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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 99/09; Petition 12.335
Session:	Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause:	Gustavo Giraldo Villamizar Duran v. Colombia
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Paulo Sergio Pinheiro, Paolo G. Carozza.
Dated:	29 October 2009
Citation:	Villamizar Duran v. Colombia, Petition 12.335, Inter-Am. C.H.R., Report No. 99/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANT: Humanidad Vigente Corporacion Juridica

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I. SUMMARY

1. On March 30, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition filed by Humanidad Vigente Corporación Jurídica (hereinafter "the petitioners") alleging the responsibility of the Republic of Colombia (hereinafter "the State," "the Colombian State" or "Colombia") for the death of Gustavo Giraldo Villamizar Durán, on August 11, 1996, in the municipality of Saravena, department of Arauca, and the failure to judicially clarify the facts. The petitioners allege that Gustavo Giraldo Villamizar received four gunshot wounds in the back and that in the military criminal court proceedings into his death, important probative elements tending to show that Gustavo Giraldo Villamizar was killed in a confrontation with National Army forces were not considered.

2. The petitioners alleged that the State was responsible for violating the rights to life, humane treatment, judicial guarantees, and judicial protection, established at Articles 4, 5, 8, and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"), in relation to the duty to guarantee, in keeping with Article 1(1) of the Convention. The State, for its part, alleged that the petitioners' claims were inadmissible considering that they do not tend to establish violations of the American Convention, and that in the event that the Commission were to declare the petition admissible, it would be acting as a fourth instance. The petitioners argue that the exception to the requirement of prior exhaustion of domestic remedies set out at Article 46(2)(a) of the American Convention is applicable.

3. After analyzing the parties' positions and compliance with the requirements provided for at Articles 46 and 47 of the American Convention, the Commission decided to find the claim admissible for the purposes of examining the alleged violation of Articles 4(1), 8(1), and 25, and,

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in application of the principle of iura novit curia, Article 11, in conjunction with Article 1(1) of the American Convention, to notify the parties, to order its publication, and to include it in its Annual Report to the General Assembly of the OAS.

II. PROCESSING BEFORE THE COMMISSION

4. The IACHR recorded the petition under number 12.335, and after a preliminary analysis, on October 31, 2000 it proceeded to forward a copy of the pertinent parts to the State, which was given 90 days to submit information, in keeping with Article 34(3) of the Regulations then in force. The State submitted its observations on January 31, 2001, and they were transmitted to the petitioners for their observations. The IACHR received the petitioners' observations on March 12, 2001, which were forwarded to the State, which was given one month to submit observations. In response, the State requested a 30-day extension to submit its observations, which was granted by the IACHR. On May 18, 2001, the State requested a new 30-day extension to submit its observations, which was granted by the IACHR. On June 7, 2001, the State submitted its observations.

5. On April 3, 2009, the Commission, in keeping with Article 30(5) of its Rules of Procedure, asked the State and the petitioners to submit up-to-date information on the matter. In response, the State and the petitioners requested 30-day extensions to submit their observations, which were granted by the IACHR. On June 10, 2009, the State submitted its brief of observations, and on June 26, 2009, the attachments to its brief. The petitioners submitted updated information on July 3, 2009, which was forwarded to the State. On July 30, 2009, the State submitted a brief with final observations.

III. THE PARTIES' POSITIONS

A. The petitioners

6. The petitioners indicate that on August 11, 1996, during the morning hours, merchant Gustavo Giraldo Villamizar Durán was travelling by motorcycle along the highway that leads from the rural district of Puerto Contreras to Saravena, municipality of Saravena, department of Arauca. They note that along the way, Gustavo Giraldo Villamizar had recognized María Orfa, to whom he gave a ride for a few minutes until his motorcycle broke down, and that he had to continue along his way pushing it. They allege that at approximately 12:30 p.m. members of the National Army from the Lince 6 Counter-guerrilla patrol under the "Gabriel Reveíz Pizarro" Mechanized Cavalry Group, who were carrying out the "Júpiter"[FN1] operations order in the rural district of Mata de Plátano, had shot Gustavo Giraldo Villamizar and caused his death. They allege that according to the autopsy report Gustavo Giraldo Villamizar had four gunshot wounds to the head, neck, back, and left hand, whose trajectory was posterior-anterior.[FN2]

