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Title/Style of Cause:	Jose Alexis Fuentes Guerrero, Ciro Blanco Caceres, Jose del Carmen Salcedo, Ivan Lozano Gonzalez, Fructuoso Rincon Paez, Ezequiel Tabares Salazar, Adolfo Calderon Florez and Luis Hernan Vargas Luna v. Colombia
Doc. Type:	Report
Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Members: 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, as provided in Article 19(2)(a) of the Commission's Regulations.
Dated:	13 April 1999
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Represented by:	APPLICANT: the Comision Colombiana de Juristas
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I. BACKGROUND

1. On July 18, 1995, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition submitted by the Comisión Colombiana de Juristas (hereinafter "the petitioner") against the Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia"). The petition alleges that State agents violated the right to life (Article 4) and the right to judicial protection (Articles 8 and 25) enshrined in the American Convention on Human Rights (hereinafter "the American Convention") to the detriment of José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna.

II. FACTS ALLEGED IN THE COMPLAINT

2. The petitioner alleges that on January 3, 1994, at approximately 4:30 p.m., members of the Mechanized Cavalry Battalion (Batallón de Caballería Mecanizada) "Reveiz Pizarro," commanded by Lt. Germán Darío Otálora Amaya, and Second Lt. Francisco Molina Guerrero, carried out a counterinsurgency operation in the hamlet of Puerto Lleras, department of Arauca.[FN1] In the course of the operation, called "Operación Pincer," members of the Army unit shot indiscriminately at unarmed civilians for 20 minutes, resulting in the death of the following eight persons: José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen

Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna. Members of the Army then allegedly forced the survivors to come out of their homes and to lie down along the bank of a nearby river while they pillaged their homes. The next day, the troops forced the survivors to gather in a circle around them in the local soccer field, and thereby used the unarmed civilians as a shield in case of an attack by the armed dissidents.

[FN1] The petition indicates that the Army unit entered the town in the course of carrying out "Operations Order No. 4 of January 3, 1994," issued by the Battalion commander in response to a missile attack by armed dissidents that same day on the Army base in the municipality of Saravena. During the attack, three soldiers were killed by a fragmentation grenade and four others were wounded.

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3. The petition states that on January 4, 1994, Lt. Otálora Amaya, locally known by his nom de guerre "Andrés," delivered the eight victims' bodies to police agents and a physician, alleging that the victims were insurgents. The police agents and physician did not speak with the civilians gathered at the soccer field; they were ordered to turn around when the bodies were removed.[FN2] That same day, seven corpses were taken to the morgue at Saravena, where the autopsies were performed.[FN3]

[FN2] Statement by Reyes Garzón Vargas to the Office of Special Investigations, Puerto Lleras, Municipality of Saravena, March 8, 1994.

[FN3] One of the victims, Luis Hernán Vargas Luna, was apparently trying to swim away from the troops when he was shot and killed. His corpse, with a gunshot wound to the head, was found one week later by local fishermen, floating downriver in the Arauca river.

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4. Colombian television broadcast interviews with some of the survivors of the attack at Puerto Lleras, and further reported that Lt. Otálora Amaya returned to the hamlet and threatened those who gave televised testimony.[FN4]

[FN4] Statement by Reyes Garzón Vargas, Office of the Procurator General of the Nation, Office of Special Investigations, March 8, 1994, Puerto Lleras.

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5. In February 1994, the Office of the Procurator General of the Nation (Procuraduría General de la Nación) requested the exhumation of seven of the eight corpses (Iván Lozano Gutiérrez, José del Carmen Salcedo, Ezequiel Tabares Salazar, Fructuoso Rincón Páez, Adolfo Calderón Flórez, and Ciro Blanco Cáceres) for the purpose of performing a second autopsy. On February 16, 1994, the authorities exhumed the body of Luis Hernán Vargas Luna, and performed the remaining autopsy. The studies confirmed that the deaths occurred as the result of injuries inflicted by firearms, in some cases from a short distance.[FN5]

[FN5] Institute of Forensic Medicine, analysis of the report and photographs compiled by members of the National Police of Arauca, and photographs taken at the scene by members of the "Reveiz Pizarro" Army battalion.

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6. Subsequently, the military justice system assumed jurisdiction over the criminal investigation. The case was removed from the 124th Court of Criminal Investigation of Saravena to the 13th Court of Criminal Investigation, also of Saravena. On March 13, 1995, the 13th Court handed down indictments against 14 members of the Army, on charges of aggravated homicide, torture, and unlawful detention, and issued arrest warrants for them. The 14 members of the Army included Lt. Germán Darío Otálora Amaya, who was not arrested until one year later.

