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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 30/99; Case 11.026
Session:	Hundred and Second Regular Session (22 February – 12 March 1999)
Title/Style of Cause:	Cesar Chaparro Nivia and Vladimir Hincapie Galeano 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, Dr. Jean Joseph Exume. Commissioner Alvaro Tirado Mejia, a Colombian national, did not participate in the discussion and decision of this Report, pursuant to Article 19(2)(a) of the Commission's Regulations.
Dated:	11 March 1999
Citation:	Chaparro Nivia v. Colombia, Case 11.026, Inter-Am. C.H.R., Report No. 30/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
Represented by:	APPLICANT: The Corporacion Colectivo de Abogados "Jose Alvear Restrepo"
Editor's Note:	The original contains text of footnotes without corresponding references in the body of the text.
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I. SUMMARY

1. On June 17, 1992, the Corporación Colectivo de Abogados "José Alvear Restrepo" (hereinafter "the petitioner") presented a petition to the Inter-American Commission on Human Rights (hereinafter "the Commission") against the Republic of Colombia (hereinafter "the State" or "the Colombian State") alleging violations of the rights of César Chaparro Nivia and Vladimir Hincapié Galeano as set forth in Articles 4, 5, and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention.")

2. The State requested that the case be declared inadmissible, arguing that it did not meet the requirements set forth in Articles 46(1)(c) and 47(1)(d) of the American Convention. Subsequently, it argued that the case should be declared inadmissible on the basis of Article 46(1)(a). The petitioner maintained that the petition met the requirement set forth in Article 46(1)(c) and that, thus, the requirement that domestic remedies be exhausted, as set forth in Article 46(1)(a), was not applicable in this case. After analyzing the positions of the parties and whether the requirements set forth in the Convention had been met, the Commission decided to declare the case admissible.

II. PROCESSING BY THE COMMISSION

3. On June 17, 1992, the Commission opened case 11.026 and forwarded the pertinent parts of the complaint to the State, indicating that it should reply within 90 days. This request was repeated on June 10, 1993. Finally, the State presented its reply on December 21, 1993, and this was duly forwarded to the petitioner.

4. On June 13, 1994, the petitioner presented its observations on the State's reply. On November 16, 1994, the State sent additional information. On February 17, 1995, the petitioner sent a new communication, and the pertinent parts were duly forwarded. The State presented its reply on May 8, 1995. The petitioner presented new observations, to which the State replied on November 13, 1995, having requested an extension of the deadline. On February 20, July 15, and October 8 and 30, 1996, the petitioner presented further observations, to which the State replied on April 25, October 10, and November 18, 1996, respectively. During its 93rd session, held at the end of 1996, the Commission placed itself at the disposal of the parties for the purpose of reaching a friendly settlement of the case. The State expressed doubts about the possibility of reaching such a solution, alleging that domestic remedies were still pending.

5. On January 29, 1997, the State presented information on the outcome of disciplinary action taken against the officials involved in the events that gave rise to this case. On March 5 and July 10, 1997, the petitioner sent additional observations to the Commission, and the State replied thereto on November 5 of that year. On February 25 and August 6, 1998, the petitioner presented additional written material. On October 6, 1998, during the 100th session of the Commission, the parties presented their positions at a hearing.

III. POSITIONS OF THE PARTIES

A. Arguments by the petitioner

6. According to the petitioner, on February 29, 1992, at 1.30 p.m., the Administrative Department of Security (DAS) arrested César Chaparro Nivia, an educator and member of the Patriotic Union (UP), and Vladimir Hincapié Galeano, a pharmacist, on Avenue Carrera 73 A in Bogotá. Mr. Hincapié Galeano was shot and wounded at the scene of the arrest following a confrontation with DAS agents. Both detainees were taken to DAS facilities.

