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Title/Style of Cause:	Faride Herrera Jaime, Oscar Ivan Andrade Salcedo, Astrid Leonor Alvarez Jaime, Gloria Beatriz Alvares Jaime and Juan Felipe Rua Alvarez v. Colombia
Doc. Type:	Decision
Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Commissioner: Prof. Carlos Ayala Corao. Commissioner Alvaro Tirado Mejia did not participate in the discussion and decision of this Report, pursuant to Article 19(2)(a) of the Commission's Regulations.
Dated:	9 March 1999
Citation:	Herrera Jaime v. Colombia, Case 11.531, Inter-Am. C.H.R., Report No. 46/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
Represented by:	APPLICANT: the Colombian Commission of Jurists
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I. SUMMARY

1. On July 22, 1995, the Colombian Commission of Jurists (Comisión Colombiana de Juristas) (hereinafter "the petitioner") filed a petition before the Inter-American Commission on Human Rights (hereinafter "the Commission") alleging the violation of the right to life of Faride Herrera Jaime and Oscar Iván Andrade Salcedo, and of the right to humane treatment of Astrid Leonor Alvarez Jaime, Gloria Beatriz Alvarez Jaime, and Juan Felipe Rua Alvarez, by the Republic of Colombia (hereinafter "the State" or "the Colombian State").

2. After processing the complaint, the Commission made itself available to the parties to reach a friendly settlement, which was agreed to by the State and petitioner. On May 27, 1998, a friendly settlement agreement was signed and whose implementation is still in the monitoring phase.

II. PROCESSING BEFORE THE COMMISSION

3. On August 30, 1995, the Commission opened case 11531 and proceeded to transmit the pertinent parts of the complaint to the State, giving it 90 days to submit its answer. The State submitted its answer on May 9, 1996. The petitioner submitted its observations thereto on June

19, 1996. The State presented observations again on December 5, 1996, after having been granted two extensions, and the petitioner submitted its answer on January 30, 1997.

4. On March 3, 1997, in the course of a hearing held during its 95th session, the Commission made itself available to the parties to reach a friendly settlement in the matter. That same day an act of understanding was signed under which it was agreed to create a "Working Committee for the search of a friendly settlement in the cases of Roison Mora and Faride Herrera et al." (hereinafter "Working Committee"). It was agreed that this Committee would be made up of delegates of the Office of Internal Review, of the Ministry of Foreign Affairs, and of the Office of the Presidential Adviser for Human Rights, in representation of the State, and members of the "José Alvear Restrepo" Lawyers Collective and the Colombian Commission of Jurists, on behalf of the victims.

5. The Working Committee was created with a mandate to: (a) study and recommend formulas or measures to ensure the full reparations due to the victims and their family members; (b) study and recommend possible legal solutions that would make it possible to overcome the difficulties the victims had encountered in the course of the criminal and disciplinary investigations into these events; and (c) submit a final report on its activities to the Inter-American Commission on Human Rights.

6. During the 96th regular session of the Commission, the Working Committee submitted a report establishing the facts, detailing the procedures followed domestically, and setting forth a series of conclusions. The report, adopted by consensus, includes recognition by the State of its responsibility, as well as general recommendations related to legal problems in the area of military criminal justice, the activities of the institutions in charge of investigation and control, and the involvement of State agents in grave human rights violations.

7. During its 97th regular session, the Commission held a hearing on progress in the friendly settlement process. The parties reported that the victims and their family members were in the process of receiving compensation for the harm suffered. Finally, on May 27, 1998, the parties signed the friendly settlement agreement.

8. On October 5, 1998, during the 100th session of the Commission, a hearing was held in the context of monitoring progress achieved in implementing the friendly settlement agreement. On December 10, 1998, the petitioners presented to the State a proposal for recovering the historical memory of the victims. The Commission received a copy of such proposal on December 14, 1998.

