

OEA/Ser.L/V/II.  
Doc. 7  
27 January 2017  
Original: Spanish

**REPORT No. 6/17**

**PETITION 187-07**

REPORT ON ADMISSIBILITY

ENRIQUE ALBERTO GAMERRO AND FAMILY  
ARGENTINA

Approved by the Commission on January 27, 2017

**Cite as:** IACHR, Report No. 6/17, Admissibility. Enrique Alberto Gamerro and family.  
Argentina. January 27, 2017.



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 JANUARY 27, 2017

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Enrique Alberto Gamero
<b>Alleged victim:</b>	Enrique Alberto Gamero and family
<b>State denounced:</b>	Argentina
<b>Rights invoked:</b>	No specific articles alleged

**II. PROCEDURE BEFORE THE IACHR<sup>1</sup>**

<b>Date on which the petition was received:</b>	February 21, 2007
<b>Additional information received at the initial study stage:</b>	December 5, 2007; December 17, 2007; March 18, 2008; December 22, 2008; August 28, 2009; March 22, 2011
<b>Date on which the petition was transmitted to the State:</b>	February 1, 2012
<b>Date of the State's first response:</b>	November 26, 2012
<b>Additional observations from the petitioner:</b>	November 5, 2012; July 1, 2013
<b>Additional observations from the State:</b>	August 26, 2014

**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 on Human Rights <sup>2</sup> (instrument of ratification deposited on September 5, 1984)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 21 (right to property), and 25 (right to judicial protection) of the American Convention, in relation to Article 1(1)

<sup>1</sup> The observations presented by each party were duly transmitted to the opposing party.

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

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, pursuant to Subsection VI
Timeliness of the petition:	Yes, pursuant to Subsection VI

## V. ALLEGED FACTS

1. According to Enrique Alberto Gamarro (hereinafter, “Mr. Gamarro” or “the alleged victim”), in June 2001 in San Nicolás, in the province of Buenos Aires, a criminal case was brought against him for the crime of fraud committed in the practice of his profession as a lawyer, to the detriment of a client. The case is reportedly still ongoing, as of the date of this report.

2. The alleged victim maintains that on June 11, 2001, in the context of that investigation, the examining judge (*Juez de Garantías*) issued an order—one that was general, imprecise, and unwarranted under the law—for his law firm to be searched. The measure was carried out that same day by the intervening Public Prosecutor’s Office, whose staff seized all documentation in the alleged victim’s office, even beyond the terms of the irregular order in question. The alleged victim adds that when he demanded the return of the seized material, he was given only part of it, and the accounting documents needed for him to exercise his right to defend himself were missing.

3. The alleged victim indicates that he lodged a complaint regarding the irregular actions of the Public Prosecutor’s Office during the search, as well as the handling of the seized material and the fact that documents that belonged to him were subsequently missing, but that from the outset the San Nicolás operational unit handling preliminary proceedings (*Unidad Funcional de Instrucción*) did not move the complaint forward. The first time the case was archived, he appealed the decision, and the city’s Chief Prosecutor ordered the investigation to continue; however, after certain measures were carried out, the Prosecutor of First Instance proceeded to dismiss and archive the case. The alleged victim states that he appealed that decision, but that it was upheld by the Chief Prosecutor on July 4, 2006. On September 5 of that year, he petitioned to the examining judge to intervene in the case and reopen the investigation, but the judge declared that the filing of the case was inadmissible. The alleged victim then filed a new appeal, which was ultimately declared inadmissible by the San Nicolás Court of Appeals on November 7, 2006. Finally, the alleged victim filed two administrative cases with the Office of the District Attorney of Buenos Aires province, but these were also dismissed, it having been determined that the irregularities he was reporting should be examined as part of the same case that led to the search.