7. The petitioner alleges that Mr. Chaparro Nivia remained in the basement of the DAS facility from 2.00 p.m. until 10.00 p.m. on February 29, 1992, when his arrival at the detainee hall was officially recorded. During this period, agents Carlos Isidro Bernal and Carlos Hernán Vivas Morales, under the command of Germán Vicente Cuéllar Manrique, head of the operation, allegedly struck him with his fists and with blunt objects. On March 1, in view of his physical condition, he was sent to the Institute of Legal Medicine, and from there to San Juan de Dios Hospital. The Hospital admitted him on March 2 at 12:35 a.m. with severe trauma to the thorax and abdomen, and with his vital organs injured and hemorrhaging. The petitioner states that the victim died on March 4, 1992, allegedly as a result of his injuries.

8. The petitioner alleges that Vladimir Hincapié Galeano, who had been injured at the scene of the arrest, remained at the DAS facilities for two and a half hours. He too was allegedly

tortured there until he was taken to San Juan de Dios Hospital, where he was admitted on February 29 at 4:40 p.m., with bullet wounds and a fractured right foot.

9. According to the petitioner's account, on July 1, 1992, the Bogotá section of the Unit for Preliminary Investigations initiated ordinary criminal proceedings. Subsequently, the Regional Prosecutor took jurisdiction. On October 26, 1994, the Regional Prosecutor issued a preventive detention order for the crimes of aggravated homicide, attempted homicide, and torture against agents Abel Cubillos and Edilia Mora Patiño, who allegedly had been confined at DAS facilities. However, on November 16, 1994, the charge was changed to simple homicide and torture, and the case was transferred to the Sectional Prosecutor, Unit 8. This Office lifted the preventive detention order on December 9, 1994. Between February 20 and 24, 1995, Sectional Prosecutor, unit 8, investigated 13 agents, who were released on their own recognizance until their legal situation could be determined. Finally, on September 28, 1995, the Prosecutor issued a preventive detention order pertaining only to Carlos Isidro Bernal, Carlos Hernán Vivas Morales, and Germán Vicente Cuéllar Manrique, for the crime of manslaughter. However, Isidro Bernal and Vivas Morales were never captured.

10. On January 12, 1996, the Human Rights Unit of the Office of the General Prosecutor of the Nation took over the investigation, which concluded six months later on July 31, 1996. At that time, the petitioner requested that charges of aggravated homicide, rather than manslaughter, be brought, because the victim, a member of a political party, had been placed in a defenseless situation and subjected to extreme cruelty. On February 9, 1998, Circuit Criminal Court No. 30, section 558, opened the oral proceedings. The only person to give testimony in this proceedings has been Germán Vicente Cuéllar Manrique who is currently being detained in connection with another case.

11. The petitioner also has presented arguments about the disciplinary and administrative proceedings instituted against DAS agents in connection with the death of César Chaparro Nivia. On November 9, 1992, the Delegate Procurator for Human Rights formally opened the disciplinary investigation and brought charges of torture against 15 agents for the corporal punishment inflicted upon Mr. Chaparro Nivia before his death in the San Juan de Dios Hospital. After the corresponding proceeding, the agents involved were sanctioned with a 90-day suspension. This decision was appealed, and the Office of the Procurator General of the Nation declared that the disciplinary action was barred by the statute of limitations. On November 3, 1993, César Chaparro Nivia's family presented a claim before the Cundinamarca Administrative Court for damages resulting from the action of the DAS agents. On November 21, 1996, the Court determined that the responsibility of the DAS agents for the fatal injuries suffered by César Chaparro Nivia had been sufficiently proven and, consequently, ordered the State to pay compensation. However, a final decision is still pending. The petitioner did not provide documentation on any administrative claim relating to the alleged violations suffered by Mr. Hincapié.

12. With regard to the allegations on the merits of the case, the petitioner argues that the events reported constitute violations of Articles 4, 5, and 25 of the American Convention with respect to César Chaparro Nivia, and of Articles 5 and 25 respecting Vladimir Hincapié Galeano.