III. BRIEF ACCOUNT OF THE FACTS AND CONCLUSIONS REACHED BY THE WORKING COMMITTEE

9. Petitioner's factual allegations indicate that on April 13, 1992, Oscar Iván Andrade Salcedo (30 years old), an attorney by profession, was driving in his Toyota Samurai, green, license plates SCK-297, towards the municipality of Ocaña. He was accompanied by Astrid Leonor Alvarez (30 years old), Faride Herrera, also an attorney, Gloria Beatriz Alvarez (19 years old), and Juan Felipe Rua Alvarez (9 years old), to spend Holy Week together. In the morning

hours, when passing through the place known as "Alto del Pozo," with no sign that they should stop and without any warning whatsoever, they were attacked by grenades and rifle fire by a counterinsurgency patrol made up of regular members of the National Police as well as the Elite Corps of the National Police, hiding there in ambush. The motive for the attack was apparently the existence of information according to which members of a guerrilla group had been travelling in the area in a vehicle of the same make, but blue. These facts were acknowledged to be true by the State in the friendly settlement agreement.

10. As a result of the attack, Oscar Iván Andrade Salcedo and Faride Herrera were killed. The latter died on June 4 as a result of the injuries sustained. Astrid Leonor Alvarez Jaime, Gloria Beatriz Alvarez Jaime, and the child Juan Felipe Rua Alvarez were injured. The members of the National Police who were the protagonists of the incident collected the victims and took them to the Hospital at Ocaña. Nonetheless, they decided to cover up the facts and did not report them to the Police Command. After receiving the complaint lodged by the family members of Faride Herrera, the office of the First Special Prosecutor of Cúcuta opened the investigation, in which he implicated five members of the National Police in the attack.

11. The Working Committee concluded that both the failure to act on the part of the Public Ministry--represented in this case by the Office of Internal Review--and the clear delaying tactics of the National Police, impeded the clarification of the facts by the regular courts and contributed to the manipulation and destruction of important evidence. This manipulation encompassed the autopsy of the corpse of Oscar Iván Andrade Salcedo, which was performed negligently.

12. Later, the military criminal jurisdiction successfully argued its case for claiming jurisdiction over this matter, and the case was transferred to the 70th Judge of Military Criminal Investigation, based in Bogotá. The victims were kept from participating in the proceeding in the military criminal courts. As a result, the Working Committee concluded that their right to access to justice was denied.

13. The members of the panel who are Vocales sitting in judgment in the first court martial proceeding, held in Bogotá in May 1994, handed down a verdict acquitting the accused. The President of the panel declared the verdict to be against the evidence, and the Superior Tribunal ruled that that declaration was well-founded, with which a second court martial panel was convened that deliberated in December 1994. The members of the panel who are vocales, who themselves are National Police officers, acquitted again.

14. The Working Committee concluded that the military criminal justice system does not operate independently and impartially as demanded by the Constitution and the international instruments binding on Colombia, and that it was not effective for ensuring that justice be done. Specifically, it noted that legal definitions included in the military criminal laws, such as the binding nature of the second verdict of the vocales sitting on a court-martial panel and the exclusion of the civil party, were obstacles to securing justice. For example, the Superior Military Tribunal noted:

[this Court] cannot adopt any decision other than to affirm the ruling exonerating the accused police officers of all responsibility. Unfortunately, the evidence introduced in the record during

the investigative stage may have demonstrated the opposite.... The acquittal shall be affirmed, but because the law so mandates, not because the innocence or non-responsibility of the accused has been shown by the evidence produced.

The Military Criminal Code stipulates, in Article 680, that the second acquittal shall necessarily be abided by, even if against the weight of the evidence, i.e. even though it is not consistent with the facts brought out in the proceedings. In this case, the members sitting in judgment in the oral court martial proceeding who are Vocales handed down judgments of acquittal on two occasions. Consequently, the members of the National Police responsible for the deaths of the victims were acquitted against the evidence introduced into the record.

IV. THE FRIENDLY SETTLEMENT AGREEMENT

15. On May 27, 1998, the representatives of the State and the petitioners signed the friendly settlement agreement. The document establishes acknowledgements and obligations as follows:

1. The State expresses its grief and solidarity to the relatives of the victims, and expresses its censure and rejection of actions of this type.

The Government undertakes, within two (2) months from the date this document is signed, to hold a public act of reparation, with the presence of the President of the Republic, the victims, and their relatives and representatives, in which the victims and their family members will be told that the Government accepts that the State is responsible for the acts in question.

