decision issued by the Constitutional Court on February 27, 2018. The IACHR considers that this was the decision that exhausted domestic remedies, and taking into consideration that the petitioner indicates that it was notified on March 13, 2018, and that the petition was filed on August 24, 2018, it concludes that the international complaint meets the requirements set forth in Article 46(1)(a) and (b) of the American Convention.

VII. COLORABLE CLAIM

19. The Commission observes that the present petition includes allegations regarding the failure to recognize compensation in the contentious-administrative proceeding brought for the rape of the child L.J.S.H., on the grounds that the State did not comply with its obligation to make reparation for the harm caused by one of its agents, and that the Council of State did not take into account the duty to prevent human rights violations by the National Army. Colombia states that the petitioner intends to use the IACHR as an international appellate court to review the decision adopted by the Council of State, despite the fact that it was adopted in observance of the judicial guarantees enshrined in the American Convention.

20. For the purposes of admissibility, the Commission must decide whether the alleged facts can establish a violation of rights, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order," in accordance with Article 47(c) of the American Convention. In this regard, the Commission reiterates that the criterion for assessing a colorable claim at the admissibility stage differs from that used to rule on the merits of a petition. The IACHR must carry out a *prima facie* evaluation to determine whether the petition establishes the basis for the possible or potential violation of a right guaranteed by the Convention, but not establish the existence of a violation of rights. This determination on the colorable claim regarding possible violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the case.

21. The Commission recalls that the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Inter-American Court") has recognized a broad content of the right of access to justice in the framework of the protection of the rights to a fair trial and judicial protection, enshrined in Articles 8(1) and 25(1) of the Convention.⁷ Within this framework, the Court has studied the violation of this right in relation to the judicial remedies available in the States and has assessed whether remedies of a pecuniary nature allow access to compensation under conditions of equality to those who claim to have been victims of human rights violations.⁸

22. For its part, this Commission has specified that the right of access to justice derived from the joint reading of Articles 8(1) and 25(1) of the American Convention "*confers on the relatives of the victims the right to reparation for the damages suffered by the death of their loved ones,*"⁹ which is also applicable to other

⁶ Cf. IACHR, Report No. 279/21, Petition 2106-12, Admissibility, Huitosachi, Mogótvato, and Bacajípare Communities of the Rarámuri Indigenous People, Mexico, October 29, 2021, para. 29.

⁷ Inter-American Court of Human Rights. Case of Ordenes, Guerra et al. v. Chile. Merits, Reparations and Costs. Judgment of November 29, 2018. Series C No. 372, para. 76.

⁸ See Inter-American Court. Case of Ordenes, Guerra et al. v. Chile. Merits, Reparations and Costs. Judgment of November 29, 2018. Series C No. 372; and, Case of Almeida v. Argentina. Merits, Reparations and Costs. Judgment of November 17, 2020. Series C No. 416.

⁹ IACHR. Report No. 62/01, Case 11.564, Riofrío Massacre, Colombia, April 6, 2001, para. 44; and IACHR, Report No. 52/16, Case 12.521. Bottom. María Laura Ordenes Guerra and others. Chile. November 30, 2016, para. 105.

serious human rights violations. However, the IACHR has limited the analysis of the right to access an effective judicial remedy to that it is not limited to determining a specific amount of compensation or to replacing the domestic courts when the alleged victims are dissatisfied with the amounts awarded at the domestic level.¹⁰

23. Thus, with regard to the so-called exception of the "fourth international instance," the Commission underscores the complementary nature of the Inter-American System and emphasizes that, as the Inter-American Court has indicated, in order for the exception to proceed, it would be necessary to "*seek that [...] [se] reviews the judgment of a domestic court by virtue of its incorrect assessment of the evidence, the facts or domestic law, without, at the same time, alleging that such judgment incurred in a violation of international treaties [...]*".¹¹

24. In the instant case, the Commission notes that the petitioner alleges a violation of the right of access to justice and an adequate reparation for the sexual violence suffered by L.J.S.H., as well as the failure to study the allegations of the Ombud's Office to examine the facts in light of the State's duty to prevent human rights violations. Thus, the IACHR considers that it must verify "*whether or not the steps actually taken at the domestic level violated the State's international obligations derived from the inter-American instruments that grant it competence*".¹² It is also responsible for examining "*whether or not the actions of judicial bodies constitute a violation of the State's international obligations, [which] may lead to [...] should be concerned with examining the respective domestic proceedings to establish their compatibility with the American Convention*".¹³

25. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the petitioner's allegations are not manifestly groundless and require a study at the merits stage; since the facts alleged, if corroborated as true, could tend to establish violations of Articles 5 (humane treatment), 8 (right to a fair trial), 11 (protection of honor and dignity), 19 (rights of the child), 24 (equality before the law), and 25 (judicial protection) of the American Convention to the detriment of L.J.S.H., and her parents, all duly identified in this petition's file.

26. As for the claim regarding the alleged violation of Article 17 (protection of the family) of the American Convention, the Commission observes that the petitioners have not offered sufficient allegations or support to allow a *prima facie* finding of a possible violation.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 5, 8, 11, 19, 24, and 25 of the American Convention, in relation with Article 1(1) thereof.
2. To declare this petition inadmissible concerning Article 17 of the American Convention.
3. 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.

¹⁰ See IACHR, Report No. 173/22. Petition 916-10. Inadmissibility. Hernando Martínez Novoa and others. Colombia. 22 July 2022, paras. 15 and 16; and IACHR, Report No. 12/22. Petition 1035-11. Admissibility. Blanca Ruth Sánchez de Franco y Familia. Colombia. February 9, 2022, para. 12.

¹¹ I/A Court H.R., Case of Cabrera García and Montiel Flores v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 26, 2010, Series C No. 220, para. 18.

¹² I/A Court H.R., Case of Cabrera García and Montiel Flores v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 26, 2010, Series C No. 220, para. 19.

¹³ Inter-American Court of Human Rights. Case of Palma Mendoza et al. v. Ecuador. Preliminary Objection and Merits. Judgment of September 3, 2012. Series C No. 247, paragraph 18; Inter-American Court of Human Rights. Case of Rosadio Villavicencio v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 388., paragraph 24; Inter-American Court of Human Rights. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, paragraph 19.

Approved by the Inter-American Commission on Human Rights on the 27th day of the month of November, 2024. (Signed:) Roberta Clarke, President; José Luis Caballero Ochoa, Second Vice President; Arif Bulkan, and Gloria Monique de Mees, Commissioners.