REPORT No. 40/13
PETITION 12.362
ADMISSIBILITY
RELATIVES OF LUIS FERNANDO LALINDE LALINDE
COLOMBIA[1]
July 11, 2013

I. SUMMARY

1. On November 5, 1999 the Inter-American Commission on Human Rights (hereinafter "the Commission," or "the IACHR") received a petition filed by the Comisión Colombiana de Juristas (Colombian Commission of Jurists) (hereinafter "the petitioners")[2] in which it is alleged that the Republic of Colombia (hereinafter "the State" or "Colombia") is responsible for not guaranting to the relatives of Luis Fernando Lalinde Lalinde (hereinafter "the alleged victims")[3] access to an appropriate and effective remedy to investigate and punish those responsable for the detention and subsequent extrajudicial execution of Luis Fernando Lalinde. They allege that, even though the IACHR established State reponsibility for said violations through 1987,[4] the government authorities have not guaranteed their right to obtain justice.

2. The petitioners allege that, regarding events that occurred subsequent to 1987, the State is liable for violating the right to a fair trial and to judicial protection, as set forth in Articles 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), according to the general obligation to respect and guarantee rights as set forth in Article 1(1) of that Convention. They allege that there have been several flaws in the judicial response since 1988. They maintain that the petition is admissible under the exception to the requirement for exhaustion of internal remedies as set forth in Articles 46(2)(a) and (b) of the American Convention, because a military court is not a suitable forum for investigating the violations committed against Luis Fernando Lalinde. The State, for its part, alleges that the petition is inadmissible because the material facts of the matter are based on a case that was already decided upon by the IACHR, recalling that in 1988 the Commission issued Resolution 24/87 with its conclusions on the matter.

3. After examining the positions of the parties in light of the admissibility requirements set forth in Articles 46 and 47 of the Convention, the Commission concludes that it has jurisdiction to examine the complaint and that the petition is admissible regarding an alleged violation of the alleged victims' rights set forth in Articles 5, 8, and 25 of the American Convention, in connection with Article 1(1) of same. Therefore, the Commission orders that the parties be notified and that this decision be published and included in its Annual Report to the General Assembly of the OAS.

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[1] According to the provisions of Article 17(2) of the Rules of Procedures of the Commission, Commission member Rodrigo Escobar Gil, a Colombian national, did not participate in the discussion or decision regarding this petition.

[2] Grupo Interdisciplinario de Derechos Humanos (Interdisciplinary Human Rights Group) (GIDH) intervened as a co-petitioner in this case starting on February 22, 2002.

[3] The petitioners identify the following relatives: Fabiola Lalinde (mother), Adriana, Jorge Iván, and Mauricio Lalinde Lalinde (siblings).

[4] See IACHR, Resolution of September 16, 1988, case 9620 (Luis Fernando Lalinde Lalinde) available at: http://www.cidh.oas.org/annualrep/87.88eng/Colombia9620.htm.

II. PROCESSING BY THE COMMISSION

4. The IACHR recorded the claim at number 12,362, and after conducting a preliminary analysis, proceeded to transmit the complaint to the Colombian State for its observations on February 9, 2001. On May 18, 2001 the State requested an extension, which was granted. On June 7 of that year, the State submitted its response, which was transferred to the petitioners for their observations.

5. On February 5, 2002 the IACHR convened the parties to a hearing, which was held on March 5, 2002. On May 13, 2005 the State requested information regarding the processing of the petition.

6. On July 15, 2010 the petitioners submitted observations, which were forwarded to the State for comment. On August 30, 2010 the State submitted its reply, which was transferred to the petitioners for their observations. On October 28, 2010, the petitioners filed their reply, which was transmitted to the State for comment. On December 6, 2011 the State submitted its reply, which was transmitted to the petitioners for their information.

