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Decided by: President: Clare K. Roberts;
First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
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Represented by: APPLICANTS: the Centro por la Justicia y el Derecho Internacional and the Asociacion Casa Alianza America Latina
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I. SUMMARY

1. On March 28, 2002, the Inter-American Commission on Human Rights (hereinafter referred to as "the Commission" or the "IACHR") received an application filed by the Centro por la Justicia y el Derecho Internacional (CEJIL) and the Asociación Casa Alianza América Latina ("Casa Alianza") (hereinafter referred to as "the applicants") imputing to the State of Guatemala (hereinafter "the State" or the "Guatemalan State") liability in the murder of Mr. Edgar Eduardo Pineda, 18 years of age, and the impunity that remains.

2. The applicants argue that the State is liable for the violation of the right to life, to a fair trial and to judicial protection under Articles 4, 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") to the detriment of the victim and his family. On the issue of admissibility of the matter, the State does not allege that the remedies of the internal jurisdiction were not exhausted.

3. After reviewing the positions of the parties, the Commission concluded that it had jurisdiction to hear the claim and that the case was admissible under Articles 46 and 47 of the Convention. Accordingly, the Commission decided to notify the decision to the parties and to continue examining the substance of the matter, namely the alleged violation of Articles 4, 8 and 25 of the Convention. In addition, the Commission decided to publish and include its decision in the Annual Report to the OAS Assembly.

II. PROCEDURE BEFORE THE COMMISSION

4. On May 6, 2002, the IACHR initiated the proceedings of the Application N° 221/2002 under its Rules in effect since May 1, 2001, transmitting to the State the pertinent parts of the application and giving it two months to file its comments. On June 28, 2002, the State asked for a 60-day extension to collect the information needed to file its comments. An extension was granted on July 29, 2002, for a period of 30 days.

5. As the State did not reply, on March 19, 2003, the applicants asked the IACHR to apply Article 39 of its Rules and presume the truth of the facts alleged, whereupon the relevant admissibility report could be issued.

6. On January 15, 2004, the State asked for another 60-day extension. This request was denied in line with Article 30(3) of the Rules of the Commission.

7. On May 17, 2004, the State submitted additional information, which was sent to the applicants on May 21, 2004, giving them one month to reply. On June 21, 2004, the applicants filed their comments on the information submitted by the State. In order to preserve the adversarial principle, the relevant parts of the additional information filed by the applicants was conveyed to the State, giving it one month to file its comments.

7. On May 17th, 2004, the State presented additional information on the petition, which was sent to the petitioners on May 21st, 2004, for their observations in a month's term. On June 21st, 2004, the petitioners presented their observations to the information presented by the State. In order to ensure the "contradictory principle", the parts related to the additional information presented by the petitioners was transmitted to the State for its observations. A month was given to the State for this purpose.

8. On December 11, 2002 the Guatemalan State presented his observations, which were transmitted to the petitioners on December 17, 2002. In the communication of December 17, 2002 the CIDH indicated to the petitioners that in case of considering it to be necessary, the CIDH would request them opportunistically more information, nevertheless the petitioners would be authorized to send to the Commission any unproved statement or additional information that they were considering to be pertinent to the case.

9. On July 29, 2004, the State advised the IACHR that the Presidential Commission to Coordinate the Policy of the Executive on Human Rights (COPREDEH, "Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos") had asked the General Secretary of the Prosecutor's Office "to review the provisional closing of the proceedings prompted by the killing of Edgar Eduardo Pineda, so as to continue the case and reopen proceedings before the relevant courts of law and resume criminal prosecution in the case to reflect new evidence." Consequently, the State asked the IACHR for a 60-day extension. A one-month extension was granted on August 2, 2004. On September 1, 2004, the State submitted additional information.

III. POSITION OF THE PARTIES

A. Position of the applicants

Concerning the facts

10. The applicants say that about 10 PM on August 21, 1994, Edgar Eduardo Pineda, a street youth, was walking with his friends Edwin Antonio Mux, José Reyes Siqui and Nicolás Cruz Ruiz along 9th Avenue in Zone 1 of the City of Guatemala. The petitioners point out that, a man was at that time passing by and the youths decided to get his wallet. They approached him and Edwin Antonio Mux put his hand in the man's pocket, and once he had the wallet they ran off. While escaping, the applicants say, the youths realized that the man was chasing them with a gun, which he fired. Two of his shots struck and killed Edgar Eduardo Pineda.[FN1]

[FN1] Annex 1: Statement from Edwin Antonio Mux dated September 12, 1995.

