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File Number(s):	Report No. 72/09; Petition 11.538
Session:	Hundred Thirty-Fifth Regular Session (3 – 8 August 2009)
Title/Style of Cause:	Herson Javier Caro (Javier Apache) and Family v. Colombia
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo G. Carozza.
Dated:	5 August 2009
Citation:	Javier Caro v. Colombia, Petition 11.538, Inter-Am. C.H.R., Report No. 72/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANT: by the Comision Intercongregacional de Justicia y Paz
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I. SUMMARY

1. On September 5, 1995 the Inter-American Human Rights Commission (hereafter “the Commission”) received a petition presented by the Comisión Intercongregacional de Justicia y Paz today referred to as the Comisión Intereclesial de Justicia y Paz (herein after “the petitioners”) in which it is alleged that agents of the Republic of Colombia (herein after “the State”, “the Colombian State” or “Colombia”) are responsible for the extrajudicial execution of the youth Herson Javier Caro, known as “Javier Apache”, presumably committed by an agent of the State on November 15, 1992 in the El Castillo municipality, Medellín del Ariari, Colombia.

2. The petitioners maintain that the State was responsible for a violation of the rights to life, humane treatment, personal liberty, judicial protections, compensation, dignity and honor, and judicial guarantees as enshrined in Articles 4, 5, 7, 8, 10, 11 and 25 of the American Convention on Human Rights (herein after “the American Convention” or “the Convention”) against the alleged victim and his family, as well as the generic obligation to guarantee and respect the rights protected by the treaty, as highlighted in Article 1(1). For its part, the State alleged that the competent authorities complied with their duty to administer justice and the petitioner’s claims were inadmissible as the IACHR cannot function as a court of appeal.

3. After having analyzed the positions of the parties and compliance with the requirements as stated in Articles 46 and 47 of the American Convention, the Commission decided to rule that the case was admissible in order to examine the presumed violation of Articles 4(1), 5(1), 8(1) 19 and 25, in accordance with Article 1(1) of the American Convention. It also decided, to declare

the case examining the presumed violation of Articles 7, 10 and 11 of the American Convention as inadmissible, notify the parties of the decision and order its publication in its annual report.

II. PROCEDURE BEFORE THE COMMISSION

4. The IACHR registered the petition under number 11.538 and on October 5th, 1995 proceeded to transmit a copy to the pertinent organs of the State, with 90 days to respond and present information, in accordance with regulations in force at that time. On January 23, 1996, the State asked for a 30 day extension to present its observations, which was granted by the IACHR.

5. On March 1st, 1996 the State presented its answer, which was given to the petitioners on March 4th, 1996 for their observations within 45 days. On April 12, 1996 the petitioners presented their response, which was sent to the State on April 15th, with 45 days for presentation of its observations. On May 29th, 1996 the State asked for an extension in order to present its answer, which was granted. The State presented its answer on October 4th, 1996, which was sent to the petitioners for their observations. On February 17th, 1997 the State presented additional information, which was sent to the petitioners on February 27th, 1997. On March 24th, 1997 the IACHR reiterated its request for comments from the petitioners. On March 24th, 1997 the State presented additional information, which was sent to the petitioners on March 26th, 1997. On May 19th, 1997 the petitioners sent their response, which was sent to the State on May 20th, 1997. On September 17th, 1997 the State released additional information, which was given to the petitioners on September 22nd, 1997. On October 21st, 1997 the petitioners gave their response, which was sent to the State on November 4th, 1997 for their observations. On February 4th, 1998 the State gave its answer, which was sent to the petitioners on February 18th, 1998 for their observations.