7. On August 11, 1995, the section of the Delegate Procurator for the Armed Forces (Procuraduría Delegada para las Fuerzas Militares) asked that Lt. Otálora Amaya be discharged from the Army for his alleged participation in crimes and human rights violations not related to this case. Lt. Otálora Amaya appealed this decision to the Procurator General of the Nation to no avail. He was discharged on November 5, 1995.

8. On November 28, 1995, the Judge of First Instance issued a resolution convening a court-martial (Consejo Verbal de Guerra) of the accused. The court-martial met on February 29, 1996. The jury acquitted the accused, after which the Judge of First Instance declared the verdict to be against the evidence and remitted this decision to the Supreme Military Tribunal for review.

9. On June 26, 1996, the Supreme Military Tribunal affirmed the lower court's decision that the acquittal of the accused contradicted the evidence produced. On September 30, 1996, the Judge of First Instance issued a ruling convening a second court-martial where the officers accused of executing the eight victims in Puerto Lleras were once more acquitted. Under Article 680 of the Code of Military Justice, a second verdict from a court-martial is final.[FN6]

[FN6] Article 680 of the Code of Military Justice, Decree No. 2550 of December 12, 1988.

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10. On August 19, 1994, the Office of the Delegate Procurator for Human Rights (Procuraduría Delegada para Derechos Humanos) opened an investigation into the events at Puerto Lleras and filed charges against the following Colombian Army officers: Lt. Col. Hernando Alonso Ortiz Rodríguez, Maj. Winston Oswaldo Romero Sierra, Maj. Javier Darío Vargas González, Lt. Germán Darío Otálora Amaya, Second Lieutenant Francisco Antonio Molina Guerrero (now deceased), and against soldiers José Rafael Quiroz Mejía, Armando Garcés Briceño, and Antonio Gómez Ardila.

11. On September 18, 1996, the Procuraduría Delegada para Derechos Humanos rejected the claims of nullity presented by some of the accused, and decreed the evidence to be collected.

12. On October 9, 1996, conversations were held on a possible settlement agreement with respect to the action brought by the victims' next-of-kin before the Administrative Tribunal of Villavicencio, department of Meta.

III. PROCESSING BEFORE THE COMMISSION

13. On July 24, 1995, the case was opened and the pertinent parts of the petition were forwarded to the Colombian State with the request that it provide information regarding the facts alleged.

14. On October 27, 1995, the State reported that the matter was under the jurisdiction of a military court and, therefore, that domestic remedies had not been exhausted. On November 20, 1995, the State presented additional information on the standing of Lt. Germán Darío Otálora Amaya in the Army. On December 22, 1995, the petitioner sent its observations on the State's response and reiterated its position in a communication received by the Commission on February 2, 1996.

15. On May 6, 1996, the Commission received the State's response to the petitioner's observations. On June 14, 1996, the Commission received the petitioner's observations, with a reiteration of its arguments. On September 26, 1996, the State presented information on progress in the proceedings in the military courts.

16. On October 8, 1996, representatives of the State and the petitioners appeared before the Commission during the 93rd regular session. The Commission, pursuant to Article 48(f) of the American Convention, placed itself at the disposal of the parties for the purpose of achieving a friendly settlement in the case.

17. On November 12, 1996, the petitioners expressed their willingness to initiate a friendly settlement procedure on the following conditions: (a) express recognition of State responsibility; (b) the transfer of the domestic investigation from the military to the ordinary justice system; (c) removal of the accused from the Armed Forces; (d) compensation to the victims' next-of-kin and the social reconstruction of the community of Puerto Lleras; (e) the creation of a monitoring mechanism to oversee progress in the criminal investigation, the proceedings for compensation, and the social renewal of the community. On November 20, 1996, the State informed the Commission that, in its view, this case was not suitable for a friendly settlement.

18. On May 15, 1997, the Commission received additional information on the second acquittal handed down by the court-martial that was examining the case in the domestic jurisdiction. On May 16, 1997, the Commission requested from the State the final decisions issued by the second court-martial and the Supreme Military Tribunal. On August 12, 1997, the request was reiterated, but no response was forthcoming.

IV. ADMISSIBILITY

19. In this case, the Commission has not prepared a separate admissibility report. It has reached its decision on admissibility together with the decision on the merits of the case, issued pursuant to Article 50 of the American Convention.

20. The Commission has prima facie jurisdiction to examine the petition in question. The facts alleged in the petition occurred when the obligation to respect and guarantee the rights set forth in the Convention was already in force for the Colombian State.[FN7] Consequently, the Commission moves on to analyze whether the requirements set forth in Articles 46 and 47 of the American Convention have been satisfied.

[FN7] Colombia ratified the American Convention on Human Rights on July 31, 1973.

