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Title/Style of Cause:	Roison Mora Rubiano v. Colombia
Doc. Type:	Decision
Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Commissioners: Prof. Carlos Ayala Corao. Commissioner Alvaro Tirado Mejía 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:	Mora Rubiano v. Colombia, Case 11.525, Inter-Am. C.H.R., Report No. 45/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
Represented by:	APPLICANT: the "Jose Alvear Restrepo" Lawyers Collective
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## I. SUMMARY

1. On July 25, 1995, the "José Alvear Restrepo" Lawyers Collective (Corporación Colectivo de Abogados "José Alvear Restrepo") (hereinafter "the petitioner") filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission") regarding the violation of the right to life and humane treatment enshrined in the American Convention on Human Rights (hereinafter "the Convention") to the detriment of Roison Mora Rubiano by the Republic of Colombia (hereinafter "the State" or "the Colombian State").

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

## II. PROCESSING BEFORE THE COMMISSION

3. The Commission opened case 11,525 on August 17, 1995, and proceeded to transmit the pertinent parts of the complaint to the State, giving it 90 days to submit its answer. On August 29, the petitioner provided additional information. The State submitted its answer on January 29, 1996. The petitioner submitted its observations on April 2, 1996.

4. On October 8, 1996, during the hearing held at its 93rd session, the Commission made itself available to the parties to reach a friendly settlement. On October 10, it officially communicated its proposal. The parties expressed interest in the proposal through respective communications of October 30 and November 12, 1996.

5. On March 3, 1997, during the 95th session of the Commission, an Act of Understanding was signed, by which it was agreed to create a "working committee to seek 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 from the Office of Internal Review (Procuraduría General de la Nación), the Ministry of Foreign Affairs, and the Office of the Presidential Adviser for Human Rights, all in representation of the State, and members of the "José Alvear Restrepo" Lawyers Collective and the Colombian Commission of Jurists (Comisión Colombiana de Juristas)--on behalf of the victim.

6. 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 have encountered in the course of the criminal and disciplinary investigations into these events; (c) submit a final report on its activities to the Inter-American Commission on Human Rights.

7. 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.

8. 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.

9. 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. THE FACTS

10. The Working Committee determined that on June 22, 1993, in Bogotá, Harold Alberto Garcés, Jimmy Roberto Mora Rubiano, and Roison Mora Rubiano were playing, throwing stones in the road, as they headed home from work. When they were passing by the bridge where Avenida Boyacá meets Avenida El Tunal, one of the stones hit the roof of a bus as it passed under the bridge. The vehicle was transporting personnel from the National Army Command.

11. Sargent-Major Luis Ferney Bonilla Rincón and Second Sargent José Mena Serna got out of the vehicle and pursued the youths. When they were at a distance of some 200 meters, they shot at them. As a result of the shooting, Roison Mora Rubiano was seriously injured; he later died at the Hospital Meissen.

12. The matter came before the 41st judge of Military Criminal Investigations in an irregular fashion, as his court lacked jurisdiction. The military criminal courts requested the regular courts to forward the record in the case already opened concerning that death, without raising the issue of competing jurisdictional claims. The Office of the Public Prosecutor (Fiscalía) answered that before making such a decision they needed to carry out an examination of the proceedings taking place in the military criminal courts. The military courts insisted on their request before the Office of the Prosecutor, and the regular courts accepted the request without insisting on judicial examination of the record in the military courts, and without exercising the right to seek a ruling on competing jurisdictional claims before the appropriate body.

13. The relatives of the victim were deprived of the right to participate in the process as a civil party. The Public Ministry did not perform its function as special agent in the military criminal proceedings, as the request made by the Chief of the Office of Special Investigations went unanswered. The Military Prosecutor who acted instead of the Public Ministry filed no motion for cassation, despite being convinced, as he stated in his arguments in the hearings in the oral court martial proceedings (Consejo Verbal de Guerra), that the accused, Sargeant-Major Luis Ferney Bonilla Rincón, was responsible for the homicide of minor Roison Mora Rubiano.

14. The Military Criminal Code stipulates, at Article 680, that the second acquittal should be binding despite being against the evidence, i.e. it does not follow from the facts brought out in the proceeding. In this case, the members sitting in judgment in the oral court martial proceedings handed down judgments of acquittal twice. Consequently, the members of the Armed Forces responsible for the homicide of Roison Mora Rubiano were acquitted despite the evidence in 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 Commission and rapporteur for Colombia, and Ambassador Jorge E. Taiana, its Executive Secretary, 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 below.

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.[1] 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.

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[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 of 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 to investigate 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 in the case of Roison Mora Rubiano

25. The Working Committee recommended to the Office of Internal Review that it study the possibility of filing, and, if it is found viable, that it proceed, through the Public Ministry, to file an action for reconsideration of the proceedings. In addition, it recommended that the State take measures aimed at recovering the victim's memory, in accordance with the recognition of international responsibility for his death.

### IV. MONITORING IMPLEMENTATION OF THE COMMITMENTS ASSUMED IN THE FRIENDLY SETTLEMENT AGREEMENT

#### A. Act of reparation

26. 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 Roison Mora ... 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 victim's memory

27. 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 Roison Mora Rubiano. The May 27, 1998 agreement notes that two months are allowed for reaching agreement.

28. 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.

29. 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

30. 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.

#### V. CONCLUSIONS

31. 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.

32. 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.

33. 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.