III. POSITIONS OF THE PARTIES

A. The petitioners

7. By way of context, the petitoners recount that in case 9620 (Luis Fernando Lalinde Lalinde), processed by the IACHR between 1985 and 1988, the IACHR held the Colombian State liable for violations of Articles 4, 5, and 7 of the Convention because of the detention, torture, and subsequent extrajudicial execution of Luis Fernando Lalinde Lalinde by members of the National Army on October 3, 1984. They maintain that one of the recommendations of the IACHR was that the State

> conduct a thorough investigation of the facts reported in order to identify the persons responsible and bring them to justice so that they may receive the sanctions warranted by such serious conduct, and that it adopt the necessary measures to prevent a repetition of such serious acts.[5]

8. They indicate that this petition is different from case 9620 in terms of the facts and rights involved. They allege that the facts incurring State responsibility in this petition have to do with the administration of justice, particularly military criminal jurisdiction, and the State's obligation to conduct an investigation into the detention, torture, and death of Luis Fernando Lalinde. The petitioners add that while these facts were considered in incipient fashion within the context of the violations of Luis Fernando Lalinde Lalinde's rights, they were not the subject of an analysis and decision by the IACHR.

9. The petitioners allege that it was imposible for the relatives of Luis Fernando Lalinde to effectively participate in the investigations conducted by the military criminal courts, and that there were delays, a failure to produce results, and no guarantees of independence or impartiality—all of which violated their right to due process. They also allege that the failure to conduct exhaustive investigations to clarify the circumstances under which such serious violations of human rights occurred,

[5] The petitioners cite IACHR Resolution 24/97 of September 22, 1987, case 9620 (Luis Fernando Lalinde Lalinde), operative paragraph 2.

and to identify the perpetrators and accomplices to such crimes and the reasons they were committed, means that these acts have enjoyed impunity. This violates Luis Fernando Lalinde's relatives' right to the truth.

10. They allege that the facts whereby the State incurred liability occurred after the IACHR Resolution of 1987. They cite, for example: the decision of June 29, 1990 by the Third Criminal Procedure Court of Andes to transfer the proceedings from the regular courts to Military Criminal Procedure Court 121, because it deemed itself unqualified to hear the case; the opinion of September 20, 1990 of the Principal Military Auditor of the National Army Eighth Brigade regarding the competence of the military criminal courts to hear the case; the judicial decisions of the judge in the court of first instance; and the investigative and procedural transactions before Military Criminal Procedure Court 121 starting in October of 1991, among others.

11. Regarding the investigative procedures, they maintain that in 1991, seven years after the events occurred, photographic recognition was done with the witnesses who had testified against the members of the army. They petitioners allege that because of the time lapsed, and because the laws governing such evidence were not followed, the witnesses were unable to recognize the perpetrators of the crimes. They indicate that likewise, on May 14, 15, and 19, 1992, steps were taken once again to exhume N.N.'s corpse, which had been buried under the name "Jacinto," in order to determine whether this was in fact Luis Fernando Lalinde. They also incidate that in 1992 they received reports about two members of the army, but in 1993 Court 121 refrained from ordering the preventive detention of those individuals.

12. The petitioners allege that in May of 1996, after the Institue for Forensic Medicine determined that the remains exhumed did not belong to Fernando Lalinde, the American Association for the Advancement of Science established that "the likelihood that these mortal remains belong to a member of the Lalinde family is more than a mere coincidence; it is equal to or greater than 99%." The opinion was that "these mortal remains are those of Fernando Lalinde." This opinion was approved by the Command of the National Army Eighth Brigade in July of 1996, with no objection from the parties.

13. They indicate that on October 23, 1996 the judge in the court of first instance ordered a halt to the proceedings, as requested by the members of the National Army and against the request of the plaintiff or party claiming damages. This decision was the subject of an appeal by Fabiola Lalinde as the plaintiff, in which she reiterated her request to convene a War Council and to bring other individuals into the investigation. The petitioners indicate that in November of 1996 her appeal was granted and it was brought before the Military Superior Court (TSM) as a subsidiary, and everything else was dismissed.

14. They indicate that on September 1, 1997 the Public Ministry asked the TSM to remand the case to the ordinary courts for reasons of competence, pursuant to decision C-358 of 1997 of the Constitutional Court,[6] since "the conduct being investigated was neither directly nor closely related to service." They maintain that on November 27, 1997 the TSM decided to refrain from ruling on the request and declared it invalid for closure of the investigation, which was reported only to the Public Ministry.