4. Meanwhile, in the criminal case brought against him, Mr. Gamarro petitioned to have the case dismissed, but the First Oral Criminal Court, in violation of the procedures established for that institution, rejected the petition without scheduling the required hearing with the Public Prosecutor’s Office, and oral proceedings were held. The alleged victim states that on June 28, 2006, he was convicted and sentenced to six and a half years in prison and that he was ordered to be taken into custody immediately, as the Prosecutor’s Office argued that he could flee and in so doing jeopardize the case. The alleged victim explains that there was no reason to incarcerate him, as he had remained free throughout the entire process, a period in which he cooperated with the authorities and fulfilled his obligations. He adds that the sole purpose of his detention was the premature execution of his sentence and that this violated his human rights.

5. Moreover, he indicates that he was initially held for approximately three months in police lockups and that during this time he could not have any contact with his 6-year-old daughter, as children are prohibited from visiting such facilities, and that he could not have any other type of contact with her either, as there were no telephones available for that purpose. He indicates that this had a negative impact on his daughter.

6. The alleged victim states that on November 3, 2006, he was transferred to a prison, where he was housed with inmates who were serving definitive sentences, and that he was subjected to conditions of incarceration that had an even greater impact on his family situation and state of health. In that regard, he explains that the conditions under which his family members were frisked included practices that upset his

mother, as well as his wife and 17-year-old daughter, including having to take off their clothes and squat down, among other measures that were damaging to their honor and dignity. He states that because of these practices, their visits grew further apart, until finally they stopped visiting altogether. In terms of his health, he states that he failed to receive the medical care he needed and that sometimes his ailments were not properly documented, all of which meant that his general state of health deteriorated, a situation that started to be reversed only after he was paroled on June 5, 2009.

7. He indicates that from the time he was deprived of liberty, he tried to challenge the situation through various remedies and to have the searches of his family eased or at least carried out differently, and tried to get better medical care, but that his complaints were rejected or ignored.

8. The alleged victim adds that while he appealed his conviction on October 19, 2006, it was not resolved until June 26, 2012, when the judgment was partially overturned by removing the aggravating circumstances that had been imposed and adjusting the sentence accordingly. Notwithstanding all that, from the time his petition to have the case dismissed was rejected, he filed several appeals until the complaint reached the Supreme Court. On August 7, 2012, the Supreme Court decided to invalidate the decision denying the dismissal and ordered that a new decision be issued, although this has not yet happened. The alleged victim argues that this could result in the invalidation of the trial that was held and even the sentence that was imposed.

9. Finally, he maintains that the criminal proceedings have gone on for an unreasonable length of time, as they are still not over, and that even though he is at liberty, he is still subject to certain restrictions, including being unable to practice his profession, all of which has caused him moral and material damage.

10. For its part, the State maintains that the alleged victim's deprivation of liberty was ordered in accordance with the applicable laws in place and was justified because of the alleged victim's flight risk. It also indicates that Mr. Gamarro was released and that the petition should be archived as the reasons for it no longer exist.

11. The State adds that the petition should not be admitted because while the alleged victim met the requirement of exhaustion of domestic remedies with regard to the complaint he filed over the disappearance of his documents, the case brought against him for the crime of fraud has yet to run its course. It notes that there has still been no ruling in complaint proceedings before the Court of Criminal Cassation of Buenos Aires province concerning his petition, rejected at the time, for the case to be dismissed.

12. It should be noted that the State has said nothing concerning the other aspects indicated by the petitioner as potential violations of rights that are protected in the American Convention.

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

13. With regard to the criminal case brought against the alleged victim for the crime of fraud and the alleged violations that may have occurred in the context of that case, the IACHR observes that both the petitioner and the State agree that the resolution of the complaint proceedings before the Court of Criminal Cassation of Buenos Aires remains pending, and therefore domestic remedies have not been exhausted. However, while the State maintains that the petition should be rejected for failing to comply with the requirement established in Article 46(1)(a) of the American Convention, the petitioner maintains that the process has gone on for an unreasonable length of time and that during this period his freedom has been restricted. He alleges, therefore, that the exception to the requirement of exhaustion of domestic remedies established in Article 46(2)(c) of the American Convention should apply to this case.