6. On July 5th, 2001 the IACHR put itself at the disposition of the parties in order to find an amicable solution to the issue and asked them for updated information. On July 31st, 2001 the petitioners made explicit their conditions for an amicable solution, which were sent to the State for their observations, on August 10th, 2001. On the same date, the State asked for an extension in order to answer the communiqué of July 5th, 2001, which was granted by the Commission. On October 16th, 2001 the State indicated that in their view that budgets did not allow for an amicable solution to the issue. On April 13th, 2009 the IACHR asked for updated information from the parties in accordance with Article 30.5 of their Rules. On May 14th, 2009 the State presented its final observations.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. The petitioners indicate that Herson Javier Caro was born in San Pedro de Borbur, Boyacá Department, on November 12th, 1977 and a little while after was taken to the El Castillo Municipality, in Medellín del Ariari, an area characterized by a high level of violence and confrontations between the guerrillas and the police. They indicate that in El Castillo, where the

family engaged in farming, he was known as Javier Apache for his mother's life partner, Heliodoro Apache Oyola.

8. They indicate that on November 15th, 1992, when he was 15 years old, Javier Apache was sent by his parents to sell various kilos of coffee in the Hamlet of Puerto Unión. That same day, Army Battalion 21 Vargas was setting up roadblocks, and identification control of the local population and searches in the hamlet. It is alleged that some of the soldiers wore ski-masks and bandannas to cover their faces. They allege that this situation made the boy afraid as "he rarely went to urban areas without his parents" and on seeing someone being mistreated at the roadblock, "he began to move about nervously and once he started to run he was shot in the back". They claim that members of the army forced a detained civilian, Jose Gabriel Ocampo Gallego, to take the boy, still wounded on the ground, to the hospital in El Castillo. They indicate that at approximately 11:00 AM, only moments after receiving medical attention, Javier Apache died.

9. They indicate that the afternoon of November 15th, 1992 Javier Apache's parents went to Medellín del Ariari and upon seeking explanations for the incident, an army officer told them "if he ran away it must be for something". He also told them that a collection had been made for the coffin and that the funeral arrangements were taken care of- it was held on November 16th, 1992.

10. The petitioners allege that the suffering endured by Javier Apache's parents led them to not pay enough attention to the procedures related to removal of the body and the other paperwork. They mention that the Attorney General's Office took testimony that directly proves that the military is responsible, nevertheless, five years later, only two soldiers have been punished, and this only by 30 days suspension. They claim that due to the facts prior inquest was settled before the Attorney General of Oriente on April 1st, 1996.

11. In light of the aforementioned facts, the petitioners allege that the State violated the rights enshrined in Articles 4, 5, 7, 8, 10, 11 and 25 of the American Convention and that the events in this case remain unpunished.

B. Position of the State

12. In response to the petitioners' claim, the State notes that on the morning of November 15, 1992 the army was setting up roadblocks, and identification control of the local population and searches in the hamlet Puerto Unión, suspected of collaborating with the guerrillas. Regarding the presumed victim it notes that "as it was one of the few instances he left his house alone, this time sent by his parents to sell some coffee, and feeling fear due to the circumstance (the roadblock) and after seeing a person be mistreated by the soldiers, he began to move about nervously from one side to the other and upon running away was shot in the back, which caused his death moments later"[FN1].

[FN1] Note EE/DH 228/96 from Colombia's Ministry of Foreign Relations, received on March 1st, 1996, attached.

13. It notes that the procedures related to the removal of the body were enacted by the El Castillo police inspector who sent the case to Prosecutor's Office 27 attached to the Granada section, Meta department, based on 722. It indicates that prior investigation was ordered on August 5th, 1996. It notes that the investigation was suspended in October of 1997 and attached to the preliminary investigations which were sent to Prosecutor's Office 14 delegated before the regional judges in the city of Villavicencio. It indicates that on June 12th, 1998 the Rebellion and Terrorism Unit of the Regional Prosecutor's Office of Oriente ordered the opening of investigation 2118 against civilian Tiberio Silva and Sergeant Pedro Guarnizo Ovalle (Commander of the second platoon, Company A) On April 30th, 1999 the Regional Prosecutor's Office of Oriente sent the investigation to Military Criminal Justice due to the purported participation of military personnel.

