

## **Yenys Osuna Montes v. the Mayor of Zambrano Municipality, Constitutional Court, 1999**

...Yenys Maria Osuna Montes, a student at the educational institution “*Escuela Oficial Mixta María Inmaculada*,” filed an action for injunctive relief against Alejandro Lopez Franco, mayor of the municipality of Zambrano (Bolívar), arguing that her rights to life and education were being threatened.

The petitioner was elected student representative by her peers at the above-mentioned school and, in such capacity, she sees to it that the rights and duties of her fellow students and teachers are respected and observed. Petitioner claimed in her complaint:

“...I consider that our dignity as humans and the integrity of the institution I belong to, and which together with all members of the educational community we have strived to preserve, have been stepped on. We do not feel safe, and we live under the constant strain of knowing that we are serving as human shields for the police headquarters which are located right behind our building, and my friends and I often worry that a confrontation could break out during school hours. If this happened, what would we do?”

Therefore, Osuna Montes requested that the judge order the municipal government to move the Police Headquarters to a new site.

The evidence contained in the case file includes:

- A document ... indicating that:

“It is hereby noted that in the toilets and the school playground the windows have no protection. The classrooms used by the 1st and 4th grade of the primary level, as well as the school’s playground, are situated immediately adjacent to the street where the police headquarters are located. There is a street separating the wall at the rear end of the school compound from the Police Station and the Police Inspectorate by 6.50 meters. The School occupies a full block. Three barricades have been set up in the street leading to the Police Headquarters using bags and barrels filled with sand. The first barricade, which was built at the corner, is at a distance of 3.71 meters from the School wall. The other one is in the middle of the

street, in front of the Police Inspectorate, while the third barricade is located on the other corner, on a diagonal line from the School, at approximately 3.10 meters.”

...

- Documents signed by the [Commander of the Police Station of Zambrano]..., which state that:

1) “Reports by the 3rd Naval Infantry Battalion indicate that approximately 300 FARC [Revolutionary Armed Forces of Colombia] guerrillas were stationed in farms in the area surrounding the municipality of Córdoba Tetón, and that one of their main objectives is to take over the Zambrano municipality.”

2) “According to intelligence reports, the Zambrano Police Station is one of the military objectives pursued by the Caribbean Block of the FARC, made up of fronts 35 and 37 of that guerrilla group.”

...

- Statement by the acting Headmistress of “Escuela María Inmaculada” ... in which she states the following:

“We, the teachers and parents of the students at ‘*Escuela María Inmaculada*,’ have met with previous city mayors to discuss the fact that school premises were often used to accommodate members of the Army when they were sent to our city. During the periods when the school was used to house these officers, children would not attend classes. In early August this year, after the guerrilla took over Córdoba, the day after that (...) It is really dangerous that the school is at such short distance from the Police Headquarters. Given the current state of public order, children, teachers and the institution are at risk, because in case—God forbid—of a takeover by the guerrilla they would be affected in the first place, because we are 4 or 5 meters away from the Police Headquarters. QUESTION: Could you specify how you think public order has been disturbed in the municipality of Zambrano Bolívar? ANSWER: The day after the guerrilla took over the municipality of Córdoba, Ms. Maida, one of the teachers, was at a meeting with the Secretary of Education and other school headmasters. They wanted to suspend classes on August 5 and 6 due to the state of public order. While they were at this meeting, rumors spread that Zambrano had been taken over and this created a climate of chaos: some mothers

rushed to the school to fetch their children, and others were upset because their children had been allowed to go home just a moment before. The truth is that the teachers in the morning shift got too scared and desperate when they heard the rumors about the attack in Zambrano. QUESTION: Is there anything else you would like to add, correct or change in this statement? ANSWER: At present, we are finishing the afternoon shift earlier than usual, before 6 p.m., because we are a bit scared, and we are always the last to hear about the status of public order.”

- Statement by the minor who brought the action for injunctive relief...:

“I feel that teachers rush the classes and finish earlier than planned, because they say that the guerrilla will come to the school. I think that both students and teachers are worried because the school is right next to the Zambrano Police Station. QUESTION: Tell us if any event lately has made you feel unsafe or worried as a result of your proximity to the Police Headquarters. ANSWER: The school has always been right next to the Police Station and we did not have any problems before. But now we are constantly scared because the guerrilla took over Córdoba Bolívar and there were confrontations with the Police. The following day, we saw police officers, from here, from Zambrano, running and riding their motorbikes around the school. They were carrying guns and they said that members of the guerrilla were going to enter the school, and suddenly all the mothers came to fetch their children in tears, frightened by the rumors that the guerrilla would storm the building. The streets were full of people and we feared for our lives.”...