[FN1] The petitioners indicate that the Lince 6 Counter-guerrilla Patrol was under the command of Sergeant Gustavo Urbano and was made up of First Corporal José Jiménez Mahecha and volunteer soldiers Reimon Piñeres, José Benavides Liñan, Ariel Méndez Quiripe, Luis

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Villamizar Anaya, Wilson Díaz Duran, Omar Duarte Herrera, and Leonardo Prieto Cáceres. Petitioners' brief received at the IACHR March 12, 2001.
[FN2] The petitioners make reference to Autopsy Report 040-96-ULS of the National Institute of Legal Medicine and Forensic Sciences, Arauca Section. Attached to the petitioners' brief received at the IACHR on March 12, 2001.
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7. The petitioners argue that the objective of the "Júpiter" operations order was "to carry out search and military control operations in the general area of the rural district of Mata de Plátano, jurisdiction of the municipality of Saravena, where a group of narco-bandits from the "Domingo Laín Saenz" squad of the ELN is reported to have a presence, in order to detain and, in case of armed resistance, act in the exercise of legitimate self-defense or defense of third persons."[FN3] They allege that on that same date, August 11, 1996, on the local radio station "La Voz de Cinaruco," the National Army announced that a member of the Ejército de Liberación Nacional (ELN), Gustavo Giraldo Villamizar, alias "Cendales," was killed in combat when he attempted to flee a military checkpoint on his motorcycle. They allege that contrary to the version put out by the National Army, Gustavo Giraldo Villamizar had worked as a merchant.[FN4]

[FN3] Petitioners' brief received at the IACHR on March 12, 2001.
[FN4] The petitioners make reference to the statements by Ludy Lizarazo Vega, companion in consensual union, and other family members of Gustavo Giraldo Villamizar. Petitioners' brief received at the IACHR on March 12, 2001.
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8. The petitioners allege that a preliminary investigation was opened into these events on August 25, 1996, in Court of Military Criminal Investigation 124 of Saravena. They allege that on July 8, 1999, the Court of Military Criminal Investigation resolved the legal situation of four members of the National Army allegedly implicated in the events, and refrained from ordering their detention. They allege that the decision of the 124th Court was based on the consideration that the death of Gustavo Villamizar occurred in the context of an operations order and that the conduct of these members of the military was covered by grounds 1 (strict performance of a legal duty) and 4 (legitimate self-defense) for excluding consideration of conduct as unlawful, as set forth in Article 26 of the Military Criminal Code.

9. The petitioners allege that on November 19, 1999, the Office of the Fifth Judge Advocate of the "Rebeíz Pizarro" Mechanized Cavalry Group No. 18 ordered the discontinuance of proceedings in favor of the five persons prosecuted considering that their conduct "is covered by grounds of justification 1, 2 and 4 of Article 25 of the Military Criminal Code since, at the time of the facts, they were strictly performing a legal duty and carrying out a legitimate order[.] [The] events that occurred on August 11, 1996 … led to a swift reaction to respond and defend their lives from the attack of which they were the target by the subject [Gustavo Villamizar], who was killed."[FN5] The petitioners indicate that the decision by the Office of the Fifth Judge Advocate notes that Gustavo Villamizar "was no gentle dove ["no era ninguna mansa paloma"] [and that] he was no more and no less than the Chief of Militias of the ELN."[FN6] They allege that in that pronouncement it was concluded that Gustavo Villamizar was killed in the context of

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combat after he threw himself from his motorcycle to the ground and proceeded to shoot at the military troops, to which they answered with gunfire.

[FN5] The petitioners make reference to the pronouncement of the Office of the Fifth Auxiliary Judge Advocate, "Rebeiz Pizarro" Cavalry Group No. 18, November 19, 1999. Attached to the petitioners' brief received at the IACHR on March 12, 2001.
[FN6] The petitioners make reference to the pronouncement of the Fifth Auxiliary Auditor of War, "Rebeiz Pizarro" Cavalry Group No. 18, November 19, 1999. Attached to the petitioners' brief received at the IACHR on March 12, 2001.

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10. The petitioners state that the report from the Ballistics Laboratory of the Institute of Legal Medicine and Forensic Sciences concluded that the pistol with which Gustavo Giraldo Villamizar had allegedly fired at the military troops "is in sufficient condition to shoot, but not the magazine with which it was received as it was not apt for this … to be able to shoot it the cartridges had to be manually introduced into the chamber…. The fragment of armor was not fired in the pistol received for study, and possibly neither the fragment of the core of the projectile." In addition, the report indicates that the weapon "… has been shot without it being possible to establish the time or date…"[FN7] which, according to the petitioners, should have cast doubt on the version of the military forces concerning the use of the weapon by Gustavo Villamizar.