13. Regarding the admissibility of the case, the petitioner affirms that the undue delay in resolving the criminal case and the alleged ineffectiveness in determining the individual responsibility of those involved violate the right to adequate legal protection set forth in Article 25 of the American Convention. In its opinion, in cases such as this, where the alleged violation is a criminal offense under domestic law, the victims or their relatives have the right to a judicial investigation and decision regarding individual responsibility for the crimes committed. It is argued that domestic courts have failed to provide access to an effective remedy and that the delay in resolving the case, now more than five years, does not satisfy the standards of reasonableness established by the Inter-American Court.

14. The petitioner considers that the requirement of exhaustion of domestic remedies is not applicable in this case, based on the exception provided for in Article 46(2) of the American Convention. It is also argued that an issue such as this is linked to the merits of the case, in accordance with the case law of the Inter-American Court.

B. Arguments by the State

15. In its reply of December 21, 1993, the State requested that the case be declared inadmissible on the ground that it failed to meet the requirement on duplication of procedures set forth in Article 46(2) of the Convention. It argued that the alleged infliction of torture was already under study by the U.N. rapporteur on torture and the U.N. special rapporteur on extrajudicial, summary, or arbitrary executions.

16. In subsequent pleadings however, the State relied upon the trial of the case under domestic jurisdiction to justify the delays which it said were reasonable. Further, in its communication of October 9, 1996, the State argued that domestic remedies had not been exhausted. In particular, it affirmed:

This case is inadmissible because the remedies provided under domestic law are being pursued to determine any personal criminal liability or any disciplinary responsibility that may apply.

17. In subsequent communications, the State merely presented progress reports on the pending domestic remedies. As regards the disciplinary process, it stated that disciplinary measures had been applied--a 90-day suspension--to the officials who took part in the torture of Mr. Hincapié Galeano and Mr. Chaparro Nivia, and in the murder of the latter. The State has not expressly disputed the facts reported by the petitioner, nor has it referred to the petitioner's arguments relating to the violation of Articles 4 and 5 of the American Convention.

IV. ANALYSIS

A. Competence

18. The Commission is competent to examine this petition. The petitioner has legal standing to appear before the Commission and has submitted claims regarding compliance with the American Convention by a State party. The facts alleged in the petition took place when the obligation to respect and ensure the rights set forth in the Convention was already in force for the

Colombian State. The Commission will now determine if this case is admissible in accordance with the requirements set forth in Articles 46 and 47 of the American Convention.

B. Admissibility requirements

a. Exhaustion of domestic remedies and timely presentation

19. In its communication of October 9, 1996, the State maintained that domestic remedies had not yet been exhausted. In response, the petitioner argued that the exception on exhaustion of domestic remedies set forth in Article 46(2)(c) is applicable to this case because more than five years had elapsed since the events took place without an effective trial.

20. The Commission notes that the State introduced its objection to exhaustion of domestic remedies in its communication dated October 9, 1996, more than four years after the pertinent parts of the original petition were forwarded to it. The Inter-American Court of Human Rights has established that:

Under generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly. A waiver, once effected, is irrevocable.

As a corollary to this doctrine, failure to exhaust domestic remedies as an impediment to the competence of the Commission to examine a case must be alleged at the earliest possible opportunity.

21. In this case, more than four years lapsed between the date the case was opened, June 19, 1992, and the State's communication of October 10, 1996, in which it argued that the requirement set forth in Article 46(1)(a) had not been met. The State failed to invoke lack of compliance with the requirement during this period. In fact, the State presented observations on six occasions without referring to this issue as an impediment to the admissibility of the case, thus failing to avail itself of the corresponding procedural opportunities to allege lack of compliance with this requirement. The Commission finds that, in this case, failure to allege that domestic remedies had not been exhausted in a timely manner is equivalent to a tacit waiver of the right to present this objection. Accordingly, the arguments dated October 9, 1996, regarding noncompliance with this admissibility requirement should be rejected in limine litis for being untimely filed.