15. The petitioners allege that on March 27, 1998 the military judge upheld his competence and ruled in favor of the defendants to suspend the proceedings. They allege that this judge did not rule on the request of the Public Ministry to remand the case to the ordinary courts. They maintain that this decision was not reported to the relatives or representatives of the victim through suitable and effective means which would have allowed them to challenge it in timely fashion. They indicate that notification was done by edict posted at the Eighth Army Brigade, and taken down on April 14, 1998.

16. The petitioners maintain that this decision was sent to the TSM for consultation, which led them to request the opinion of the Public Ministry, which replied that these proceedings were invalid because the miltiary judge had violated the decision handed down by the Constitutional Court, and that the military court did not have jurisdiction.

17. The petitioners assert that in November of 1998, since they had not be notified that the proceedings had been suspended, the plaintiff asked the trial judge to rule on the request for a change of jurisdiction. This was when she learned that the proceedings were before the TSM because they had been suspended. Given the situation, the plaintiff presented her request to the TSM. They also allege that the plaintiff filed a motion to vacate with the TSM in December of 1998, given her lack of participation in the proceedings.

18. The petitioners add that on April 6, 1999 the TSM confirmed that the proceedings had been stopped, as well as its determination that the military courts had competence to oversee the investigation. They allege that this was based on the fact that they had not appealed the decision that was questioned, and that the criteria did not exist to call those involved to a War Council. They state that as regards the change of jurisdiction, the TSM indicated that

> We are not unaware of the scope of the jurisprudential statement invoked by the parties in filing their motion. But it is also true that judges, in their orders and decisions, are only subject to the rule of law and the Constitution. Jurisprudence, like all general principles of law and doctrine as well as equity, according to the Constitution itself, are ancillary to judicial activity.[7]

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[6] The petitioners indicate that said Judgement establishes that "a member of the military, although on active duty, may have committed the crime oustide of the military mission assigned. In such case, the mere fact of being on active duty does not exempt him from the jurisdiction of common criminal courts. The prerogatives and recognition enjoyed by members of the armed forces lose all ties to their service when they are deliberately used to commit common crimes, and these do not cease to be common crimes just because the perpetrator has taken advantage of these prerogatives and recognition, because that is not service; nor does service have the virtue of changing a common crime into an act related to service. The mere fact that one is in the military does not give his criminal intent a military mission. These continue to be acts of criminal intent attributable to the individual perpetrating them, disconnected from the public mission of defending public safety. Out of rigorous respect for equality, these must be investigated and punished according to ordinary criminal law."

[7] Initial petition of November 5, 1999.

19. In response, the petitioners maintain that the obstruction, omission of information, lack of collaboration on the part of the armed forces, the permanent transfer of the case to military jurisdiction, the excessive delays and lack of seriousness in handling evidence, all had a direct impact on allowing the violations of Luis Fernando Lalinde's human rights to enjoy impunity. The petitioners assert that the alleged victims were left without any judicial protection, with no possibility of re-opening the investigation, or of procuring individual convictions and sentences for those responsible for violating Luis Fernando Lalinde's rights, which constitutes a denial of the right to justice. They maintain that Article 8(1), in connection with 25(1) of the American Convention, confers on the relatives of victims the right to see that a disappearance and death are duly investigated, and that those responsible are tried and punished independently, impartially, and within a reasonable time; and they have the right to be heard and to act in the trial, as well as to receive compensation for the damages caused to their loved one.

20. The petitioners have responded to the State's argument about non-duplication of petitions, *res judicata*, and its opinion that this petition was already decided upon by the IACHR (see *infra* III.B). They assert that the common element of the *res judicata* rule is the nature of the issue being examined.[8] They allege that the Human Rights Committee has established precedents regarding the idea of "same matter," and that it "must be understood as relating to the same author, the same facts, and the same substantive rights," and it should include the same complaint regarding the same individual.[9] They also indicate that the jurisprudence of the European Court of Human Rights has established that a complaint is "essentially the same" when the facts, the parties, and the rights alleged to be violated are identical, as is the identity of the complainants.[10]

21. They allege that in the inter-American system, the Court has established that a matter will be declared *res judicata* when the petition is "substantially the same" as one already examined by the IACHR or another international organization, in terms of the identity of the parties, legal grounds and object, and the identity of the active and passive subjects in the violation.[11] The petitioners also maintain that