[FN7] The petitioners make reference to report 1584.96.LAB.RB of the Ballistics Laboratory of the Institute of Legal Medicine and Forensic Sciences. Attached to the petitioners' brief received at the IACHR on March 12, 2001.

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11. The petitioners allege that the version of the facts that is narrated in the decision on discontinuance of the proceedings of the Office of the Fifth Judge Advocate of the "Rebeíz Pizarro" Mechanized Cavalry Group No. 18 had not taken into account very important probative elements and that they had been ignored by both the 124th Military Criminal Judge when ruling on the legal situation of those implicated and the Commander of the "Rebeíz Pizarro" Mechanized Cavalry Group No. 18 on ordering the discontinuance of proceedings, to wit: report 1584.96.LAB.RB of the Ballistics Laboratory of the Institute of Legal Medicine and Forensic Sciences, the judicial inspection of Gustavo Villamizar's motorcycle, the declaration of Edgar Ortega, and the autopsy report. They allege that in order to carry out the principle of impartiality in the administration of justice, it was up to the 124th Military Criminal Judge and the Commander of Mechanized Cavalry Group No. 18 to weigh the favorable and unfavorable evidence so as to confirm or refute the version of those implicated, which in practice did not happen.

12. The petitioners allege that the military criminal justice system was not a suitable jurisdiction for trying the members of the National Army for committing human rights violations, given its lack of independence and impartiality. They allege that this situation was

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shown in the military criminal investigation carried out into the death of Gustavo Villamizar, in which there was a lack of efficient and sufficient probative activity, and that the consequence was the discontinuance of the proceedings and impunity in the death of Gustavo Villamizar.[FN8]

[FN8] The petitioners make reference to IACHR, Third Report on the Human Rights Situation in Colombia, February 26, 1999, paras. 17, 18, and 19. "The problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy… In Colombia specifically, the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations.… [C]ases of human rights violations tried in the military courts are protected by impunity."

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13. As for the disciplinary proceeding, the petitioners note that on April 17, 1998, the Office of the Departmental Office of the Procurator (Procuraduría Departamental) of Arauca ordered that the investigation be initiated, as case No. 008-42739/00, against two members of the National Army, and that on September 27, 2000 the Office of the Delegate Procurator for Human rights (Procuraduría Delegada Disciplinaria para la Defensa de los Derechos Humanos) ordered the discontinuance of the proceeding.

14. As for the contentious-administrative proceeding, the petitioners note that the next-of-kin of Gustavo Villamizar filed an action for direct reparation against the Ministry of Defense. They note that by judgment of February 11, 1999, the Contentious-Administrative Court of Arauca declared the administrative liability of the Nation, Ministry of Defense, National Army, for the death of Gustavo Villamizar by a National Army patrol belonging to the "Rebeíz Pizarro" Mechanized Cavalry Group No. 18 and ordered the payment of damages for moral injury to five of the alleged victim's family members. They argue that in its decision the Administrative Court indicated that "from the evidence in the order it appears that members of the National Army, on duty and making use of their official-issue weapons, mercilessly shot at citizen Gustavo Giraldo Villamizar Durán, last August 11, 1996, as he was travelling to Puerto Contreras on the highway that leads to Saravena.…"[FN9]

[FN9] The petitioners make reference to the Judgment of direct reparation handed down on February 11, 1999, by the Contentious-Administrative Court of Arauca. Attached to the petitioners' brief of additional information received at the IACHR on May 27, 1999.

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15. The petitioners allege that the State is responsible for the violation of the rights to life and humane treatment protected by Articles 4 and 5 of the American Convention in conjunction with Article 1(1) of the same Convention, to the detriment of Gustavo Villamizar. They also allege that the lack of an exhaustive judicial clarification of the facts that are the subject of the claim, and the fact that the criminal investigation was conducted by the military criminal jurisdiction,

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constitute a violation of the right to judicial protection established at Article 25 of the American Convention in connection with the generic obligation to ensure respect for the rights enshrined in the Convention, guaranteed at Article 1(1).