11. According to the application, the man ran off along 9th Avenue, with several people chasing him, and was intercepted by patrol car No. 205 of the National Civil Police (PNC) manned by Police Officer II, Reyes Horacio González Portales, and a policeman named Emilio Matías Aguilar, badge No. 6982. The applicants contend that when the man, who subsequently identified himself as Ismael Nehemías Parhan Ramírez, was apprehended, he was still holding the gun; that the policemen were told by eyewitnesses that moments earlier Mr. Parhan Ramírez, while on 9th Avenue between 18th and 19th streets, in front of a property bearing the number 18, had fired on a male individual; and that the policeman went to that location and did indeed find the body of young Pineda, dead from bullet wounds, and they reported the matter to the Justice of the Peace.[FN2]

[FN2] Annex 2: See police report dated August 21, 1994.

12. In addition, the applicants indicate that once Parhan Ramírez was processed, he voluntarily confessed to Police Officer First Class Jorge Urbano Fuentes Hernández, that he had indeed fired against Edgar Eduardo Pineda because the latter, along with other individuals who fled, had taken his wallet, in which he said he had 500,000 quetzals.[FN3] Despite this, they maintain, it was only seven hours later that the paraffin glove test was done.

[FN3] Id.

13. Nevertheless, say the applicants, in the initial inquiry before the Fifth Judge of the Lower Criminal Court for Drug Activities and Environmental Offenses, Mr. Parhan Ramírez denied having taken part in the events[FN4] and said that the firearm he owned, having purchased it on August 26, 1994,[FN5] had been stolen from him at knifepoint by other people. His attorney, in

the same statement, states that his client was entitled to carry the weapon without a proper permit because he was a Military Commissioner.

[FN4] Annex 3: Copy of statement of Mr. Parhan Ramírez.

[FN5] Annex 4: Copy of the purchase contract.

14. In the petition are related the following procedures made by the Fiscal Agent Edgar Abel Méndez during the homicide investigation of Edgar Eduardo Pineda : Decision issued on march 6 of 1995, requesting the presence of the agents of the PNC that captured him, in order to listen to their statement; the decision of July 6 of 1995 solicited information about the location of the PNC agent; the statement of the agent Reyes Horacio González Portales before the Auxiliary Prosecutor of the Public Minister rendered the July 20 of 2005, in which he confirmed the version introduced in the police file the night that the events occurred;[FN6] the statement of the young Edwin Antonio Mux of the Cid, received the 12 of September of 1995, before the Auxiliary Prosecutor of the Public Minister, which according to the petitioners coincides whit the version of Agent Gonzalez;[FN7] the statement of Jose Reyes Siqui made the February 27 of 1996.

[FN6] Annex 2: Police report of date August 21. Of such a way he affirmed that while one was covering the sector of the zone, he observed that to " that thing about the two of the morning on the eighth avenue there was covering an individual of the masculine sex which age chased by several persons, who did not provide his names informing that the recorded today was responsible for a blood fact in the ninth avenue between street eighteen and nineteen of the zone one. For what we proceeded to his detention same that we him seize a revolver calibrates 38 mm Mark Smith bone, same that it was carrying in right hand for what immediately we go to the ninth avenue ", taking Mr. Parhan Ramírez to the Second Body of the National Police.

[FN7] Annex 1: Deposition encloses.

15. The applicants contend that the investigation was assigned to a new prosecutor, Mario González Contreras, who, on May 21, 1996, requested the provisional closing of the proceedings. They indicate that on May 27, 1996, the Judge of the Fifth Lower Criminal Court for Drug Activities and Environmental Offenses ordered the provisional closing of the proceedings in a ruling that was reversed on August 14, 1996, by the Tenth Division of the Court of Criminal Appeals for Drug Activities and Environmental Offenses, which was of the opinion that the facts were sufficient to warrant a trial.

16. According to the application, the investigation remained inactive for three years until February 18, 1999, when officials of Prosecuting Office No. 17, in charge of the investigation, tried to take a statement from another policeman, Emilio Matías Aguilar--then an inmate in the Pavón Model Rehabilitation Farm--who refused to cooperate.

17. Since then, the applicants say, actions intended to clear up the killing of Edgar Eduardo Pineda and punish his killer have been absolutely ineffective and gone nowhere, the case having been provisionally closed on June 29, 2000. At the same time, the Prosecutor ordered to take some evidentiary measures that were even then pending: a) confrontation of the three witnesses; b) rehearing of the testimony of the two policemen of the National Civil Police who captured the suspect; c) finding the weapon used; d) ballistic testing of the bullets; e) establishing the existence and lawfulness of the sales contract for the weapon; f) ascertaining the relationship of the suspect with the Army; and g) taking statements from the three witnesses proposed by the complainant who joined the case. In August 2001, at the behest of "Casa Alianza," testimony was heard from Nicolás Cruz, the policeman who arrested Horacio Reyes Portales; of the measures mentioned earlier, these [sic] are so far the only ones that have been carried out.