> in this case, the Freedom of Association Committee did not hear facts that occurred after their pronouncement; facts, such as the proceedings before the Panamanian Judiciary, that were included in the application before the Court. Moreover, the Court observes that … Antonio Ducreux Sánchez declared that

[8] The petitioners maintain that the "the rules use various expressions to refer to "same matter"" (Optional Protocol to the International Covenant on Civil and Political Rights); 'individual complaint […] [that] is essentially the same as a complaint examined previously' (European Convention for the Protection of Human Rights and Fundamental Freedoms); 'the petition or communication is substantially the same as one previously studied' (American Convention on Human Rights); and if a petition's "subject matter … essentially duplicates a petition pending or already examined' (Rules of Procedure of the IACHR,)" Pleading received July 15, 2010.

[9] The petitioners cite the United Nations Human Rights Committee (HRC). Decision of July 13, 2007, Case of Wolfgang Lederbauer v. Austria, Comunication No. 1454/2006, para. 7.3.

[10] The petitioners cite the United Nations Human Rights Committee. Decision of October 22, 2008, Case of Nabil Sayadi and Patricia Vinck v. Belgium, Comunication No. 1472/2006, para. 7.3.

[11] The petitioners cite the I/A Court H.R. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 57; *Case of Baena Ricardo et al v. Panama*. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, para. 54; and *Case of Durand and Ugarte v. Peru. Preliminary Objections.* Judgment of May 28, 1999. Series C No. 50, para. 43.

the complaint before the Freedom of Association Committee only referred to the events of December 1990.[12]

22. In this regard, the petitioners maintain that objections based on duplication or *res judicata* do not apply, since the petition is different from case 9620 in terms of the facts, the rights violated, and the persons whose rights were violated. They allege that the facts examined in case 9620 were the deprivation of liberty, torture, disappearance, and extrajudicial execution of Luis Fernando Lalinde, while the instant petition refers to facts that occurred later, such as the actions of the system of justice, particularly the actions of the military criminal justice system, against the Lalinde family.[13]

B. The State

23. As a preliminary matter, the State calls attention to the period of eight years and one month which it took the petitioners to respond to its observations about admissibility, and finds that inactivity during such a lengthy period of time, without justification, violates the State's right to due process. Therefore, it requests that the petition be archived.

24. The States finds the petition to be inadmissible because it is substantially a duplicate of a previous petition already examined by the Commission, as established in Article 47(d) of the Convention, and Article 33(1)(b) of the Rules of Procedure of the IACHR. It states that the petitioners are attempting to re-open case 9620 so that the State can once again be found responsible for alleged violations in addition to those which were previously alleged and found to have occurred. The State maintains that the cases have to do with the same victim, the same internal judicial proceedings, and the same petitioners, who—dissatisfied that all of their claims before the Commission were not upheld—are now seeking to promote a new case based on one that is already concluded, and which is essentially the same matter.

25. The State alleges that when the IACHR studied case 9620, it should have examined the exhaustion, efectiveness, and suitability of domestic remedies, as well as their relationship to any alleged violation of Articles 8 and 25 of the American Convention. Consequently, the fact that the petitioners did not allege any violations of such rights at that time, and that the IACHR did not include them within the rights it examined, by virtue of the principle of *iura novit curiae*, it is not empowered to issue a decision on them at this time. To do so would be an affront to the international principle of *res judicata*.

26. The State rejects the petitioners' argument for admissibility of the petition based on non-compliance with a recommendation of the IACHR, particularly since the Inter-American Court has established that "… the State does not incur responsibility for failing to comply with a non-binding recommendation."[14] It argues that the State undertook to make its best effort to comply with the recommendations contained in Resolution 24/87, and that in good faith it has been taking the steps required to implement the recommendations, including the need to safeguard the legal order and internal institutions of a Constitutional State governed by the rule of law.

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[12] I/A Court H.R. *Case of Baena Ricardo et al v. Panama*. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, para. 55.

[13] Fabiola Lalinde de Lalinde (mother), and Adrian, Jorge, and Mauricio Lalinde Lalinde (children).

[14] The State cites I/A Court H.R. *Case of Caballero Delgado and Santana v. Colombia. Preliminary Objections*. Judgment of January 21, 1994. Series C No. 17, para. 67.