16. As regards compliance with the requirement of prior exhaustion of domestic remedies, set forth at Article 46(1)(a) of the American Convention, the petitioners allege that the exception provided for at Article 46(2)(a) applies considering that the criminal investigation into the death of Gustavo Villamizar was carried out by the military criminal courts. They allege that the military criminal justice system has a limited jurisdiction that is circumscribed to service-related acts and military discipline and is not suitable for investigating, prosecuting, and punishing those responsible for human rights violations.

B. The State

17. The State argues that domestic proceedings were carried out regarding the death of Gustavo Villamizar before the military criminal, disciplinary, and contentious-administrative jurisdictions. The allege that as regards the military criminal jurisdiction, on March 1, 2000, the Superior Military Tribunal ruled on appeal to affirm the judgment of the "Rebeíz Prieto" Mechanized Group No. 18, of November 19, 1999, and that said decision became res judicata and put an end to the proceeding. In terms of the disciplinary jurisdiction, the State confirms what petitioners indicated regarding the termination of the procedure ordered September 27, 2000, by the Office of the Delegate Procurator for Human Rights (Procuraduría Delegada Disciplinaria para la Defensa de los Derechos Humanos). As regards the contentious-administrative jurisdiction, the State indicates that the Ministry of Defense, by resolutions 00689 of July 20, 1999, and 2126 of December 29, 1999, made the payment of damages ordered by the Contentious-Administrative Court of Arauca on February 11, 1999.

18. As for the admissibility requirements of the petition, the State alleges that it is inadmissible insofar as the facts that are the subject matter of the claim do not tend to establish violations of the rights enshrined in the American Convention. It further alleges that the facts have been judged in the domestic procedures and that a pronouncement by the Commission declaring the admissibility of the petition would be tantamount to the Commission sitting as a court of fourth instance.

19. First, as regards the alleged violation of Article 25 of the American Convention, the State argues that the military criminal courts did have jurisdiction to take cognizance of the facts that are the subject matter of the claim before the Commission, in keeping with the standards of the inter-American human rights system. The State alleges that as the Inter-American Court of Human Rights indicated, "the military courts [do] not per se violate the Convention,"[FN10] from which one can conclude that the "mere fact that the military criminal justice system heard the matter of the homicide of Mr. Giraldo Villamizar does not constitute an automatic violation of the American Convention."[FN11]

[FN10] The State makes reference to I/A Court H.R., Genie Lacayo v. Nicaragua Case. Judgment of January 29, 1997. Series C No. 30, para. 91. Note DDH.GOI No. 23826/1221 of the

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Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.
[FN11] The State makes reference to I/A Court H.R., Genie Lacayo v. Nicaragua Case. Judgment of January 29, 1997. Series C No. 30, para. 84. Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.
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20. The State argues that the inter-American system recognizes that military criminal courts have a restricted and exceptional jurisdiction and that the Inter-American Court itself has argued:

In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.[FN12]

[FN12] The State makes reference to the I/A Court H.R., Durand and Ugarte v. Peru Case. Judgment of August 16, 2000. Series C No. 68, para. 117; I/A Court H.R., Cantoral Benavides v. Peru Case. Judgment of August 18, 2000. Series C No. 69, para. 113, and I/A Court H.R., Las Palmeras v. Colombia Case. Judgment of December 6, 2001. Series C No. 90, para. 51. Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.
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21. The State alleges that on analyzing the record and the decisions handed down by the military criminal courts in the proceeding into the death of Gustavo Villamizar, one finds that the persons tried were active-duty members of the military and that the conduct for which they were investigated and tried correspond to those that may be heard by the military justice system. The State alleges that the National Army forces, in carrying out the military operation known as "Júpiter," whose objective was to capture members of the ELN guerrilla force who were engaged in criminal activity in the region, had set up a checkpoint on the road on which Gustavo Villamizar was travelling, and that when he became aware of the military presence he attempted to evade the checkpoint, ignored the call of "stop, National Army," and shot at the members of the Army, who "reacted by shooting the individual."[FN13]

[FN13] Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.
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22. The State concludes on this point that in effect the military criminal courts had jurisdiction to take cognizance of the facts that are the subject matter of the claim, given that active-duty members of the military were put on trial, that the circumstances in which Gustavo

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Villamizar lost his life were directly related to a legitimate military task, and that they acted in legitimate self-defense. The State indicates that the fact that the judgment of the military criminal justice system absolved the members of the military who were put on trial of any liability cannot be considered to constitute a violation of the American Convention.