14. Military Criminal Court No.30 took over the investigation within the Vargas Battalion and on August 15th, 2000 returned the matter to ordinary civilian justice after determining that the person who killed Javier Apache was a civilian (driver Tiberio Silva) and not a member of the Army. They indicate that on October 4th, 2000 the Specialized Regional Prosecutor of Villavicencio took over the investigation and established that the perpetrator of the death of Javier Apache, Mr. Tiberio Silva had died on July 13th, 1997 due to action with a "firearm" in Acacías, Meta.

15. The State indicates that on March 12th, 2001 the Prosecutor for the Tenth Division, before the specialized judges in Villavicencio received the case and on May 9th, 2001 decided to refer the matter to the Military Criminal Justice. It indicates that on July 10th, 2001 Military Criminal Justice Tribunal 63 ordered the opening of an investigation against Sgt. Guarnizo Ovalle for the crime of abuse of authority. On April 11th, 2002 Brigade Prosecutor 22 declared null and void the order by which Military Criminal Justice Tribunal 63 resolved the judicial situation of the accused and asked that the magistrate's office reinstate Sergeant Guarnizo and declare him innocent of homicide. It also asked that a ruling be made on this crime as during the investigation it was linked to the crime of abuse of authority. It indicates that on May 30th, 2002 the judicial situation related to the charge of homicide was resolved. It indicates that on January 9th, 2003 Military Criminal Prosecutor 22 charged Sergeant Pedro José Guarnizo Ovalle with aggravated homicide by omission[FN2].

[FN2] Indicates that the accused was captured by the FARC and remained hostage for five years and ten months, until he was rescued in a military operation on, May 5, 2003. Note DDHGOI/No. 25143/1311 of May 14th, 2009, received on June 19. 2009, p. 4.

16. It indicates that on April 28th, 2003 the court martial was held and that on May 29th, 2003 the Brigade Military Criminal Court acquitted the accused considering that the evidence did not support the contention that the accused could have prevented the unfortunate situation. It indicates that this sentence was confirmed on September 3rd, 2003 by the Military Tribunal, upon consideration that the principle of indubio pro reo was in effect.

17. The State notes that the Military Forces Delegated Attorney went ahead with disciplinary investigation 022-397/95 against SGT Pedro José Guarnizo Ovalle and Sub-lieutenant Esmer Erney Castellanos Tavera. It indicates that on July 8, 1997 they were given the corresponding sanction of 30 days suspension. On August 14, 1997 the Office of the Attorney General decided on the appeal filed by Sgt. Pedro José Guarnizo Ovalle's proxy, against the decision of July 8th, 1997 and confirmed the prior decision of the Military Forces Delegated Attorney. It notes that the Attorney established that "Sgt. Pedro José Guarnizo Ovalle was questioned for not having paid attention to the actions of the civilian guides assigned to his platoon, thereby allowing Tiberio Silva to shoot the young Javier Apache, mortally wounding him, as well as reprimanding him for not having informed his superiors of this incident [...] From the declarations of the witnesses present, especially from professor José Gabriel Ocampo [...] it is known that the person who shot the young Javier Apache was the civilian guide Tiberio Silva [...]"[FN3].

[FN3] Note EE. 41347 from Colombia's Ministry of Foreign Relations received on October 12, 2001, p. 3.

18. It alleges that in the contentious administrative matter on November 11th, 1994 Rosalba Caro Monroy (mother of Javier Apache) presented a request for direct reparation before the Administrative Tribunal of Meta, # 4598. It notes that on November 30th, 2000 the allegations contained in this request were denied for lack of evidence[FN4], and that said sentence was not appealed.

[FN4] The State indicates that Administrative Tribunal argued that the plaintiffs presented a statement given by Jose Gabriel Ocampo Gallego concerning the events in which Herson Javier Caro lost his life, which was not officially presented to the administrative process and they argued that there were discrepancies in the official record concerning the identity of the victim as his birth certificate identifies him as Herson Javier Caro and the death certificate as Javier Apache. Note DDHGOI/No. 25143/1311 of May 14, 2009, received on June 19, 2009.