27. As for fulfillment of recommendation No. 2 of IACHR Resolution 24/87, the State indicates that the criminal trial initiated in October of 1984 in the military criminal courts over the death of N.N. Jacinto, later identified as Luis Fernando Lalinde, was shelved in November of 1986. The State indicates that in June of 1990 the investigation was remanded to the ordinary courts for reasons of competence, and finally the inquiry was sent to the military criminal courts. The State maintains that in December of 1991 a cadaver was exhumed which was allegedly the body of Luis Fernando Lalinde. The State explains that in May and July of 1992 Major Jairo Enrique Piñeros and Lieutenant Samuel Jaimes Soto were linked to the investigation, and Military Criminal Procedure Court 121 refrained from ordering their preventive detention.

28. The State indicates that in April of 1993 it was concluded that N.N. Jacinto's body was not that of Luis Fernando Lalinde, and in May of 1993 the order of October 16, 1985 which had accepted Fabiola Lalinde as a plaintiff in the case, was revoked, since the military criminal proceedings did not accept her as a party in the trial. In 1994 a DNA test was done at U.C. Berkley, which led to a report in May of 1996 that the remains were those of Luis Fernando Lalinde. Later it was ordered that the remains be turned over to his family and he was buried on November 19, 1996.

29. The State reports that in November of 1997 the TSM refrained from issuing a ruling on the appeal over the suspension of the proceedings, since the investigation had not concluded and the preliminary trial had been evaluated, and the file was therefore returned to the Commander of the Eighth Brigade. The Commander closed the investigation in March of 1998, in favor of Lieutenant Colonel Jaime Piñeros and Samuel Jaimes Soto, since they had not been found individually responsible.

30. Regarding the disciplinary proceedings opened in December of 1987, the State indicates that they were suspended in July of 1988 and later the disciplinary action was declared extinguished, which was confirmed in April of 1990. The State indicates that the administrative litigation instituted by Fabiola Lalinde de Lalinde and her children over the arbitrary detention and death of Luis Fernando Lalinde found that the State was liable, and the Ministry of Defense was ordered to pay fifty million Colombian pesos in *damnum emergens*. The State indicates that the judgment was appealed, and the appeal is still pending. The State alleges that the office of the prosecutor has requested several times that the ruling be given priority, but the Council of State is trying to reconstitute the file since important procedural pieces are missing.

31. For these reasons, the State requests that the IACHR find the petition to be inadmissible, and that the recommendations made under Articles 50 and 51 of the American Convention are not binding on States. Therefore, the IACHR cannot examine new petitions based on compliance with its recommendations.

IV. ADMISSIBILITY

A. Competence of the Commission *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci*

32. The petitioners are entitled, in principle, under Article 44 of the American Convention to lodge complaints with the Commission. The petition indicates as victim individuals, Fabiola Lalinde and her children, whose rights under the American Convention the Colombian State has undertaken to respect and ensure. As regards the State, the Commission points out that Colombia has been a State

party to the American Convention since July 31, 1973, the date on which it deposited its instrument of ratification. Therefore, the Commission has competence *ratio personae* to review the petition. Additionally, the Commission has competence *ratione loci* to review the petition since it alleges violations of rights protected by the American Convention to have occurred within the territory of Colombia, a State party to that treaty.

33. The Commission has competence *ratione temporis* since the obligation to respect and ensure the rights protected by the American Convention was in force for the State when the violations alleged in the petition took place. Finally, the Comission has competence *ratione materiae* because the petition alleges violations of human rights that are protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

34. In order for a claim for an alleged violation of the American Convention to be admitted, it must meet the requirements established in Article 46(1) of that international instrument. Article 46(1)(a) provides that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 requires the remedies under domestic law to have been pursued and exhausted in accordance with generally recognized principles of International law.

35. Article 46(2) of the Convention states that the requirement for prior exhaustion of domestic remedies is not applicalbe 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. First we must clarify which domestic remedies must be exhausted in the instant case. The Inter-American Court has indicated that only those remedies that are suitable to correct the violations alleged to have been committed need to be exhausted.

> Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.[15]

37. The State has not presented arguments regarding the exhaustion of domestic remedies in this petition. The petitioners, however, allege that the exceptions found in Articles 46(2)(a) and (b) of the American Convention apply, since the investigation of the facts occurred under the military criminal jurisdiction, which is not an effective remedy.