On the admissibility of the application

18. The applicants allege that this case falls under an exception to the rule on prior exhaustion of domestic remedies stipulated in Article 46(2) of the Convention, inasmuch as there has been an unwarranted delay in the investigation, as reflected in the few and deficient measures carried out after the events.

19. They argue that the absence of zeal displayed by the authorities and their scant eagerness to pursue justice is apparent in the basic procedures repeatedly omitted from proceedings of this nature worthy of being recognized as effective or performed by competent personnel. Thus: no information was obtained on the eyewitnesses; there are no photographs of the body because of a "lack of the required materials"[FN8]; no ballistics testing was done on the Smith & Wesson gun even though it was unquestionably the gun used in the crime; there was no investigation of whether it was the property of Mr. Parhan Ramírez, in light of the obvious contradiction that arises between the sales contract and the fact that it was purchased by Mr. Parhan Ramírez five days after the events; the unjustifiable delay in conducting the basic "paraffin glove" test, which was done after the recommended time for it to be useful.

[FN8] Annex 6, according to the report from the Photography Lab of the Identification Department of the National Police.

20. The applicants maintain that the whole proceedings reflect a total absence of will on the part of the Justice Department to conduct a serious and full investigation that would serve as the basis for a subsequent trial of the person who killed young Pineda.

21. The petitioners argue that, since the murder on August 21, 1994, ten years have gone by without a final ruling in the criminal proceedings, even though the crime requires public prosecution and the State has the obligation to investigate and punish the perpetrator through the courts. They point out that even a ruling requiring the case to go to trial has yet to be issued,[FN9] even though any court of law would regard the evidence collected as sufficient for that purpose. Consequently, impunity has resulted.

[FN9] As to the question of when do domestic proceedings end, the Inter-American Court has consistently held that the proceedings " end when a final and firm judgment is delivered and the jurisdiction thereby ceases and that, particularly in criminal matters, that time must cover the entire proceeding, including any appeals that may be filed...!" (I/A Court H.R., Case of Suárez-Rosero vs. Ecuador. Judgment of November 12, 1997, para. 71.)

22. Regarding the status of the perpetrator as a government agent, the applicants indicate that this was established in the judicial statement of Ismael Nehemías Parham Ramírez on August 22, 1994, in which he provided documentary evidence showing that he is a Military Commissioner.[FN10] His attorney even explained that it was because of that ID that he was authorized to carry a firearm without proving that he owned it. In addition, the applicants allege that it makes absolutely no difference, from the standpoint of the international law of human rights, whether or not the perpetrator--whose identity has been established--belongs to the military, inasmuch as irrespective of such status, the State is internationally liable under the Inter-American System if it fails to meet its obligation to investigate the events and punish the perpetrator within a reasonable time.

[FN10] See his statement dated August 22, 1994, Annex 3, attached to the initial petition of March 26, 2002.

B. Position of the State

23. The State indicates that COPREDEH, after the application was submitted to the IACHR, compiled information from the Office of the Prosecutor regarding the request for provisional closing of the proceedings against Ismael Nahaman Parhan Ramírez, said to have been forwarded to the Fifth Lower Criminal Court for Drug Activities and Environmental Offenses on May 21, 1996. The State reports that it received no reply from the Prosecutor's Office.

24. Later, on June 24, 2002, COPREDEH asked the Ministry of Defense to establish whether Mr. Parhan Ramírez was in the military in 1994, inasmuch as he was carrying a military ID when the events took place; and whether the Smith & Wesson gun was the property of that Ministry. On July 3, 2003, the Ministry of Defense advised COPREDEH that Ismael Parhan Ramírez has not worked for the Guatemalan Army and that the Army has no record of any firearm registered to his name.

25. The Government indicates that on January 15, 2004, the request to the Prosecutor's Office was repeated and the response was that Agency 17 of the Metropolitan Prosecutor's Office, which was responsible for the proceedings, had in turn made inquiries with the competent judicial authorities and had been able to establish, first, that the case file was missing and, second, that a ruling on June 29, 2000, by the Fifth Lower Criminal Court had dismissed the charges brought by the Prosecutor and had ordered the provisional closing of the proceedings.