A. The exhaustion of domestic remedies

21. The State has alleged that domestic remedies have not been exhausted in this case.

22. The petitioner argues that in this case judicial mechanisms that are adequate and effective for resolving the case have not been set in motion in the domestic jurisdiction. It alleges that the State agents accused were tried by the military justice system and that the acquittals illustrate the inadequacy of this proceeding as a mechanism for having access to justice, as well as its ineffectiveness, after two courts-martial acquitted the officers and soldiers accused of executing the eight victims at Puerto Lleras. Under the Colombian Military Code, a second verdict by a court-martial is final.[FN8] The petitioner's argument is linked to the merits of the matter before the Commission.

[FN8] Article 587, Code of Military Criminal Justice, Decree Nº 0250 of July 11, 1958, adopted as law of the Republic of Colombia on December 16, 1961.

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23. The Commission considers that the issue of exhaustion of domestic remedies is linked to the merits of this case. It has been argued that the State failed to provide access to justice and adequate judicial protection to the victim’s families.[FN9] Therefore, the Commission must examine the adequacy and effectiveness of the military justice system as a remedy to gain access to justice together with its consideration of the merits of this case.[FN10]

[FN9] I/A Court HR, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 91.
[FN10] Id., paras. 95 and 96.

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24. In this respect, it must be noted that that the Inter-American Court of Human Rights ("the Court" or "the Inter-American Court") has indicated that:

when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.[FN11]

[FN11] I/A Court HR, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 91.

B. Compliance with the time limit established in Article 46(1)(b) of the American Convention

25. The Commission considers that compliance with the requirement for submitting the petition within six months from notification of the final decision of the domestic courts is linked to the availability of adequate and effective domestic remedies for judging the persons responsible for the death of the alleged victims. Therefore, the determination as to whether the period established in Article 46(1)(b) of the American Convention applies in this case must be deferred. In any event, the State has not called into question the timeliness of the submission of the petition.

C. Duplication of procedures

26. The Commission understands that the subject matter of the petition is not pending before any other procedure for international settlement, nor does it reproduce a petition already examined by this or any other international body. Therefore, the requirements established in Articles 46(1)(c) and 47(d) are also met.

D. Grounds of the petition

27. The Commission considers that the facts as presented by the petitioner could constitute a colorable claim of violation under the American Convention. As the petition is not manifestly groundless or out of order, the Commission considers the requirements of Article 47(b) and (c) to have been satisfied.

E. Preliminary conclusions on the admissibility of the case

28. The Commission considers that it is competent to hear this case, and that it is admissible, in principle, pursuant to the requirements established in Articles 46 and 47 of the American Convention, subject to the determination as to whether domestic remedies have been adequate and effective. This determination, as well as the determination as to whether the time limit set forth in Article 46(1)(b) has been observed, shall be made together with the analysis on whether the State has complied with its obligations under Article 25 of the American Convention.

V. ANALYSIS ON THE MERITS

A. The right to life

29. The petitioner alleges that State agents violated the right to life of José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna. The State has not called into question the version of the facts presented by the petitioners despite having had several procedural opportunities to do so.

30. Article 4 of the American Convention establishes that all persons have the right to have their life respected, and that no one may be arbitrarily deprived of the right to life.

31. As appears from the evidence collected in the record, on January 3, 1994, an Army unit under the command of Lt. Germán Darío Otálora Amaya carried out an attack against the civilian population of the community of Puerto Lleras, in retaliation for an attack perpetrated by an armed dissident group against the Army base in the municipality of Saravena.[FN12]

[FN12] Report by Lt. Germán Darío Otálora Amaya, Commander of "Operación Pincer," January 5, 1994; Statement by Reyes Garzón Vargas, Office of the Procurator General of the Nation, March 8, 1994, Puerto Lleras.

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32. The testimony of Mr. Guerrero Fonseca, a resident of Puerto Lleras and an eyewitness to the events, indicates that "the counter-guerrilla force shot many times. They were shooting at civilians who were in their homes."[FN13] The content of this testimony has been corroborated by the report of Lt. Germán Otálora Amaya, who notes that "[the bandits] were encountered during a rest period, as they were not camping, but billeted in the houses in the town."[FN14]

[FN13] Statement by Carlos Guerrero Fonseca, Delegate Procurator for Human Rights, January 21, 1994, Puerto Lleras.
[FN14] Report by Lt. Germán Darío Otálora Amaya, Commander of "Operación Pincer," January 5, 1994.