- Statement by the Head of the educational center, who claimed that classes had been disrupted due to the status of public order. She said that she had repeatedly requested the city's mayor to stop using the school building to accommodate members of the Army, but that the mayor had dismissed her requests....

*3. The rights of children to life, personal integrity and to a full and adequate physical and psychological development and education. The State's role in preserving those rights. The prevalence of the rights of minors. Constitutional protections and enforcement of International Humanitarian Law to cope with actual threats to prevailing rights. Reasonable restrictions on the duty of solidarity. The protection of rights requires an enforceable court order.*

This time the Court has been asked to establish whether the fundamental rights of these children—in particular the rights to life, personal integrity, to a full and adequate physical and psychological development and the right to education—have been violated or threatened by the municipal government’s response to repeated requests to move to a new site the Police Headquarters adjacent to the school that is home to the petitioning minor and her classmates and teachers...

There is, in principle, an apparent tension between the fundamental rights of children (Articles 11, 12, 44 and 67 of the Political Constitution of Colombia), which under the Constitution should prevail over the rights of others, on the one hand; and people’s duty to act in accordance with the principle of social solidarity, to respect the legitimately constituted authorities in their efforts to maintain national independence and integrity, and to strive toward the achievement and maintenance of peace, on the other (art. 95 of the P.C.).

The undoubted, visible and demonstrated presence of an armed conflict in the area, recent events proving that there are constant guerrilla attacks directed primarily against police stations and headquarters, other evidence presented by the State’s security forces and the testimony to that effect indicate that there is not just a theoretical possibility of risk or fear, but an actual and serious threat to the 264 children who every day attend this school, which is not just near the Police Station, but right next to it...

In the case of children, even though in principle they must act with solidarity or, better still, should be educated in the principles of solidarity and the demands of social coexistence, it must be established on a case-by-case basis if, given their position of unique vulnerability and defenselessness, they have the capacity and the obligation to tolerate all situations or perform all actions that are required from them, regardless of their present circumstances and the dangers to their fundamental rights, in particular their right to life.

Therefore, if we take into account that, due to their physical and psychological conditions and their total lack of experience they cannot defend themselves from attacks in the same way as an adult—especially attacks as serious as those discussed here—one cannot reasonably expect a minor to run the risk of losing his or her life, even more so when the risk can be avoided or reduced. This is one of the most important responsibilities of society as provided, inter alia, by Article 44 of the Constitution.

The duty of solidarity of minors cannot be interpreted to imply that they should tolerate that the environment where they receive education becomes a battle field and that they get caught in the crossfire, if we understand that infants, because of their defenseless state, are mere victims and cannot be expected to become heroes in the context of armed combat.

However, in this decision, and in line with its previous rulings, the Court has examined in particular the actual, evident and undeniable risk faced by the children in this case and has assessed the need to provide effective protection to them, based on factual considerations rather than theoretical classifications of what constitutes or not a military target. In light of the Political Constitution, 264 children are clearly at a grave risk of death or injury that could be prevented; and the existing dangers which have been proven to this Court emanate from the guerrilla's unilateral decision—not always consistent with academic classifications—which may consider, as they have done in the past, that the Police forces—a civilian armed body- are a military target. This factual situation cannot be ignored by the judge hearing the constitutional protection action or by government and police authorities.

Past experiences clearly indicate, and this is undeniable, that when guerrilla groups launch attacks against municipalities, they often—and almost invariably—target police stations and other public buildings in the first place. Hence, the risk posed by the specific circumstances of this case—particularly taking into account many official reports that speak categorically about the possibility of a “guerrilla takeover,” the peculiarity that the school was built immediately next to the police premises, and the fact that the school has been used as barracks to house military and police personnel—is so serious that it amounts to a threat, as defined in Article 86 of the Constitution, and which has been previously examined by this Court:

“A threat to a fundamental constitutional right can take many forms: it may relate to the specific circumstances in which an individual exercises such right; to the existence of positive and unmistakable signs indicating an individual's intention to act in a way that violates the right in question; or to a challenge (attempted crime) that affects the right at issue directly; it may also consist of unintentional acts whose characteristics persuade the judge before whom an action for relief has been brought that, should he fail to issue an order to enjoin such conduct, the right in question would be violated; it may likewise be caused by an authority's failure to act which, over time, could give rise to or enhance a risk; and it may also result from the existence of an unconstitutional rule —an authorization or an order— which, if applied, would constitute per se a violation or denial of fundamental

rights. In the latter case, Article 86 of the Constitution mandates that such unconstitutional order or authorization should not apply to the case at issue, in accordance with Article 4 of the Constitution, provided that the principle of incompatibility between the two provisions is met.” (Constitutional Court. Fifth Constitutional Review Chamber. [Corte Constitucional. Sala Quinta de Revisión]. Decision T-349 of August 27, 1993).