38. In the present petition, after the investigation had been transferred from the ordinary criminal courts to the military criminal courts on June 29, 1990, in October of 1996 the proceedings were ordered to be suspended. That decision was appealed by the plaintiff based on Constitutional Court Judgment C-358 of 1997; the appeal was denied in November of 1996, and an appeal was granted

[15] I/A Court H.R, *Case of Velásquez Rodríguez.* Judgment of July 29, 1988, Series C No. 4, para. 64.

as a subsidiary before the TSM. In September of 1997 the Public Ministry asked the TSM to remand the investigation to the ordinary courts for reasons of competence. In November of 1997 the TSM refrained from ruling on said request and declared it invalid for the closure of the investigation. In March of 1998 the military judge ordered the suspension of the proceedings and did not issue a pronouncement on the request of the Public Ministry. Notice of this decision was given by posting it at the Army's Eighth Brigade, and the notice was taken down on April 14, 1998. The decision was sent as a consultation to the TSM and an opinion was sought from the Public Ministry, which indicated that it should be declared invalid because those courts did not have competence. In November of 1998 the plaintiff asked the TSM for a response about the change of jurisdiction, and in December of 1998 filed a motion to vacate with the TSM. On April 6, 1999 the TSM confirmed that the military courts had competence and suspended the proceedings.

39. The Commission notes that the petitioners have attempted to exhaust domestic remedies, insofar as posible, within the criminal jurisdiction in order to gain access to a suitable and effective remedy. In this regard, the Commission has stated repeatedly that special courts—such as military courts—are not an appropriate forum and therefore do not provide an adequate remedy to investigatge, judge, and punish possible violations of the human rights contained in the American Convention, such as the right to life, when these are presumably committed by members of the Armed Forces.[16] The same reasoning has been systematically applied by other international human rights bodies.[17]

40. The Commission observes that the petitioners requested an investigation in the ordinary criminal jurisdiction, but after the conflict of competencies was raised by the Public Ministry, the investigation remained in the military criminal court. Thus the Commission notes that the plaintiff was not admitted as a party in the military criminal trial. Because of this, the petition is subject to the exception to the requirement for exhaustion of domestic remedies provided in Articles 46(2)(a) and (b) of the American Convention, which establishes that such an exemption applies when "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them." Consequently, prior exhaustion of domestic remedies cannot be required.

41. In addition, the Commission observes that in the administrative litigation filed by Fabiola Lalinde, she appealed the declaration of State reponsibility issued in 2000, but to date there has been no ruling on this appeal. Therefore, the Commission notes that the exception to the requirement of prior exhaustion described in Article 46(2)(c) would apply because there has been an unwarranted delay.

42. Invocation of the exceptions to the rule on prior exhaustion of domestic remedies set forth in Article 46(2) of the Convention are closely linked to a determination of posible violations of certain rights enshrined therein, such as judicial protection and the right to a fair trial. However, the

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[16] IACHR, Report No. 64/01, Petition 11,712, *Leonel de Jesús Isaza Echeverry et al*, Colombia, April 6, 2001, para. 22. See also, I/A Court H.R., *Case of Durand and Ugarte.* Judgment of August 16, 2000, Series C No. 68, para. 117; *Case of Cesti Hurtado*. Judgment of September 29, 1999, Series C No. 65, para. 151. See also IACHR, *Report on the situation of human rights in Chile*, September 27, 1985, pp. 199, 200. OEA/Ser.L/V/II.66 doc. 17; IACHR, 1996 Annual Report, March 14, 1997, p. 688. IACHR, *Report on the situation of human rights in Ecuador,* April 24, 1997, p. 36. IACHR, *Report on the situation of human rights in Brazil*, September 29, 1997, p. 50.

[17] See UN Doc. E/CN.4/Sub.2/2000/44, *Administration of justice by military courts and other special jurisdictions*, August 15, 2000, para. 30; and *1995 Report, Special Rapporteur on Torture*. UN Doc. E/CN.4/1995/34, January 2, 1995, para. 76(g).

nature and purpose of Article 46(2) make it a stand-alone rule vis-a-vis the other substantive rules in the American Convention. Consequently, a determination of whether the exceptions to the rule on prior exhaustion of domestic remedies are applicable to the instant case should be done prior to and separate from the analysis of the merits of the case, because it will rely on a standard different from that used to determine a possible violation of Articles 8 and 25 of the American Convention. It should be clarified that the causes and effects that prevented exhaustion of domestic remedies shall be analyzed in the Commission's report on the merits of the case, in order to determine whether there have been violations of the American Convention.