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33. The evidence indicates that all or almost all of the casualties in the attack were defenseless unarmed civilians.[FN15] There are indicia that one of the victims may have possessed arms two days prior to the attack.[FN16] Nonetheless, the forensic evidence in the record shows that none of the eight victims died in combat,[FN17] and that some were shot from less than one meter.[FN18]

[FN15] Statement by Reyes Garzón Vargas, Office of the Procurator General of the Nation, March 8, 1994, Puerto Lleras; Statement by Rosa Elvira Cáceres Melo, January 12, 1994, Office

of the Municipal Ombudsman (Personería), Puerto Lleras, municipality of Saravena, Arauca; Statement by Ciodaldo Enrique Vega Lobo, January 20, 1994, Delegate Procurator for Human Rights, Puerto Lleras, municipality of Saravena, Arauca; Statement by Carmen Elisa Rueda, January 12, 1994,
Office of the Municipal Ombudsman, Puerto Lleras, municipality of Saravena, Arauca; Statement by Carlos Guerrero Fonseca, Delegate Procurator for Human Rights, January 21, 1994, Puerto Lleras.
[FN16] Statement by Reyes Garzón Vargas, Office of Procurator General, Special Investigations Office, March 8, 1994, Puerto Lleras; Statement by Carlos Guerrero Fonseca, Delegate Procurator for Human Rights, January 21, 1994, Puerto Lleras.
[FN17] Report of the Institute of Forensic Medicine.
[FN18] Id.
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34. The evidence indicates that the victims were defenseless and under the custody of the Army at the time of death. Even in the case of two of the victims who were bearing arms prior to the attack, once they were hors de combat and under the custody of the authorities, the State had no right to execute them.[FN19] These persons had an absolute right to have their lives respected, consistent with the guarantees afforded by international humanitarian law and the American Convention.[FN20]

[FN19] Report Nº. 26/97, Case 11142, Colombia, Annual Report of the IACHR 1997, OEA/Ser.L/V/II.98, para. 134.
[FN20] Id., para. 136.
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35. In this case, the record includes several statements by witnesses that indicate that the targets of the Army attack on Puerto Lleras were civilians.[FN21] In effect, the photographic evidence and witness statements indicate that the soldiers manipulated the bodies after the attack and placed firearms on the victims, in a failed effort to feign that the deaths were the result of a battle between soldiers and armed dissidents.[FN22] The commander of the operation, Lt. Germán Otálora Amaya, later justified the attack, as he indicated in his report that the "civilian population of Puerto Lleras supported the subversion...."[FN23] Even in the event that the statements of Lt. Otálora Amaya were duly founded, the civilian residents of Puerto Lleras could not, on that basis, be considered combatants, and, therefore, legitimate military targets.[FN24]

[FN21] Statement by Rosa Elvira Cáceres Melo, January 12, 1994, Office of the Municipal Ombudsman, Puerto Lleras, municipality of Saravena, Arauca; Statement by Reyes Garzón Vargas, March 8, 1994, Public Ministry, Puerto Lleras, municipality of Saravena, Arauca; Statement by Ciodaldo Enrique Vega Lobo, January 20, 1994, Delegate Procurator for Human Rights, Puerto Lleras, Saravena, Arauca; Statement by Matilde Blanco de Moreno, Delegate Procurator for Human Rights, Puerto Lleras, municipality of Saravena, Arauca.
[FN22] Report by the Institute of Forensic Medicine; Statement by Rosa Elvira Cáceres Melo, January 12, 1994, Office of the Municipal Ombudsman, Puerto Lleras, municipality of Saravena,

Arauca; Statement by Ciodaldo Enrique Vega Lobo, January 20, 1994, Delegate Procurator for Human Rights, Puerto Lleras, municipality of Saravena, Arauca; Statement by Griselia Miranda Duarte, January 21, 1994, Delegate Procurator for Human Rights, Puerto Lleras, municipality of Saravena, Arauca.

[FN23] Lt. Germán Darío Otálora Amaya, Commander, "Operación Pincer," Patrol Report, Saravena, January 5, 1994.

[FN24] The American Convention does not contain any rule that defines or distinguishes combatants and other military targets, nor does it specify when a civilian may be lawfully attacked or when civilian casualties are a legitimate consequence of military operations. Therefore, the Commission must necessarily recur to and apply the relevant defining standards and rules of humanitarian law as sources of guiding authority in its resolution of this and other types of complaints that allege violations of the American Convention in combat situations. Not doing so would be tantamount to refusing to exercise its jurisdiction in many cases that refer to indiscriminate attacks by state agents that result in a given number of civilian victims. This result would, evidently, be absurd in light of the objective and basic purposes of the American Convention and the international humanitarian law treaties. See Report No. 55/97, Juan Carlos Abella, Argentina, Annual Report of the IACHR 1997, OEA/Ser.L/V/II.98, para. 161.

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36. The evidence also indicates that after the killing of the civilians in Puerto Lleras, Lt. Otálora Amaya and his subordinates tried to dress the victims in combat fatigues to create the appearance that they had died in battle with the Army troops.[FN25] Mr. Ciodaldo Enrique Vega Lobo testified as follows: "I saw when they were photographing people who were innocent. They removed their clothing and placed firearms on them: grenades, revolvers. They dressed them with camouflaged combat fatigues for the purpose of making them look like guerrillas."[FN26] These efforts to cover up the fact that the victims at Puerto Lleras were civilians, and the later threats against witnesses to the attack, are conclusive indicia as to the intent of Lt. Otálora Amaya and his subordinates to cover up the facts.