26. Regarding the status of the perpetrator, the State contends that "criminal liability for the death of Edgar Eduardo Pineda, as established, attaches to one individual, Mr. Ismael Nahaman Parthan Ramírez, who is the subject of legal proceedings in the Fifth Lower Criminal Court for Drug Activities and Environmental Offenses and who, if proven guilty of that crime, will answer for the relevant injury and losses." [FN11]

[FN11] See brief from the State dated May 17, 2004, in the case file.

27. The State alleges that the lack of progress in the investigation is due to the failure of witnesses to appear and provide evidence that will make it possible for the case to go to trial and the facts to be clarified.

28. In addition, it reports that it is taking appropriate steps to reactivate the investigation in the Justice Department and to have the Supreme Court of Justice review, in conjunction with the appropriate lower court, the reason for the provisional closing that was decreed, as well as to have the criminal prosecution of the perpetrator reinstated.

29. Regarding the last proceedings conducted domestically in the killing of Edgar Eduardo Pineda, the State indicates that on June 29, 2000, there was a hearing attended by the parties involved to decide whether the case should go to trial, as requested by the Prosecutor's Office. The State says that on that date "the Complainant gave his consent to the provisional closing" of the proceedings, and the following evidentiary measures were ordered: confrontation of the witnesses Julio César Reyes and/or José Reyes Sequi, Edwin Antonio Mux Cid and Nicolás Cruz; a rehearing of the policemen Emilio Marías Aguilar and Reyes Horacio Gonzáles Portales who arrested the perpetrator; finding the firearm that allegedly wounded Edgar Eduardo Pineda and caused his death; ballistic testing of the bullets found in the body of the victim; determining the existence and lawfulness of the sales contract for the weapon; establishing the relationship of the accused with the National Army; hearing the testimony of Nicolás Cruz, Julio César Reyes and/or José Reyes Siqui.

30. According to the State, May 20, 2002, was that date set for the confrontation of witnesses, but it did not take place because the witnesses failed to appear. The State maintains that they were duly summoned.

31. Lastly, in its communication of September 11, 2004, the State advises the IACHR that despite the requests from the Prosecutor, the judicial authorities did not locate the case file, and that an investigation by the Bureau of Criminal Investigation of the Justice Department established its whereabouts. In addition, COPREDEH asked the Chief Prosecutor of the Justice Department to reactivate the criminal investigation on the basis of Articles 251 of the Political Constitution of the Republic of Guatemala, 46, 181, 285 and 309 of the Code of Criminal Procedure, and 1 and 2 of the Organizational Law of the Office of the General Prosecutor. The State did not report on the results of the action requested.

IV. REVIEW OF JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

32. Under Article 44 of the American Convention, the applicants have in principle the right to file applications with the IACHR. The application names as the alleged victims individuals whose rights under the Convention the State has undertaken to respect and ensure. With respect to the State, the Commission notes that Guatemala has been a party to the American Convention since May 25, 1978, the date on which it deposited the corresponding instrument of ratification. The Commission is therefore competent *ratione personae* to consider the petition.

33. The Commission has jurisdiction *ratione loci* to hear the case because the application alleges violations of rights protected by the American Convention, violations that are said to have taken place within the territory of a State party to the treaty. The IACHR has jurisdiction *ratione temporis* because the obligation to respect and ensure the rights protected by the Convention was already in force for the State on August 21, 1994, the date on which the events are said to have taken place, inasmuch as Guatemala became a State party to the Convention on May 25, 1978, when it deposited its instrument of ratification. Lastly, the Commission has jurisdiction *ratione materiae* because the application complains of violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

34. The applicants argue that, although there are criminal proceedings in the murder of Edgar Eduardo Pineda, which is a domestic remedy that has not yet been exhausted, the unwarranted delay in issuing a final ruling to exhaust that remedy amounts in itself to an exception to the rule on prior exhaustion of domestic remedies, as the American Convention clearly establishes. The State, for its part, did not specifically put forward as a defense the failure to exhaust local remedies, even though it pointed to the measures carried out in the investigation by the Prosecutor's Office.

35. As to the applicants' claim of an exception to the requirement that domestic remedies must be exhausted, Article 46(2)(a) of the Convention provides that this requirement is not applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

36. The Commission has indicated in the past that application of the exceptions to the rule requiring exhaustion of domestic remedies under Article 46(2) of the Convention is intimately connected with the possible existence of violations of certain rights established therein, such as

access to the judiciary and the effectiveness of remedies. However, Article 46(2), due to its nature and purpose, is a provision whose content is independent of the substantive provisions of the Convention. Consequently, determining whether the exceptions to the domestic remedy exhaustion rule apply in the present case is something that must be done prior to and separately from a review of the merits, inasmuch as the issue involves an evaluation standard that differs from the one used to establish a violation of articles 8 and 25 of the Convention.