22. In view of the above, it is not necessary for the Commission to determine whether the deadline set forth in Article 46(1)(b) of the American Convention applies in this case.

b. Duplication of proceedings and res judicata

23. The State requested that the case be found inadmissible on the grounds that it failed to meet the requirement set forth in Article 46(1)(c) of the Convention regarding duplication of proceedings before another international body. It maintained that the alleged torture of the victims was being studied by the U.N. rapporteur on torture and the U.N. special rapporteur on extrajudicial, summary, or arbitrary executions.

24. In response, the petitioner alleged that when establishing the requirement regarding duplication of proceedings, the American Convention and the Regulations of the Commission refer to "another international proceeding for settlement" and that neither the special rapporteurs nor the working groups of the United Nations belong to such category.

25. Indeed, as established by Article 39(2)(a) of the Commission's Regulations, this body should not refrain from hearing and examining petitions relating to cases before other international inter-governmental organizations to which the State in question is a party whenever

the procedure followed before the other organization or agency is one limited to an examination of the general situation on human rights in the State in question and there has been no decision on the specific facts that are the subject of the petition submitted to the Commission, or is one that will not lead to an effective settlement of the violation denounced.

Consequently, there can be no duplication unless the procedure followed before the other body has the purpose of reaching a decision on the alleged violations. The Commission has confirmed this interpretation in its case-law.

26. Accordingly, the Commission considers that the aforementioned UN rapporteur and working group do not belong to the category of international bodies whose mandate could entail the duplication referred to in Articles 46(1)(c) and 47(1)(d) of the American Convention. These are mechanisms that do not lead to the effective settlement of the alleged violations. Furthermore, the State has not presented information demonstrating that these bodies have resolved the situation referred to by the victims in this case. For these reasons, the Commission finds that the requirements set forth in Articles 46(1)(c) and 47(1)(d) have been satisfied.

c. Characterization of the alleged violations

27. The Commission finds that, in principle, the issues submitted by the petitioner refer to facts that may constitute a colorable claim of violations under the American Convention. As the petition is not manifestly groundless or out of order, the Commission finds that the requirements of Article 47(b) and (c) of the Convention have been satisfied.

VI. CONCLUSIONS

28. The Commission concludes that it is competent to hear this case and that the case is admissible, according to Articles 46 and 47 of the Convention.

29. On the basis of the legal and factual arguments presented above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible;
2. To send this report to the Colombian State and to the petitioner;
3. To continue analyzing the merits of the case;
4. To again place itself at the disposal of the parties with a view to reaching a friendly settlement based on respect for the rights protected in the American Convention; and to invite them to present their positions on such a possibility; and
5. To make this decision public and include it in its Annual Report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C. on the 11th day of the month of March 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman; Commissioners Carlos Ayala Corao and Jean Joseph Exume.

[FN1] Colombia ratified the American Convention on Human Rights on July 31, 1973.

[FN2] I/A Court HR In the Matter of Viviana Gallardo et al., No. G 101/81, Judgment of November 13, 1981, para. 26. See also Eur. Court HR De Wilde, Ooms and Versyp Case, Judgment of June 18, 1971.

[FN3] The State replied on December 21, 1993, November 3, 1994, April 25, 1995, November 9, 1995, and September 4, 1996. In its reply of December 21, 1993, it merely stated that "at present the Regional Directorate of Prosecutors has referred the case to Bogota Criminal Court 42, which has jurisdiction. Furthermore, the Special Investigations Office of the Procurator General of the Nation is carrying out an exhaustive investigation to determine any possible responsibility on the part of officials of the Administrative Department of Security (DAS)."

[FN4] State reply dated December 21, 1993.

[FN5] Petition No. 02568, filed on April 8, 1992.

[FN6] The State alleges that it was notified on July 8, 1992, that this case was under investigation.

[FN7] Resolution 7/88, Case 9504, Annual Report of the IACHR, 1987-1988, p.251; Resolutions 30/88, case 9748, and 33/88, case 9786, Annual Report of the IACHR, 1988-1989, p. 32 and following. The Commission specifically indicated that it is not within the mandate of the UN Working Group on Forced or Involuntary Disappearances to decide on specific facts