19. Due to the aforementioned, the State claims that it has fulfilled its duty to administer justice and that the IACHR "cannot review sentences handed down by national tribunals acting within their sphere of competency[FN5]". Accordingly, it asks that the IACHR declares the petition inadmissible.

[FN5] In support of its argument, the State cites IACHR Report 39/96 Case 11.673 of Santiago Marzioni, of October 15, 1996, 1996 Annual Report and Resolution No. 15/89 Case 10.208 of Salvador Jorge Blanco, of April 14, 1989, 1988-1999 Annual Report, p. 122, para. 5. Note EE. 41347 from Colombia's Ministry of Foreign Relations received on October 12, 2001, p. 4.

IV. ANALYSIS ON COMPETENCY AND ADMISSIBILITY

A. Competency

20. The petitioners are, in principal, empowered by Article 44 of the American Convention to present petitions before the Commission. The petition notes that the presumed victims are individuals, regarding whom the Colombian State has the obligation to respect and ensure their rights as enshrined in the American Convention. In that which concerns the State, the Commission notes that Colombia is a Member State of the American Convention as of July 31st, 1973, the date it ratified said instrument. Accordingly the Commission has competency *ratione personae* to deal with this petition. Also, the Commission has competency *ratione loci* to know of the petition, as it alleges violations of the rights protected in the American Convention which would have occurred within Colombian territory, and therefore subject to said treaty.

21. The Commission has competency *ratione temporis* due to its obligation to respect and guarantee the rights protected in the American Convention as it was already the law of the land on the date that the actions alleged in the petition occurred. Finally, the Commission has competency *ratione materiae*, because in the petition possible violations of the human rights protected in the American Convention are denounced.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

22. Article 46(1)(a) of the American Convention requires prior exhaustion of all available legal resources in the internal jurisdiction as accepted in generally recognized principles of international law, as a requirement for the admission of claims of presumed violations of the American Convention. Article 46(2) of the Convention states that the requirement of prior exhaustion of domestic remedies is not applicable when:

- a) the State does not have internal legislation to guarantee due process for the protection of the right or rights that have been allegedly violated ;
- b) the alleged victim has not been allowed proper Access to domestic legal remedies, or has been impeded from exhausting the same, and
- c) there is an unjustified lapse of time between decisions of the aforementioned resources.

23. Firstly, the Commission must clarify which domestic resources should be exhausted in this case. The Inter-American Court has noted that said exhaustion should only include those resources that are adequate to redress the presumed violations. That said resource be adequate means that

The function of these resources within the internal legal system is appropriate to protect the legal situation infringed upon. In all internal legal systems there are multiple resources, but not all of them are applicable in every circumstance. If, in a specific case, the resource is not adequate, it is obvious that it need not be exhausted. This is indicated in the principle that the norm is designed

to produce an effect and cannot be interpreted in the sense that it does not produce one or its result is manifestly absurd or irrational.[FN6]

[FN6] I/A Court H.R., Velasquez Rodriguez Case. Judgment of July 29, 1988, para 63.

24. In this case, the State considers that it has duly enacted all the established processes in order to clarify any actions which involved a member of the National Army. For their part, the petitioners consider that the deeds of the claims remain unpunished.

25. The Commission observes that due to the events a pre-trial inquiry was placed before Attorney General of Oriente on April 1st, 1996 and that on August 5th, 1996 an investigation began first with regular criminal courts, then regional courts, which was then sent to Military Criminal Justice on April 30th, 1999 (regarding Tiberio Silva) and on May 9th, 2001 (regarding Sergeant Guarnizo Ovalle). On May 29th, 2003 the Brigade Military Criminal Court handed down an acquittal, which was then confirmed on September 3rd, 2003 by the Military Tribunal.