[FN25] Report by the Institute of Forensic Medicine; Statement by Ciodaldo Enrique Vega Lobo, January 20, 1994, PGN, Office of Special Investigations, Procuraduría Delegada para Derechos Humanos, Puerto Lleras, municipality of Saravena, Arauca; Statement by Griselia Miranda Duarte, PGN, Office of Special Investigations, Procuraduría Delegada para Derechos Humanos, January 21, 1994, Puerto Lleras; Statement by Reyes Garzón Vargas, PGN, Office of Special Investigations, March 8, 1994, Puerto Lleras; Statement by Rosa Elvira Cáceres Melo, January 12, 1994, Office of the Municipal Ombudsman, Puerto Lleras, municipality of Saravena, Arauca.

[FN26] Statement by Ciodaldo Enrique Vega Lobo, January 20, 1994, Delegate Procurator for Human Rights, Puerto Lleras, municipality of Saravena, Arauca.

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37. In view of the context and characteristics of this case, the Commission considers it pertinent to examine the facts in light of international humanitarian law. In its interpretation and application of the norms of this branch of international law, the Commission has been guided by the decisions of the International Criminal Tribunal for the Prosecution of Persons Responsible

for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Specifically, in its decision in the Tadic case, the Appeals Chamber of that Court determined that Resolutions 2444 (with respect to human rights in armed conflicts)[FN27] and 2675 (basic principles for the protection of civilian populations in armed conflicts)[FN28] of the United Nations were "declaratory of the principles of customary international law with respect to the protection of civilian populations and property in armed conflicts of any nature...."[FN29]

[FN27] U.N. GAOR, 3rd Committee, 23rd Session, UN Doc. A/C.3/SR.1534 (1968).
[FN28] UN GAOR, 25th Session, Supp. No. 28 UN Doc. A/8028 (1970).
[FN29] Prosecutor v. Dusko Tadic, No. IT-94-1-AR72, para. 112 (October 2, 1995).

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38. These resolutions prohibit, inter alia, launching of attacks against the civilian population, and require that the parties to an armed conflict distinguish, at all times, to make a distinction between members of the civilian population and persons actively taking part in the hostilities, and direct their attacks only against the latter, and, inferentially, other legitimate military objetives. In order to spare civilians from the effects of the hostilities, other customary law principles require the attacking party to take precautions so as to avoid or minimize loss of civilian life or damage to civilian property incidental or collateral to attacks on legitimate military targets.

39. The immunity of the civilian population and of individual civilians from direct attack is also codified in certain treaty provisions applicable to the internal hostilities in Colombia. Specifically, common Article 3 of the 1949 Geneva Conventions expressly prohibits, under all circumstances, "violence to life and person" of "persons taking no active part in the hostilities" or who have ceased to participate actively in the hostilities.

40. In addition, Article 13 of the Second Additional Protocol to the Geneva Conventions of 1949, to which Colombia is a party, develops and strengthens the basic rules of common Article 3, and codifies the principle of civilian immunity in the following terms:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual citizens, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

41. In situations of armed conflict, the civilian population includes those civilians who do not or have ceased to actively participate in the hostilities, i.e., which means participating in on attack whose purpose is to damage enemy personnel or property.[FN30] In the case of the residents of Puerto Lleras, the alleged expression of sympathy for the cause of one of the parties

to the conflict is not equivalent to carrying out acts of violence that constitute a real and immediate threat to the adversary.[FN31] Therefore, even if the expressions of Lt. Otálora Amaya in terms of the alleged sympathies of the civilian population for the armed dissidents were authentic, the members of the Army involved were not authorized to treat the victims in this case as legitimate targets of attack.

[FN30] Nuevas Reglas para Víctimas de Conflictos Armados: Comentario sobre los dos Protocolos de 1977 Adicionales a las Convenciones de Ginebra de 1949 (1982), p. 672.
[FN31] Id., p. 303.

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42. The Commission considers that there is no indication that the deaths of the victims occurred in circumstances that could have justified the action of the members of the Army involved. The State has not presented arguments or evidence that refute the argument that State agents arbitrarily deprived the eight victims of their lives.

43. Therefore, based on the foregoing considerations of fact and law, the Commission concludes that State agents violated the right to life enshrined in Article 4 of the American Convention as well as the standards of common Article 3 of the Geneva Conventions to the detriment of José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna in the incident that occurred in the hamlet of Puerto Lleras on January 3, 1994.[FN32]

[FN32] I/A Court HR, Velásquez Rodríguez Case, Judgment of July 29, 1988, paras. 79 and 80.