2. The Colombian State shall agree with the family members and their representatives, within two (2) months, counted from the signing of this document, on the appropriate mechanism for recovering the memory of the victims in the events denounced.

3. Mindful of the obligation the Colombian State acquired pursuant to the American Convention on Human Rights (hereinafter "the Convention"), to investigate, judge, sanction, and make reparations to the victims and their family members, and the irrelevance of domestic motives for failure to comply with its international obligations, the Government of Colombia undertakes to continue studying the internal mechanisms which, pursuant to the law, can enable the victims to satisfy their right to justice (Articles 8 and 25 of the Convention) and to inform the petitioners and the IACHR.

In this regard, the Government undertakes to inform the petitioners and the IACHR as to the results of the study on the viability of filing an action for reconsideration which is being done by the competent organs.

4. The Government of Colombia assumes the commitment to observe, adopt, and carry out each of the recommendations contained in the report to which reference has been made, in particular, related to the separation from service of State agents involved in grave human rights violations, and providing that the persons involved in the events that are the subject of each of the two cases to which this report alludes, if they are still in the Armed Forces or National Police,

be called on to retire, i.e. that they be separated from the service, in accordance with the constitutional and statutory powers vested in the Executive.

The commitment that the Government is acquiring to implement the recommendations should not be understood to be "... breached merely because the investigation does not produce a satisfactory result. Nevertheless it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective." (Inter-American Court of Human Rights, Case of Godínez Cruz, Judgment of January 20, 1989, Series C No. 5, paragraph 188).

5. The Government of Colombia shall keep the petitioners informed, without prejudice to the provisions of the following point, on the implementation of the foregoing commitments.

6. The Government of Colombia and the petitioners undertake to submit, in each of the regular sessions of the IACHR, a detailed report on the implementation of the commitments acquired. The IACHR shall determine how long that obligation subsists.

16. The Commission expresses its satisfaction with the terms of this agreement, which was appropriately signed by Professor Robert K. Goldman, Member of the IACHR and rapporteur for Colombia, and Ambassador Jorge Taiana, Executive Secretary of the IACHR, and wishes to convey its sincere appreciation to the parties for their efforts in working with the Commission to reach a solution based on the purpose and aims of the American Convention.

17. The operative part of the agreement, reproduced above, makes reference to the recommendations of the Working Committee. These recommendations were set forth in the Report submitted to the Commission during its 96th session, and are considered part of the friendly settlement agreement. The contents of the recommendations are described bellow.

A. Recommendations from the Working Committee on the administration of justice in general

18. The general recommendations made by the Working Committee have to do with reforming the military criminal justice system, the actions of the institutions responsible for investigation and control, and the actions of the administration in cases involving grave violations of human rights.

19. Specifically, in the area of military criminal justice, it was recommended that the type of offense referred to in the case in question be investigated and tried by the regular criminal courts, in accordance with the grounds established by the Constitutional Court of Colombia in Judgment C-358 of August 5, 1997.[FN1] In addition, the Superior Council of the Judiciary (Consejo Superior de la Judicatura), the Office of the Public Prosecutor, the Office of Internal Review, and the Superior Military Tribunal were urged to follow these rules, which are binding.

[FN1] This decision establishes, in its pertinent parts, that: "1. In order for an offense to come under the jurisdiction of the military criminal courts, there must be a clear link of origin between it and a service-related activity, i.e., the punishable act must arise as an abuse of right or abuse of