26. The Commission has proclaimed, repeatedly that military criminal jurisdiction does not constitute an appropriate forum and accordingly is not an adequate resource to investigate, judge and sanction violations of human rights enshrined in the American Convention, presumably committed by members of the armed forces or other agents of the State[FN7]. Consequently, the processing of army members before a court martial for the conduct alleged does not constitute an appropriate remedy as defined in Article 46(1)(a) of the American Convention.

[FN7] IACHR, Report N° 64/01 Case 11.712, Leonel de Jesus Isaza Echeverry and others, April 6, 2001, para 22; Report N° 63/0, Case 11.710 Carlos Manuel Prada Gonzalez and Evelio Antonio Bolaño Castro, April 6, 2001, para. 41; I/A Court H.R., Case Almonacid Arellano and others. Judgment of September 26, 2006. Series C No. 154, para. 131 and Case of Palamara Iribarne, Judgment of November 22, 2005. Series C No. 135, para. 143; Case of the 19 Businessmen. Judgment of July 5 2004. Series C No. 109, para. 167; Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90, para 52 and Case of Durand and Ugarte. Judgment of August 16, 2000, para 117.

27. Due to the above, the situation denounced by the petitioners counts as an exception to the exhaustion of domestic remedies provided for in Article 46(2) (b) of the Convention which establishes that this exception applies when “the alleged victim has not been allowed proper Access to domestic legal remedies, or has been impeded from exhausting the same”, therefore the requirement provided for regarding prior exhaustion of domestic remedies does not apply.

28. Regarding the disciplinary sanction imposed on the two agents of the State and the definitive sentence handed down by the contentious administrative district tribunal, the Commission maintains that the decisions handed down in the disciplinary action and contentious administrative tribunal do not meet the requirements established in the Convention. Disciplinary

jurisdiction is not considered a sufficient way to judge sanction and redress the consequences of human rights violations. Contentious administrative jurisdiction, on the other hand, is a mechanism for supervising administrative actions of the State, and can only provide redress for damages and injuries cause by abuse of authority. Consequently, in a case such as this, exhaustion of these resources is not required in order to appeal to the Inter-American system.

29. The invocation of exceptions to the exhaustion of domestic remedies rule as provided for in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined within, such as guarantees to the access to justice. Nevertheless, Article 46(2), by its nature and object, is a norm with autonomous content vis à vis the substantive norms of the Convention. Accordingly, the determination of whether or not exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question should be made prior and separate to an analysis of the matter of the complaint, as it depends on a standard of appreciation distinct to that used to determine the possible violation of Articles 8 and 25 of the Convention. It is important to note that the causes and effects that impeded exhaustion of domestic remedies will be analyzed in the report adopted by the Commission about the matter of the controversy, in order to determine if they constitute violations of the American Convention.

2. Timeliness

30. The American Convention establishes that for a petition to be admissible by the Commission it should be presented within a period of six months from the date in which the alleged victim received notification of a final decision. Article 32 of the Rules of the Commission establishes that in those cases in which exceptions to prior exhaustion of domestic remedies are applicable, the petition should be presented in a reasonable amount of time, based on the Commission's criterion. To this effect, the Commission should consider the date in which the presumed violation occurred as well as the circumstances of each case.

31. In this case, the facts of the claim happened on November 15th, 1992, and a disciplinary investigation was initiated which was still pending on the date the petition was presented to the IACHR on September 5th, 1995. Four years after events occurred a regular civil investigation was initiated, on August 5th, 1996. Also, the petitioners presented allegations about the unjustified delay and eventual denial of justice. Therefore, in view of the context and characterizations of this case, the Commission considers that the petition was presented within a reasonable amount of time, and that the dispositions of Article 32 of the Commission's rules were satisfied regarding the admissibility requirement referent to amount of time to present the case.