B. The right to judicial protection

44. The petitioner alleges that the right to judicial protection, as established under Articles 8 and 25 of the American Convention, has been violated in this case. Article 25 of the American Convention provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by the Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
b. to develop the possibilities of judicial remedy;
c. to ensure that the competent authorities shall enforce such remedies when granted.

This provision sets forth the obligation of the State to provide all persons within their jurisdiction an effective legal remedy for addressing violations of their fundamental rights. The Inter-American Court has established as follows:

Article 25(1) incorporates the principles recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention.... According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.[FN33]

[FN33] I/A Court HR, Advisory Opinion OC-9/87 of October 6, 1987, "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)" para. 24.

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45. In those cases in which the violation of a protected right results from the commission of a criminal act, the victims or their next-of-kin have the right to have an ordinary criminal court determine the identity of the perpetrator(s), prosecute them and impose the corresponding sanctions.[FN34] The examination of cases such as these requires a criminal process including a criminal investigation and criminal sanctions, as well as the possibility of reparation. The victims' next-of-kin did not have access to such a remedy.

[FN34] Report Nº 28/92, Argentina, Annual Report of the IACHR 1992-1993, OEA/Ser.L/V/II.91, Doc. 7 rev., paras. 42-48.

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46. In this case, the members of the Army accused of participating in the acts in question were judged by two courts-martial and acquitted both times, in decisions considered to be against the evidence by the local authorities.

47. By its nature and structure, the military criminal jurisdiction fails to meet the standards of independence and impartiality required by Article 8 of the American Convention. With respect to the adequacy of the military courts to judge conduct involving the violation of fundamental rights, the Commission has already established:

The military tribunals do not guarantee that the right to a fair trial will be observed, since they do not have the independence that is a condition sine qua non for that right to be exercised. Moreover, their rulings have frequently been biased and have failed to punish members of the

security forces whose involvement in very serious human rights violations has been established.[FN35]

The Constitutional Court of Colombia has also ruled on the issue of the jurisdiction of the military courts to examine cases relating to human rights violations:

For an offense to come under the jurisdiction of the military criminal justice system, a clear link should be made, from the outset, between the offense and the activities of military service. In other words, the punishable act should occur as an excess or abuse of power that occurs in the context of an activity directly linked to the function particular to the armed forces. The link between the criminal act and the military service-related activity is broken when the offense is extremely serious, as is the case of crimes against humanity. In such circumstances, the case should be referred to the civilian justice system.[FN36]

[FN35] IACHR, Second Report on the Situation of Human Rights in Colombia (1993), OEA Ser.L/V/II.84, doc. 39 rev., p. 245.
[FN36] Constitutional Court, Judgment C-358 of August 5, 1997.

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48. The perpetration of an indiscriminate attack against unarmed civilians cannot be considered an activity linked to the functions of the Armed Forces. Even if such a link were present in this case,[FN37] the seriousness of the violations of fundamental rights committed in Puerto Lleras severed that link and rendered inappropriate the exercise of military jurisdiction over this case. In other words, the matter should have been examined from the outset by the ordinary and not the military courts.

[FN37] Id.

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49. In addition to the criminal process, disciplinary and administrative processes have been initiated with respect to the deaths of the eight victims. The Commission considers that such processes do not constitute adequate means for judging the violations alleged.

50. A disciplinary process is not an adequate mechanism to judge a case involving the violent death of eight persons at the hands of State agents. Acts of this nature require criminal and not merely disciplinary sanctions.

51. In terms of the contentious-administrative process, which is still pending, the Commission has established, in cases similar to this, that such jurisdiction only provides a mechanism for supervising the administrative activity of the State aimed at obtaining compensation for damages caused by abuse of authority.[FN38] In general, this proceeding does not constitute an adequate mechanism to obtain reparation for human rights violations and consequently it need not be exhausted in a case such as this.[FN39] So long as there is no

determination with respect to the violation of fundamental rights, mere compensation for damages is not an adequate remedy.

[FN38] Report Nº 15/95, Colombia, Annual Report of the IACHR 1995, OEA/Ser.L/V/II.91, doc. 7 rev., para. 71.
[FN39] id.

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52. In the comparative law of the member States of the OAS, including Colombian law, a determination of responsibility pursuant to an ordinary criminal process generally includes or precedes the decision on reparation to the victims or next-of-kin who participate in the proceedings as a civilian party. Thus, the criminal proceeding, which would be the appropriate remedy in cases such as this, provides the possibility of obtaining monetary compensation, in addition to any criminal sanctions. Petitioners cannot be required to exhaust the contentious-administrative proceedings, whose sole purpose is to determine a monetary compensation, when there is another means of achieving both reparation for the damage and the trial and punishment required in a case such as this. When the criminal proceeding does not make reparation for the violation of human rights, including the right to compensation, the victims do not have to exhaust any other remedy to obtain such compensation.[FN40]

[FN40] Report Nº 5/98, Case 11019, Alvaro Moreno Moreno, Colombia, Annual Report of the IACHR 1997, para. 63.