2. Time period for lodging a petition

43. The American Convention establishes that in order for a petition to be admitted by the Commission, it must be lodged wtihin six months of the date on which the party alleging violations of his rights was notified of the final decision. In the petition being examined here, the IACHR has established that the exceptions to the rule on prior exhaustion of domestic remedies, set forth in Articles 46(2)(a), (b) and (c) of the American Convention, would apply. In this regard, Article 32 of the Rules of Procedure of the Commission establishes that in cases in which the exceptions to the rule on prior exhaustion of domestic remedies would apply, the petition must be lodged within a reasonable time, as determined by the Commission. To this end, the Commission should consider the date on which the alleged violation occurred and the circumstances of the case.

44. This petition was received on November 5, 1999, the events that form the substance of the claim began on June 29, 1990, and their effects in terms of the alleged failures in the administration of justice, with trials still pending, continue to this day. Therefore, given the context and characteristics of this petition, the Commission believes that it was lodged within a reasonable time and that the admissibility requirement regarding the deadline for submission has been satisfied.

3. Duplication of proceedings and *res judicata*

45. Article 46(1)(c) establishes the admissibility requirement that a petition "is not pending in another international proceeding for settlement" and Article 47(d) requires that a petition not be admitted if it "is substantially the same as one previously studied by the Commission or by another international organization." From the record it does not appear that the petition is pending in another international proceeding for settlement.

46. In the instant case the State alleges that the petitioners are trying to re-open case 9620 so that the State can once again be found responsible for alleged violations in addition to those which were previously alleged and found to have occurred. It maintains that the two cases revolve around the same victim, the same internal judicial proceedings, and the same petitioners, and therefore the petition is inadmissible for reasons of *res judicata* and duplication of proceedings. The petitioners dispute that argument and allege that this petition is different from case 9620 in terms of the facts, the rights violated, and the persons whose rights were violated. They allege that the facts examined in case 9620 were the deprivation of liberty, torture, disappearance, and extrajudicial execution of Luis Fernando Lalinde, while the instant petition refers to events that occurred later, such as the actions of the system of justice, particularly the actions of the military criminal justice system. As for the rights involved, the petitioners argue that in case 9620 Luis Fernando Lalinde's right to life, to humane treatment, and to personal liberty were invoked, while this petition invokes the rights to a fair trial and to judicial protection for Lalinde's relatives.

47. In 1998 the Commision gave a detailed description of the meaning of the phrase "substantially the same,"[18] and clarified what is required by Articles 47(d) of the Convention and 39 of the Rules of Procedure of the IACHR, establishing that

> Having examined the jurisprudence of the European human rights system, as well as that of the UNHRC, and consistent with its own past practice, the Commission observes that a prohibited instance of duplication involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof.[19]

48. Similarly, the Inter-American Court has established that it will declare *res judicata* when the petition is "substantially the same" as a previous petition already reviewed by the Commission, and has established that "the phrase 'substantially the same' signifies that there should be identity between the cases. In order for this identity to exist, the presence of three elements is necessary, these are: that the parties are the same, that the object of the action is the same and that the legal grounds are identical."[20]

49. First, the Commission observes that the object of the instant petition is the presumed victims' alleged lack of access to an adequate and effective remedy to investigate and punish those reponsible for the violations of human rights committed against Luis Fernando Lalinde. The State, for its part, alleges that in case 9620 the IACHR should have analyzed that petition's relationship to the alleged violations of Articles 8 and 25 of the American Convention by virtue of the principle of *iura novit curiae*, and argues that if the Commission issues a pronouncement on that now, it would be an affront to the International principle of *res judicata*.