23. With respect to the petitioners' argument that evidence favorable to the alleged victim was not weighed, the State argues that the evidence pointed out by the petitioners as not weighed not only appear in the record of the criminal proceeding, since the 124th Court took cognizance of it, but that in addition they were weighed by the judge. In that regard, the State concludes that the decisions were duly motivated and grounded in the law in force, respected judicial guarantees, and therefore are legitimate judicial acts under international law.

24. Second, as regards the alleged violation of Articles 4 and 5 of the American Convention, the State performs an analysis based on the four criteria developed by the Inter-American Court for determining when the use of force by members of the security bodies of the State is legitimate, namely:

1. Exceptionality, necessity, proportionality and humanity.
2. Existence of a legal framework to regulate the use of force.
3. Planning of the use of force - education and training of state armed forces and security agencies.
4. Appropriate control and verification of the legitimacy of the use of force.[FN14]

[FN14] The State makes reference to I/A Court H.R., Zambrano-Vélez et al. v. Ecuador Case. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, paras. 82-90. Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.

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25. As for the first criterion, the State alleges that the state agents, before making use of their firearms, unsuccessfully exhausted all other means of control, that is, waiting for the victim to stop at the checkpoint, giving the admonition "stop, National Army," and once the victim sought to elude the checkpoint, performing maneuvers to stop him, in response to which Gustavo Villamizar is alleged to have responded by shooting at the members of the military. As for the second criterion, the State notes that the legal framework is Chapter VII of the Constitution, the Military Criminal Code in force at the time of the facts, the Ten Safety Procedure Rules for Handling Firearms ("Decálogo de Seguridad con las Armas de Fuego") and, in the specific case, the "Júpiter" Operations Order. As for the third criterion, the State notes that the members of the military were knowledgeable of the provisions that permit the use of firearms, as shown by the way they acted in the events in question. Finally, as for the fourth criterion, the State argues that the military criminal justice system, acting within its jurisdiction and making use of an adequate set of evidence, analyzed with legal rigor, gave a "satisfactory and convincing explanation of the manner in which the death [of Gustavo Villamizar] occurred."[FN15]

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[FN15] Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.

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26. The State alleges that the fact that the Administrative Court of Arauca had considered the Nation – Ministry of Defense – National Army "administratively liable for the death of Gustavo Giraldo Villamizar Durán" and accordingly ordered him to pay moral damages to the family members of the alleged victim "does not contradict at all what was resolved in the military criminal justice system."[FN16] The State argues that according to the case-law of the Inter-American Court, the suitable remedy for taking cognizance of the alleged violations of Articles 4 and 5 of the Convention is a criminal action[FN17] and not a contentious-administrative action, which would not be aimed at establishing individual liability. It also argues that the judgment of the Administrative Court was handed down when the military criminal investigation and disciplinary investigations were in the investigative stage and therefore the legitimate self-defense under which the soldiers had acted had not yet been clarified. It alleges that in light of those considerations a judgment of acquittal in the criminal jurisdiction and one of liability in the contentious-administrative jurisdiction could co-exist.

[FN16] Note DDH.GOI No. 23826/1221 of the Bureau of Human Rights and International Humanitarian Law, Ministry of Foreign Relations of the Republic of Colombia, June 1, 2009.
[FN17] The State makes reference to I/A Court H. R., Ituango Massacres v. Colombia Case. Judgment of July 1, 2006. Series C No. 148, para. 296.

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27. As regards the requirement of prior exhaustion of domestic remedies, the State alleges that they were exhausted with the judgment on appeal issued by the Superior Military Tribunal on March 1, 2000. Finally, the State asks that the petition be found inadmissible, considering that a pronouncement by the Commission on the alleged violations of the American Convention would be tantamount to the Commission sitting as a court of fourth instance.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

28. The petitioners are authorized in principle, by Article 44 of the American Convention, to submit petitions to the Commission. The petition describes as an alleged victim an individual with respect to whom the Colombian State has undertaken to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Colombia has been a state party to the American Convention since July 31, 1973, the date it deposited its instrument of ratification. Therefore, the Commission is competent ratione personae to examine the petition.

29. In addition, the Commission is competent ratione loci to take cognizance of the petition, insofar as it alleges violations of rights protected in the American Convention in the territory of Colombia, a state party to that treaty. The Commission is competent ratione temporis insofar as

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the obligation to respect and ensure the rights protected in the American Convention was already in force for the State as of the date of the facts alleged in the petition. Finally, the Commission is competent ratione materiae, as the petition alleges possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

30. Article 46(1)(a) of the American Convention requires the prior exhaustion of remedies available in the domestic jurisdiction in keeping with generally recognized principles of international law as a requirement for admitting claims regarding alleged violations of the American Convention.

31. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply 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.

As the Inter-American Court has established, whenever a state alleges failure to exhaust domestic remedies by the petitioner, it bears the burden of showing that the remedies that have not been exhausted are “adequate” for curing the violation alleged, i.e. that the function of such remedies within the domestic legal system is suitable for protecting the legal situation that has been infringed.[FN18]

[FN18] Article 31(3) of the Commission’s Rule s of Procedure. See also I/A Court H.R., Velásquez Rodríguez v. Honduras Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

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32. In the instant case the State alleges that the domestic remedies have been exhausted with the judgment on appeal by the Superior Military Tribunal of March 1, 2000. The petitioners alleged that the exceptions to the prior exhaustion requirement set out at Article 46(2)(a) apply to this case, since the investigation into the death of Gustavo Giraldo Villamizar was carried out before the military criminal jurisdiction.

33. In view of the parties’ allegations, one should first clarify what domestic remedies are to be exhausted in a case such as the instant one, in light of the case-law of the inter-American system. The precedents established by the Commission indicate that whenever a crime is committed that can be prosecuted at the initiative of the prosecutorial authorities (un delito perseguible de oficio), the State has the obligation to promote and give impetus to the criminal

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proceeding[FN19] and that, in those cases, this is the suitable jurisdiction for clarifying the facts, prosecuting the persons responsible, and establishing the corresponding criminal sanctions, in addition to making possible other forms of monetary reparation. The Commission observes that the facts stated by the petitioners in relation to the death of Gustavo Villamizar translates in the domestic legislation into criminal conduct subject to prosecution at the initiative of the prosecutorial authorities, whose investigation and prosecution should be actively pursued by the State itself.

[FN19] IACHR, Report No. 52/97, Case 11,218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paras. 96 and 97. See also Report No. 55/97, Case 11,137, Abella et al. para. 392.

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34. The Commission observes that an investigation was pursued into the facts that are the subject matter of the claim before the military criminal justice system that culminated March 1, 2000, with a decision on appeal by the Superior Military Tribunal that affirmed the discontinuance of proceedings in favor of the accused handed down in the in first instance by the Commander of the "Rebeíz Pizarro" Mechanized Group No. 18.

35. The Commission has repeatedly ruled that the military jurisdiction does not constitute an appropriate forum and therefore does not provide an adequate remedy to investigate, prosecute, and punish violations of the human rights enshrined in the American Convention allegedly committed by members of the National Army.[FN20] In addition, the Inter-American Court has confirmed that the military criminal justice system is an adequate forum only for prosecuting members of the military for offenses or breaches which by their very nature constitute attacks on the legal interests particular to the military order.[FN21] The prosecution of members of the Army allegedly involved in the death of Guillermo Villamizar before the military justice system, for act or omission, does not constitute an adequate remedy for clarifying their liability in the violations alleged, in the terms of Article 46(1) of the American Convention.

[FN20] IACHR, Report No. 47/08, Petition 864-05, Luis Gonzalo "Richard" Vélez Restrepo and family, July 24, 2008, para. 74; see also IACHR, Third Report on the Human Rights Situation in Colombia (1999), p. 175; Second Report on the Situation of Human Rights in Colombia (1993), p. 246; Report on the Situation of Human Rights in Brazil (1997), pp. 40-42. See also I/A Court H.R. Durand and Ugarte Case, Judgment of August 16, 2000, Series C No. 68, para. 117.
[FN21] I/A Court H.R., Durand and Ugarte v. Peru Case. Judgment of August 16, 2000. Series C No. 68, para. 117. See, along the same lines, I/A Court H.R., Almonacid-Arellano et al. v. Chile Case. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 131; and I/A Court H. R., Palamara Iribarne v. Chile Case. Judgment of November 22, 2005. Series C No. 135, para. 124.

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36. In view of the foregoing, the situation alleged by the petitioners fits within the exception to the exhaustion of domestic remedies requirement set out at Article 46(2)(b) of the Convention that establishes that said exception applies when "the party alleging violation of his rights has

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been denied access to the remedies under domestic law or has been prevented from exhausting them."