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53. Further, a remedy that is illusory due to the general conditions that prevail in the country or the particular circumstances of a given case cannot be considered effective.[FN41] The Inter-American Court has held that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[FN42]

[FN41] I/A Court HR, Advisory Opinion OC-9/87 of October 6, 1987, "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)," paras. 27 and 28.

[FN42] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, paras. 174 and 176. Report No. 30/97, Case 10,087, Gustavo Carranza, Argentina, Annual Report of the IACHR 1997, para. 75.

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54. The lack of effectiveness of the military criminal system as a mechanism for access to justice was verified by the acquittal of the accused. As a result, the indiscriminate attack against the civilian population of Puerto Lleras, which cost the life of the victims in this case, has remained in impunity, and to this day the victim's next-of-kin have been deprived of any reparation.

55. Therefore, the Commission, based on the information in the record, concludes that the victims' next-of-kin did not have access to adequate and effective judicial protection in the terms of Articles 8 and 25 of the American Convention.

56. As regards the exhaustion of domestic remedies as an admissibility requirement, Article 46(2)(b) of the American Convention establishes an exception to the requirement regarding prior exhaustion when the efforts of the victim or victims to have access to such remedies have been hindered. In this case, the Commission considers that the requirement can be waived, as the victims' next-of-kin were deprived of access to remedies that are adequate and effective for having the persons responsible for the death of their next-of-kin judged, and for determining the corresponding reparations. Consequently, the time period set forth in Article 46(1)(b) of the American Convention can also be waived.

VI. APPROVAL OF THE ARTICLE 50 REPORT AND IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATIONS

57. The Commission examined this case in the course of its 100th session, and on September 29, 1998, adopted Report Nº 49/98, pursuant to Article 50 of the American Convention. In its Report it concluded that the Colombian State was responsible for the violation of the right to life pursuant to Article 4 of the American Convention and common Article 3 of the Geneva Conventions, and of the right to judicial guarantees pursuant to Articles 8 and 25 of the American Convention, to the detriment of José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna. In addition, it recommended that the State: "(1) undertake a serious, impartial, and effective investigation of the events at Puerto Lleras for the purpose of putting on trial and punishing the persons responsible; (2) adopt the necessary measures to make reparation to the victims' next-of-kin, including the payment of fair compensation; (3) adopt the necessary measures so that in the future the persons responsible for acts similar to those examined in this report may be judged by the regular justice system, pursuant to the doctrine developed by the Constitutional Court of Colombia and by this Commission." On November 10, 1998, the Commission transmitted the Report to the State, and gave it three months to submit information on implementation of the above-noted recommendations. The State submitted its observations to the Report by note of February 15, 1999.

58. The State set forth several material discrepancies that appear in Report 49/98, of which the Commission has taken due note, and which have been incorporated, as pertinent, in this Report.

59. The State has also made a series of statements regarding the grounds for the Commission's decision. It called into question, among other things, the decision regarding admissibility in this case, based on the determination that the victims had been deprived of access to adequate and effective remedies for curing the violations alleged in the domestic forum. The State argued that there exists, in its domestic legislation, a set of mechanisms of protection that should be considered by the Commission as a whole for the purpose of exhaustion of domestic remedies.

60. The Commission must note that it would be inappropriate to re-examine its decision on admissibility at this stage in the proceedings unless documentation were presented showing the existence of substantial material errors or the existence of facts which, had they been taken into account, would have substantially modified the decision on admissibility. The Commission has clearly expressed the grounds that led it to conclude that the investigation of the facts and the judgment of the persons responsible by the military courts deprived the victims' next-of-kin of access to justice pursuant to the standards of the American Convention.

61. The State considers that the breadth with which the Commission has applied the rules on exhaustion of domestic remedies leaves it "in a relatively defenseless position" given that its domestic legislation assigns independence to the disciplinary and administrative oversight bodies. In this regard, the Commission should remind the Colombian State that the principles and standards in force under international law establish that those States that have assumed obligations by virtue of having ratified a treaty may not invoke their domestic legislation to excuse non-compliance with the treaty. The Commission has been mandated to determine whether the provisions of the American Convention are duly respected and guaranteed by the States parties. While the process of making this determination is subject to admissibility requirements such as the prior exhaustion of domestic remedies, the Commission should not neglect its obligation to determine whether there have been violations of the fundamental rights enshrined in the American Convention, as it has been shown that the remedies offered in the domestic jurisdiction have not worked or are not working in accordance with the standards set forth in the treaty, with regard to access to justice. This is especially so when the State has refrained from expressly objecting to the Commission's jurisdiction to analyze the particular case.