50. In this vein, the Commission observes that on September 22, 1987 it analyzed the facts of case 9620 and declared that the State had violated

> The right to personal liberty embodied in Article 7 of the American Convention on Human Rights, and the right to life, recognized in Article 4 of that International instrument, through the actions of its agents that led to the detention and subsequent disappearance of Luis Fernando Lalinde [...] on October 3, 1986.[21]

51. Later, through a resolution dated September 16, 1988, the Inter-American Commission confirmed the resolution of September 22, 1987 in its entirety, "substituting the phrase 'detention and subsequent disappearance' by the phrase 'detention and subsequent death,'" and also declaring that "Colombia has violated as well, the right to humane treatment upheld in Article 5 of the American Convention on Human Rights through the actions of its agents."[22]

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[18] See Art. 47(c) of the American Convention: "substantially the same." *Cfr.* IACHR Report No. 96/98 Case 11.827 Peter Blaine v. Jamaica, December 17, 1998.

[19] IACHR Report No. 96/98 Case 11.827 Peter Blaine v. Jamaica, December 17, 1998.

[20] *Case of Baena Ricardo et al*, supra note 13, para. 53 and *Case of the Saramaka People v. Suriname,* Judgment of November 28, 2007. Series C No. 172, paras. 46 and 47.

[21] See IACHR, Resolution of September 16, 1988, case 9620 (Luis Fernando Lalinde Lalinde) available at: http://www.cidh.oas.org/annualrep/87.88sp/Colombia9620.htm, which cites the Resolution of September 22, 1987 in "Having Seen" clause number 11.

[22] See IACHR, Resolution of September 16, 1988, case 9620 (Luis Fernando Lalinde Lalinde), operative paragraphs 1 and 2 available at: http://www.cidh.oas.org/annualrep/87.88sp/Colombia9620.htm

52. Secondly, the Commission notes that when Resolution No. 24/87 was issued on September 16, 1988, the investigation of the detention and execution of Luis Fernando Lalinde was pending before Preliminary Criminal Proceedings Court 13 in the ordinary criminal jurisdiction. In particular, is is to be stressed that the material facts of this petition originated in the transfer of the investigation from the ordinary criminal courts to the military criminal jurisdiction on June 29, 1990. These subsequent events, which generated the violations alleged in this petition due to lack of an adequate and effective remedy, were not analyzed by the Commission when it issued that resolution. Therefore, one of the three elements necessary to declare *res judicata*—identity in the object of the action—is not present. Furthermore, the alleged victims in this petition are Fabiola Lalinde and her children, and the alleged violations were of their rights. In this regard, the legal grounds are also different.

53. In light of this, the Commission finds that the object of this petition is different from that of case 9620, and therefore concludes that it cannot declare *res judicata* in relation to case 9620, and that the petition has not been previously decided by the Inter-American Commission. Consequently, the IACHR concludes that the exceptions contained in Article 46(1)(d) and Article 47(d) of the American Convention are not applicable.

4. Nature of the allegations

54. Given the elements of fact and law presented by the parties and the nature of the matter placed before it, the IACHR finds that in this petition one must establish that the petitioners' allegations regarding the alleged violation of the victims' right to a fair trial and to judicial protection could constitute violations of the rights protected in Articles 8 and 25 of the American Convention, in connection with Article 1(1).

55. Neither the American Convention nor the Rules of Procedure of the IACHR require the petitioner to identify the specific rights alleged to be violated by the State in the matter placed before the Commission, although petitioners may do so. The Commission, using the case law in the system, may determine in its admissibility reports which provisions of the relevant inter-American instruments would apply and may have been violated if there is enough evidence to prove the facts alleged. The Commission observes that the allegations made may constitute violations of the alleged victims' right to humane treatment; therefore, during the merits stage the IACHR will also consider potential violations of Article 5 of the Convention.

V. CONCLUSIONS

56. The Commission concludes that it is competent to review the claims made by the petitioner regarding alleged violations of Articles 5, 8, and 25, in connection with Article 1(1), of the American Convention.

57. Based on the arguments in fact and in law presented above, and with no pre-judgment on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 5, 8, and 25, in relation to Article 1(1) of the American Convention on Human Rights, regarding the relatives of Luis Fernando Lalinde.

2. To notify the parties of this decision.

3. To proceed to review the merits of the case; and

4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 11 day of July 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Felipe González, Dinah Shelton, Rose-Marie Antoine, Commissioners.