37. Invoking the exceptions to the prior exhaustion rule provided for at Article 46(2) of the Convention is closely tied to the determination of possible violations of certain rights enshrined in it, such as the guarantees of access to justice. Nonetheless, Article 46(2), given its nature and purpose, has autonomous content vis-à-vis the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule requiring exhaustion of domestic remedies apply to the case in question must be made prior to and separate from the analysis of the merits, since it depends on a different standard from that used to determine the possible violation of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that impeded the exhaustion of domestic remedies will be analyzed in the report the Commission adopts on the merits, in order to determine whether there are violations of the American Convention.

2. Deadline for lodging a petition

38. The American Convention establishes that in order for a petition to be admissible by the Commission, it shall have to be submitted within six months of the date on which the person allegedly harmed has been notified of the final judgment. In the claim under analysis, the IACHR has determined that the exceptions to the prior exhaustion rule pursuant to Article 46(2)(b) of the American Convention apply. In this respect, Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the rule requiring prior exhaustion of domestic remedies apply, the petition must be submitted within a time which, in the Commission's view, is reasonable. To that end, the Commission must consider the date on which the alleged violation is rights is said to have occurred and the circumstances of each case.

39. In the instant case, the petition was received on March 30, 1999; the facts that are the subject matter of the claim occurred on August 11, 1996; and their effects, in terms of the alleged failure of the administration of justice, extend to the present day. The Commission observes that on February 11, 1999, the Contentious-Administrative Court Tribunal of Arauca declared the State responsible for the death of Gustavo Giraldo Villamizar; and on November 19, 1999, the military justice system declared the discontinuance of criminal proceedings into the death of Gustavo Giraldo Villamizar, and on September 27, 2000, the Office of the Delegate Procurator for Human Rights (la Procuraduría Delegada para la Defensa de los Derechos Humanos) ordered the discontinuance of the disciplinary proceeding against two members of the National Army allegedly involved in the facts that are the subject matter of the claim. Therefore, in view of the context and the characteristics of the instant case, the Commission considers that the petition was submitted within a reasonable time and that the admissibility requirement referring to deadline for lodging a petition should be considered to have been satisfied.

3. Duplication of procedures and international res judicata

40. It does not appear from the record that the subject matter of the petition is pending before any other procedure for international settlement, nor that it reproduces a petition already

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examined by this or any other international organization. Therefore, the requirements established at Articles 46(1)(c) and 47(d) of the Convention should be deemed to have been met.

4. Characterization of the facts alleged

41. In view of the elements of fact and law presented by the parties and the nature of the matter put before it, the IACHR considers that the petitioners' allegations on the scope of state responsibility for the death of Gustavo Villamizar and its failure to judicially clarify the facts tend to establish possible violations of the rights to life, judicial guarantees, and judicial protection protected at Articles 4(1), 8(1), and 25, all in conjunction with Article 1(1) of the American Convention. In addition, given the elements of fact of the instant petition, and in application of the principle of iura novit curia, the Commission observes that in the merits stage it should analyze the possible responsibility of the State, in light of the standards of Article 11 of the American Convention, for reporting that Gustavo Giraldo Villamizar belonged to the ELN and had allegedly been killed in combat on a radio station of the National Army.

42. The Commission does not find admissible the aspect of the claim alleging a violation of the right to humane treatment established at Article 5 of the American Convention in connection with Article 1(1) of that treaty.

V. CONCLUSIONS

43. The Commission concludes that it is competent to examine the claims presented by the petitioners on the alleged violation of Articles 4(1), 8(1), 11, and 25 in keeping with Article 1(1) of the American Convention, in relation to the death of Gustavo Giraldo Villamizar Durán and the judicial clarification of the facts surrounding his death, and that these are admissible, in keeping with the requirements established at Articles 46 and 47 of the American Convention. In addition, it concludes that the alleged violation of Article 5 of the American Convention is not admissible.

44. Based on the arguments of fact and law set forth above, and without this constituting any prejudgment of the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find this claim admissible in relation to Articles 4(1), 8(1), 11, and 25 in conjunction with Article 1(1) of the Convention.
2. To notify the Colombian State and the petitioners of this decision.
3. To continue with the analysis on the merits.
4. To publish this decision and include it in its report to the Annual Report of the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 29th day of the month of October 2009. (Signed): Luz Patricia Mejía, President; Víctor E. Abramovich, First Vice-president; Felipe

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González, Second Vice-president; Paulo Sérgio Pinheiro, and Paolo G. Carozza, members of the Commission.