62. The State has called into question the recommendation to undertake a serious, impartial, and effective investigation of the events that occurred at Puerto Lleras for the purpose of trying and punishing the persons responsible. It considers that, as the military and disciplinary proceedings have concluded, the initiation of new proceedings on the same facts would be tantamount to disregarding final judicial and disciplinary decisions, and would entail the consequent violation of the principles of res judicata and non bis in idem enshrined in the Colombian Constitution and the American Convention.

63. The Commission must reiterate that, as determined in Report 48/98, the State agents accused in the Puerto Lleras massacre were acquitted in a proceeding that did not have impartial and independent judges. The judgments against the evidence handed down by the military courts cannot be considered as reparation for the serious violations committed. The State has not met its obligation to ensure access to an effective remedy, pursuant to the standards of Article 25 and the guarantees of impartiality of Article 8 of the American Convention. Therefore, the State must do all that it can to cure this situation, which triggers its international responsibility. In any event, the Commission would like to note that while the principle of legality is enshrined in the American Convention, the standards of the Convention should not be invoked so as to suppress the enjoyment or exercise of other rights recognized by it,[FN43] in this case, access to justice.

[FN43] See Article 29(a) of the American Convention.

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64. As regards the reparation due, the State emphasized that, as indicated in Report 49/98, the contentious-administrative proceeding initiated by the victims to establish the responsibility of the State and determine the compensation due is still under way. The Commission notes that the fact that this proceeding under domestic legislation is ongoing does not stand in the way of the State making compensation to the victims pursuant to the determination of responsibility made by the Commission in its Report. Indeed, the State has the legal mechanisms in place to do so.

65. The State added, in this respect, that the very publication of the Report adopted by the Commission "represents a form of moral reparation." The Commission appreciates the value that the State attributes to its pronouncements. Nonetheless, the possible publication of the Report in the case under study does not relieve the State of its obligation to make reparation for the damage caused, pursuant to the Convention, by payment of compensation, as well as the adoption of other measures to satisfy the victims' next-of-kin for the loss they have suffered.

66. As regards implementation of the recommendation to adopt the measures needed to ensure that in the future the persons responsible for conduct similar to that examined here be tried in the regular courts, the State indicated that since Judgment C-358 of August 1997, the Constitutional Court has proceeded to transfer a large number of cases to the regular courts. It also pointed to the study by the Colombian Congress of a draft reform to the military criminal justice system that incorporates the guidelines and standards expressed by the Court in its judgment. The Commission hopes that, if adopted, this legislative initiative will correspond with the standards established in the American Convention regarding access to justice and due process. In terms of the removal of cases to the regular jurisdiction, the Commission expresses its hope that the Council of the Judiciary will fully implement the criteria of that Constitutional Court judgment.

VII. CONCLUSIONS

67. The Commission, based on the foregoing considerations of fact and law, and in light of the observations to Report 49/98, ratifies its conclusions that the Colombian State is responsible for the violation of the right to life pursuant to Article 4 of the American Convention and

common Article 3 of the Geneva Conventions, and the right to judicial guarantees protected by Articles 8 and 25 of the American Convention, to the detriment of José Alexis Fuentes Guerrero, Ciro Blanco Cáceres, José del Carmen Salcedo, Iván Lozano González, Fructuoso Rincón Páez, Ezequiel Tabares Salazar, Adolfo Calderón Flórez, and Luis Hernán Vargas Luna.

VIII. RECOMMENDATIONS

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE COLOMBIAN STATE:

1. That it undertake a serious, impartial, and effective investigation into the events that occurred at Puerto Lleras so as to put on trial and punish the persons responsible.

2. That it adopt the necessary measures to make reparation to the victims' next-of-kin, including the payment of fair compensation.

3. That it adopt the necessary measures so that in the future the persons responsible for acts of a similar nature as those examined in this report may be judged by the regular justice system, pursuant to the doctrine developed by the Constitutional Court of Colombia and by this Commission.

IX. PUBLICATION

68. The Commission transmitted the report adopted pursuant to Article 51 of the American Convention to the State and to the petitioner on February 25, 1999, and gave the State one month to submit information on the measures adopted to comply with the Commission's recommendations. The State failed to present a response within the time limit.

69. Based on the foregoing considerations, and in conformity with Article 51(3) of the American Convention and Article 48 of its Regulations, the Commission decides to reiterate the conclusions and recommendations of paragraph 67, to make this Report public, and to include it in its Annual Report to the General Assembly of the OAS. The Commission, pursuant to its mandate, shall continue evaluating the measures taken by the Colombian State with respect to the recommendations at issue, until they have been fully implemented.

Done and signed by the Inter-American Commission of Human Rights in the City of Washington D.C., on the 13 day of the month of April 1999. (Signed:) Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second vice-Chairman; Jean Joseph Exumé; and Carlos Ayala Corao.