In the instant case, it should be underscored that, on certain occasions, Police and Army officers have stayed overnight in the School premises, aggravating in this way the risk to children's health, life, and integrity. As a result, an order will be issued to enjoin them from doing so in the future.

Having analyzed all the evidence submitted in the course of the proceedings, the Court understands that there is a high probability that the Zambrano municipality will be taken over by the guerrilla group that operates in that part of the country's territory, as can be inferred from intelligence reports. Therefore, there is a real and impending threat to the lives of the local residents, particularly those in the proximity of the police station. And there is no justification for the fact that those who are closest to the police station are no other than the students of the above-mentioned school.

This is further aggravated by the disruption of the educational process which has caused fear among children and has resulted in high drop-out rates, as demonstrated by the evidence provided.

In this respect, the Court finds that an unreasonable burden has been placed on the students of the school in the municipality of Zambrano and that the duty of solidarity—which also falls on minors—is limited by their capacity to assume such obligation. Forcing children to occupy a facility which is in immediate proximity to the police station and, as a result, is highly exposed to attacks that fall under the guerrilla's classification of armed conflict would be a manifestly disproportionate measure which violates the right to equality and threatens the right to life and education.

Also, this openly contradicts Article 44 of the Political Constitution, which provides that the rights of children have priority over the rights of others. It must be emphasized that international humanitarian law requires that children be protected from the horrors of the war.

It should be recalled that Protocol II to the Geneva Conventions, with a view to protecting civilians and children from attacks, encourages the temporary evacuation of children from an area in which hostilities are taking place to a safer area.

Taking into account the special relevance of the fundamental rights of children; that the duty of solidarity should reasonably and proportionally meet the limits imposed by prevailing fundamental rights; that there are constitutional provisions which expressly protect minors in areas of armed conflict; and that it must not be overlooked that one of the main goals of the State is precisely to protect the lives of its members—and this is also the paramount and necessary purpose of political organization; this Court considers it appropriate to require the municipal mayor, in collaboration and coordination with the relevant authorities at the departmental and national levels, especially the Ministries of Finance and Public Credit, Education, and National Defense, to adopt all necessary budgetary and administrative measures to transfer without delay the educational institution “Escuela Oficial Mixta María Inmaculada” in the Zambrano municipality to an area where the risk is lower, or otherwise to move the Police Headquarters to a different site that is still within the territory of the municipality but where a potential guerrilla attack would not likely result in the horrendous killing of children.

And given that for practical reasons this judgment may not be executed immediately, the Court understands that, in view of the circumstances of the case and in order to ensure the observance of the fundamental rights at issue, it is both viable and necessary to grant temporary injunctive relief to reduce the risk that threatens the lives of these children.

Therefore, the Court understands that the city’s mayor should prevent members of the State security forces from entering the school premises to conduct practices, trainings or to mount weapons, ammunition or deploy armed personnel, as this would increase the danger to the student community. Also, the educational community should be instructed on how to manage an emergency evacuation situation and on the mechanisms to protect the lives of its members.

In addition, this Court finds striking that the appellate court has only formally safeguarded the petitioner’s rights and has failed to issue a specific order for their protection. In this regard, it is worth noting that the action for injunctive relief (*acción de tutela*) is a protection established to safeguard rights that have been threatened and to guarantee their effectiveness (art. 2), and that the Constitution explicitly states that (art. 86) “the protection will consist of an order enjoining others to act or refrain from acting.”...

The lower court's decision is hereby SUPPLEMENTED and the municipal mayor is ordered, in collaboration and coordination with the relevant authorities at the departmental and national levels, especially the Ministries of Finance and Public Credit, Education, and National Defense, to adopt without delay all necessary budgetary and administrative measures to transfer as soon as possible the educational institution "*Escuela Oficial Mixta María Inmaculada*" in the Zambrano municipality to an area where the risk is lower, or otherwise to move the Police Headquarters to a different site that is still within the territory of the municipality but where the minors attending the school could be effectively protected.

In the meantime, before the execution of this judgment is completed, the mayor shall prevent members of the State's security forces from occupying the premises of the educational institution "*Escuela Oficial Mixta María Inmaculada*" and conducting shooting practices or training in the use of firearms, ammunition and explosives. Likewise, the educational community shall be instructed on how to manage an emergency evacuation situation as well as on the mechanisms to protect the lives of its members...

*Yenys Osuna Montes v. the Mayor of Zambrano Municipality, SU-256/99, Constitutional Court, April 21, 1999.*