authority that has occurred in the context of an activity directly related to a function that is particular to the armed forces. But what's more, the link between the offense and the activity particular to the service must be proximate and direct, and not purely hypothetical and abstract. This means that the excess or abuse of right must occur directly during the performance of a task that in itself constitutes a legitimate development of the missions of the Armed Forces and National Police. To the contrary, if from the outset the agent has criminal designs, and then uses his investiture to carry out a punishable act, the case corresponds to the regular courts, even in those cases in which there may be a certain abstract relationship between the purposes of the Armed Forces and National Police and the actor's punishable act. In effect, in those events there is no concrete relationship between the offense and the service, since at no time was the agent carrying out activities particular to the service, as his conduct was, ab initio, criminal. The link between the criminal act and the service-related activity is broken down when the offense is unusually grave, as in the case of what are called crimes against humanity. In these circumstances, the case should come before the regular courts, given the total contradiction between the offense and the constitutional missions of the Armed Forces and National Police. In this respect, it should be noted that this Court has already indicated that all conduct that constitutes crimes against humanity is manifestly contrary to human dignity and the rights of the person, and consequently bears no relationship to the constitutional function of the Armed Forces or National Police, to the point that no obedience is due to an order to commit such an act.... Consequently, a crime against humanity is so foreign to the constitutional function of the Armed Forces and National Police that it can never bear any relationship with any service-related act, since the mere commission of these criminal acts dissolves any link between the conduct of the agent and the military or police discipline and function, properly speaking; thus they should be heard in the regular courts. The Court has noted, ‘it is obvious that a service-related act could never be criminal, which is why service-related conduct is not deserving of punishment. This is why the military courts do not hear cases involving "service-related acts," but service-‘related’ crimes. In other words, what this Court affirms is not that crimes against humanity are not acts of service, for it is obvious that in a State under the rule of law a crime, whether a crime against humanity or of another type, can never constitute legitimate conduct on the part of the agent. What the Court is indicating is that there are punishable forms of conduct that are so flagrantly contrary to the constitutional function of Armed Forces and National Police that the mere commission of them breaks any functional nexus between the agent and the service." [..] ‘3.The relationship to the service should arise clearly in the evidence brought into the process. As jurisdiction in the military criminal courts is the exception to the regular rule, they will have jurisdiction only in those cases in which it is clear that the exception to the principle should be applied according to which the judge whose position is created by law, with general jurisdiction, should have jurisdiction over a given matter. This means that in those situations in which there is doubt as to where jurisdiction should lie in a given proceeding, the decision should be in favor of the regular jurisdiction, considering that it was not possible to fully demonstrate that the exception was met."

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20. The Working Committee recommended that the reforms to the military criminal justice system under consideration by the National Congress include eliminating the institution of Vocales as members of the panel sitting in judgment in court martial proceedings. This will help ensure that these processes are in line with the principles of independence and impartiality, and

in general, with the procedural guarantees enshrined in international instruments and in the Constitution itself. It is also recommended that the participation of the civil party be guaranteed, with full respect for all of his or her rights, in the same terms in which it is regulated by the Code of Criminal Procedure.

21. In terms of the actions of the investigation and control institutions, the Working Committee recommended that the Office of Internal Review permanently and effectively monitor the actions of its agents in criminal proceedings, in particular, in cases related to grave violations. It suggests the establishment of a procedure to make it possible to forward cases to the Bureau of Public Defense in the Office of the Ombudsman (Defensoría), so that the attorneys in that office could study the possibility of filing motions of appeal, cassation, or reconsideration in cases in which the civil party has not been allowed to intervene in the processes before the military criminal courts. If necessary, the attorneys should become a civil party by the power-of-attorney conferred by the party with standing, or as a civil party on behalf of the people (parte civil popular: Article 43 of the Code of Criminal Procedure). The Office of the Public Prosecutor should exercise permanent oversight, through the Oficina de Veeduría, over the acts of its prosecutors in the criminal proceedings, especially in cases of grave human rights violations, pursuant to Article 25 of Decree 2699 of 1992.

22. It was recommended that the Human Rights Unit within the Office of the Public Prosecutor be strengthened to contribute to the fight against impunity. The Office of Internal Review should carry out the process of disciplinary investigations with the diligence required to forestall the running of the statute of limitations with respect to the actions in question.

23. The Committee also recommended reforming the Single Disciplinary Code to ensure that the penalties imposed correspond to the gravity of the infractions committed; give the victims, their family members, and their representatives standing in the disciplinary investigations; consider interrupting the running of the statute of limitations once the investigations are initiated; and provide for the imprescribability of crimes against humanity, as recognized by international law.