14. The information provided by both parties indicates that the criminal proceedings against Mr. Gamarro were begun in 2001 and that there has still been no final judgment in the case up to the time this report was adopted, 15 years later. Given the duration of the process, the IACHR believes that the exception to the requirement of exhaustion of domestic remedies established in Article 46(2)(c) of the American Convention does apply. The IACHR also observes that the allegations at issue in this case date back to 2001,

the trial court's judgment was handed down on June 28, 2006, and the petition before the IACHR was received on February 21, 2007. Therefore, considering the context and characteristics of this case, the Commission believes that the petition was lodged within a reasonable time and that the admissibility requirement related to timeliness should be considered to have been met.

15. In addition, in terms of the alleged disappearance of the seized documents and the failure to investigate and punish those responsible, both parties concur that domestic remedies have been exhausted; therefore, in this regard this petition meets the requirement established in Article 46(1)(a) of the Convention. Moreover, given that the petition was received on February 21, 2007, and that—according to allegations by the petitioner that have not been disputed by the State—the last decision is dated November 7, 2006, the IACHR concludes that the requirement established in Article 46(1)(b) of the Convention has also been met.

16. Finally, Mr. Gamarro states, without specifying the dates or the remedies sought, that he brought to the attention of the enforcement judge the deficient medical care he allegedly received while he was incarcerated, as well as the difficulties that came up in maintaining regular contact with his family and the violation of privacy of his mother, wife, and 17-year-old daughter due to the body searches to which they were subjected. Mr. Gamarro indicates that his complaints were either rejected or ignored. The IACHR also observes that the State is not presenting any observations relating to the alleged victim's allegations regarding any steps Mr. Gamarro took to bring these allegations to the attention of the national authorities and regarding any results obtained. The IACHR calls to mind that it is up to the State to demonstrate that domestic remedies have not been exhausted, unless this is apparent from the case file,<sup>3</sup> and the Commission believes that in this case it should be concluded that the alleged victim brought these allegations to the attention of the enforcement judge.

17. The IACHR calls to mind that, as it has already stated, Article 46(2) of the Convention, given its nature and purpose, is a rule whose content stands alone vis-à-vis the substantive rules of the Convention; therefore, whether it is applicable should be determined prior to and separate from an analysis of the merits of the case, considering that it relies on a different standard of evidence.<sup>4</sup>

## **VII. COLORABLE CLAIM**

18. Based on the foregoing, the Commission considers that the facts alleged in this case, if proved, could constitute violations of the rights established in Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 17 (rights of the family), 21 (right to property), and 25 (right to judicial protection) with respect to Mr. Gamarro.

19. Along the same lines, the facts alleged, if proved, could constitute violations of the rights established in Articles 5, 11 (protection of privacy), and 17 (rights of the family) with respect to the mother and wife of Mr. Gamarro. In addition, the IACHR considers that the facts alleged in this case, if proved, could constitute violations of the rights established in Articles 5, 17, and 19 (rights of the child) with respect to Mr. Gamarro's two daughters, as well as Article 11 with respect to the 17-year-old daughter.

## **VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 11, 17, 19, 21, and 25 of the American Convention, in conjunction with Article 1(1) of that treaty, with respect to Mr. Gamarro and his family;
2. To notify the parties of this decision;

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<sup>3</sup> IACHR, Report No. 48/15, Petition 79-06. Admissibility, Yaqui People. Mexico. July 28, 2015, para. 51.

<sup>4</sup> IACHR, Report No. 48/15, Petition 79-06. Admissibility, Yaqui People. Mexico. July 28, 2015, para. 56.

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

Done and signed in the city of San Francisco, California, on the 27 day of the month of January, 2017.  
(Signed): James L. Cavallaro, President; Francisco José Eguiguren, First Vice President; Margarete May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Esmeralda E. Arosemena Bernal de Troitiño and Enrique Gil Botero, Commissioners.