3. Res Judicata

32. It is evident from the dossier that the petition is not currently pending in any other procedure of international law, nor that it is a copy of a petition already examined by this or any other international organ. Accordingly, the requirements established in Articles 46.1.c) y 47.d) of the Convention have been satisfied.

4. Characterization of alleged facts

33. In the case in question, the State alleges that it has complied with its responsibility to administer justice and that the IACHR “cannot review decisions handed down by national tribunals acting within their sphere of competency”. Regarding this, it is important to note that the purpose of an international complaint before the organs of the Inter-American system, and in particular that of the Commission, is not to establish individual responsibility of state functionaries but to determine the responsibility of the State vis-à-vis the American Convention. To this effect, faced with the facts and laws presented by the parties and the nature of the matter being brought to its attention, the Commission finds that in the present case the allegations of the petitioners relative to the presumed violation of the rights to life, judicial guarantees and protection, that these are violations of the rights in Articles 4(1), 5(1), 8(1) and 25 in accordance with Article 1(1) of the American Convention.

34. The Commission, applying the principle of *iura novit curia*, considers that the events alleged in the petition can also be characterized as possible violations of Article 19 of the American Convention, to the detriment of Javier Apache. Conforming with the interpretative norms on human rights established in the American Convention[FN8] and with the criteria established by the IACHR regarding the tendency to integrate regional legal systems with the international legal system[FN9], as well as with respect to the notion of *corpus juris* for children[FN10], the Commission will interpret the reach and content of the rights alleged to have been violated in the case of young Javier Apache, in light of what is stated in the Convention concerning the rights of the child by the United Nations. Regarding this, the lack of foundation or improper filing of the claim is not evident and, the Commission considers the requirements established in Articles 47(b) and (c) of the American Convention to be satisfied.

[FN8] American Convention, Article 29 Norm of Interpretation. No disposition of this convention may be interpreted in the sense that [...] b) it limits the enjoyment and exercise of any right or liberty that may be recognized in accordance with the laws of any member state or in accordance with any other convention of which one of these states is a member; [...].

[FN9] I/A Court H.R., "Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paragraph 41.

[FN10] I/A Court H.R., Case of the “Street Children” (Villagran Morales et al.). Judgment of November 19, 1999. Series C No. 63, paragraph 194. Case of the "Juvenile Reeducation Institute". Judgment of September 2, 2004. Series C No. 112, para148, Case of the Gomez Paquiyauri Brothers. Judgment of July 8 2004. Series C No. 110, paragraph 166. I/A Court H.R., Judicial conditions and the rights of the child. Advisory Opinion OC-17/02 on 28 August 2002. Series A No. 17, paragraphs 24, 37, 53.

35. Finally, the Commission considers that petitioners have not presented the essential elements to prove their claims of a presumed violation of the rights to personal liberty, payment, honor and dignity, as provided for in Articles 7, 10 and 11 of the American Convention. Accordingly these claims do not satisfy the established requirements in Articles 47(b) and (c) of the American Convention, and correspondingly declares these claims as inadmissible.

V. CONCLUSIONS

36. The Commission concludes that it is competent to examine the claims of a presumed violation of Articles 54(1), 5(1), 8(1), 19 and 25 in concordance with Article 1.1 of the American Convention and that these are admissible, in accordance with the established requirements in Articles 46 and 47 of the American Convention.

37. With a foundation in the heretofore presented arguments of fact and law and without prejudging the merits of this case,

THE INTER AMERICAN HUMAN RIGHTS COMMISSION,

DECIDES:

1. To declare as admissible the present case as it relates to Articles 4(1), 5(1), 8(1), 19 and 25, as stated in Article 1(1) of the American Convention and declare inadmissible the case in relation to Articles 7, 10 and 11 of the American Convention.
2. Notify the Colombian State and the petitioners of this decision
3. Continue with an analysis of the merits of this question.
4. Publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 5th day of the month of August 2009. (Signed) Luz Patricia Mejía, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo G. Carozza, members of the Commission.