24. The Working Committee also recommended to the National Government and the Congress of the Republic that they adopt the appropriate measures to make it possible to guarantee enforcement of the security measures issued against members of the Military Forces and Police, particularly in the case of grave human rights violations. In addition, it was recommended that in cases of clear disciplinary or criminal liability for grave human rights violations, the persons alleged to be responsible be suspended from their posts pending the investigation. In those cases in which the accused is acquitted in the military criminal or disciplinary jurisdictions against the evidence brought out in the proceeding, it is recommended that the agents not be reincorporated into the service, and instead that they be called on to retire, in other words, to be removed from the institution to which they belong, pursuant to the constitutional and statutory powers of the executive branch.

B. Recommendations of the Working Committee on this particular case

25. The Working Committee recommended that the Office of Internal Review study the possibility of submitting and, in case it is found viable, proceeding to bring an action for reconsideration of the process.

26. The Working Committee recommended to the National Government and the Office of the Presidential Adviser for Human Rights that they investigate the offenses in which the members of the National Police who obstructed the production of evidence in the case may have been involved. In addition, it recommended to the Office of Internal Review that it monitor and give impetus to the disciplinary criminal investigations into the major or minor offenses entailing misrepresentation, escape of prisoners, and embezzlement, which are referred to in the proceedings.

27. In addition, it recommended that the State carry out measures for the recovery of the victims' memory, in accordance with its recognition of international responsibility for their deaths.

V. MONITORING IMPLEMENTATION OF THE COMMITMENTS ASSUMED IN THE FRIENDLY SETTLEMENT AGREEMENT

A. Act of reparation

28. On July 29, 1998, implementing the commitment to hold a public act of reparation to the victims and their family members, then-President Ernesto Samper Pizano publicly acknowledged the responsibility of the State in this and other cases before the Commission. On that occasion, the President said:

In the events involving Faride Herrera and others... I express my acknowledgement to the family members, who in an act of tolerance and pardon, have believed in our justice system and in the desire of the State to prevent violence on the part of public employees. ... I offer this act of contrition, apologies to the families of the victims for these acts of violence ... which set forth a goal that this history not be repeated, that such situations be prevented, and that those who, in a hostile and stubborn manner, continue exercising the rule of violence, be punished.

B. Recovery of the victims’ memory

29. The State agreed to leave it up to the family members and their representatives to determine the most appropriate form and mechanism to recover the historical memory of Faride Herrera and Oscar Iván Andrade Salcedo. The May 27, 1998 agreement notes that two months are allowed for reaching agreement.

30. In this respect, it should be noted that the Working Committee proposed the creation of an annual award, with the names of the victims, by which to distinguish members of the Army who stand out for their conduct respectful of human rights.

31. The petitioners have presented a series of proposals for carrying out this commitment in light of the Working Committee's recommendation. Nonetheless, in accordance with the

information received in the course of the 100th and 102th sessions of the Commission, and provided afterwards by the petitioner, this commitment has yet to be implemented, despite the expiry of the time period established in the agreement.

C. Right to justice

32. As regards the right to justice, the State made a commitment to study the possibility of filing an action for reconsideration of the proceedings that concluded in the acquittal of the State agents involved in the incidents, and to proceed to pay the respective compensation. According to information brought out at the hearings held during the 100th and 102th sessions of the Commission, this commitment has yet to be implemented.

VI. CONCLUSIONS

33. Based on the foregoing considerations, and by virtue of the procedure provided for in Articles 48(1)(f) and 49 of the American Convention, the Commission would like to reiterate its profound satisfaction at the conclusion of the friendly settlement agreement in this case, and its sincere appreciation for the efforts of the parties to reach an agreement based on the object and purpose of the American Convention.

34. The Commission would like to acknowledge implementation by the State of its commitment to hold a public act in which it acknowledged its responsibility. At the same time, it calls on the State to continue implementing the rest of the commitments assumed, and to cooperate in the subsequent monitoring.

35. By virtue of the considerations and conclusions set forth in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the friendly settlement agreement concluded on May 27, 1998.
2. To urge the State to take all necessary measures to comply with the pending commitments.
3. To continue supervising implementation of the commitments assumed with respect to recovery of the victim's historical memory and access to justice.
4. To make this report public and include it in its Annual Report to the OAS General Assembly.

Done and signed by the Inter-American Commission on Human Rights in the City of Washington, D.C., on the 9th day of the month of March, 1999. (Signed): Robert K. Goldman, Chairman; Helio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman and Carlos Ayala.