37. The Inter-American Court and the IACHR have repeatedly pointed out that the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding,[FN12] in this case the international jurisdiction of human rights, that reinforces or complements the domestic jurisdiction.[FN13] This general rule not only recognizes the above right of the State but imposes on it the duty to provide persons under its jurisdiction with adequate remedies against the particular violation that actually produce the results for which they were established. If the remedies offered by the State do not meet these requirements, it is appropriate to apply the exceptions in Article 46(2) of the Convention, which have seek to ensure international action when domestic remedies and the domestic judicial system itself do not insure timely and effective protection of the victims' human rights.

[FN12] I/A Court H.R., Case of Velásquez-Rodríguez vs. Honduras. Judgment of July 29, 1988, Series C, No. 4, para. 61.

[FN13] I/A Court H.R., Case of Velásquez-Rodríguez vs. Honduras. Judgment of July 29, 1988, Series C, No. 4, para. 61.

38. The Commission notes that, in this case, ten years after Edgar Eduardo Pineda was murdered the investigation has not ended; on the contrary, judicial officials ordered the proceedings provisionally closed and the State itself reports that the case file was missing for a time, which in itself amounts to evidence of delay. The Commission consequently takes the view that in the present case the domestic remedies would not have been effective to remedy the rights infringed, and that the exception stipulated in Article 46(2)(a) of the Convention consequently applies. Also applicable is the exception established in paragraph (c) of that provision, because an unwarranted delay has occurred in deciding the domestic legal actions, as alleged by the applicants. This would eliminate any reasonable prospect of securing the remedy or relief for which they were established.

39. The Commission points out that, as a rule, a criminal investigation and the relevant criminal proceedings must take place promptly, so as to ensure justice and due process of law. In this case, the length of time that has elapsed without trial or punishment of the perpetrators amounts to evidence of unwarranted delay and scant prospects of effective redress. As the Inter-American Court has pointed out, although every criminal investigation must be conducted subject to a series of legal safeguards, the rule on prior exhaustion of domestic remedies must not

lead to a halt or delay that would render international action in support of the defenseless victim ineffective.[FN14]

[FN14] I/A Court H.R., Case of Velásquez-Rodríguez vs. Honduras. Preliminary Objections. Judgment of June 26, 1987, para. 83.

40. In view of the above, the Commission is of the opinion that the requirements on exhaustion of domestic remedies prescribed by the American Convention, as well as the six-month time frame for filing an application, should not apply. Consequently, it is proper to apply the exception to that requirement prescribed in Article 46(2)(c) of the Convention.

2. Filing deadline

41. Under Article 46(1)(b) of the Convention the petition must be lodged within six months from the date on which the party alleging violation of his rights was notified of the final judgment. In this case that provision does not apply because of the stipulation of Article 46(2)(c) of the Convention and Article 32(2) of the Rules of the Commission. As the Commission sees it, the application was filed on July 24, 2002, within a reasonable time frame considering the date of the alleged violation of rights and the circumstances of the case, particularly the last proceedings in the criminal investigation. Consequently, that requirement has been met.

3. Duplication of procedures and international res iudicata

42. It does not appear from the dossier that the application is being heard under any other international procedure or that it duplicates an application already heard by this or another international body. Consequently, the requirements of Articles 46(1)(c) and 47(d) of the Convention are deemed to have been met.

4. Characterization of the allegations

43. The Commission believes that the applicants' allegations concerning absence of judicial determination of the circumstances that supposedly led to the violent death of Mr. Pineda, as well as the trial of the perpetrator and the imposition of proper punishment, could amount to a violation of rights protected by articles 4, 8 and 25, in relation to Article 1(1), of the American Convention to the detriment of the victim and/or his family.

V. CONCLUSIONS

44. The Commission concludes that the case is admissible and that the Commission has jurisdiction to examine the claim filed by the applicants and the alleged violation of the victim's right to life, to a fair trial, and to judicial protection, as it might amount to a violation of the rights guaranteed by Article's 4, 8 and 25 in conjunction with Article 1(1) of the American Convention.

45. Based on the above facts and law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES

1. To find admissible the present case with regard to Articles 1(1), 4, 8 and 25 of the American Convention.
2. To notify this decision to the State and the applicants.
3. To begin examining the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C., on the 23rd day of February 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez, Commissioners.