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REPORT No. 17/14
PETITION 394-06
REPORT ON ADMISSIBILITY

JOSÉ ORLANDO GIRALDO BARRERA AND FAMILY
COLOMBIA

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ADMISSIBILITY

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I. SUMMARY

1. On April 26, 2006, the Inter-American Commission on Human Rights (hereinafter, “the Commission” or “the IACHR”) received a petition filed by Ms. Martha Lucía Giraldo Villano alleging that the Republic of Colombia (hereinafter, “the State”) was responsible for the extrajudicial execution of her father, José Orlando Giraldo Barrera (hereinafter, “the alleged victim”); such extrajudicial execution was purportedly carried out by law enforcement authorities in the context of an anti-insurgent military operation conducted on March 6, 2006 in the Department of Valle. After the petition was originally submitted, the *Comité de Solidaridad con los Presos Políticos* [Committee in Solidarity with Political Prisoners] joined in as a petitioner before the IACHR (hereinafter, “the petitioners”).

2. The petitioners hold that the State is responsible for violating the alleged victim’s rights to life, honor, and dignity. They likewise claim that the State has failed to ensure justice and due process or to provide comprehensive reparations to the alleged victim’s relatives, to uncover the truth behind what happened or to establish criminal liability or any other type of liability there might be, for the facts being alleged. The State, for its part, maintains that proceedings having to do with the facts being alleged in the petition are still underway in the ordinary criminal justice system and thus, domestic legal remedies have not been exhausted. The State further claims that the facts do not likely constitute violations since, on the one hand, the State has been meeting its obligations under the Convention in terms of access to justice, and on the other, these events occurred in the context of legitimate military activities intended to “defend the interests of the community” and “national sovereignty.”

3. Without prejudging the merits of the matter, and after having analyzed the parties’ positions and verified compliance with the requirements set forth under Articles 46 and 47 of the American Convention, the Commission decides that the petition is admissible for purposes of examining the alleged violation of Articles 4, 5, 7, 8, 11, and 25 of the American Convention, in accordance with Article 1(1) thereof, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission further decides to inform the parties of the decision and publish and include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petition

4. The Commission registered the petition under number P-394-06 and, on May 21, 2010, after a preliminary analysis, forwarded the relevant portions to the State for its observations. On July 22, 2010, the State requested an extension, which was granted by the Commission in accordance with the stipulations of Article 30(3) of the IACHR Rules of Procedure in force at the time.

5. On August 31, 2010, the State’s response was received; it was then forwarded to the petitioner for her comments. The petitioners requested extensions by means of communications dated October 2 and November 3, 2010; both requests were granted and a maximum deadline of December 14, 2010 was given, pursuant to the stipulations of Article 30(3) of the Rules of Procedure in force at the time. Via a December 14, 2010 communication, the petitioners requested an additional extension, which was not granted by the Commission because the period of time accorded had lapsed; the petitioners were asked to provide their comments as soon as possible.

6. By means of a communication dated February 25, 2011, the petitioners submitted their response, which was forwarded to the State for its comments. On April 15, 2011, the State requested an extension, which was granted. On April 18, 2011, the petitioners submitted additional information that was then sent on to the State for its observations. On June 3, 2011, the State submitted its observations, which were forwarded to the petitioners for their information. On February 7, 2014, the petitioners submitted additional information that was then passed on to the State for its information.

B. Precautionary measures

7. On May 19, 2009, the Commission granted precautionary measures (MC 139-09) for the relatives of José Orlando Giraldo Barrera, requiring the Colombian state to adopt whatever measures necessary to protect the life and personal safety of Martha Lucía Giraldo Villano and Ximena Giraldo Villano (daughters); Luz Marina Villano Morales (wife); Marcial Orlando Giraldo Barrera, José Wilson Orlando Barrera, and Jairo Giraldo Barrera (siblings), as well as each of their immediate families.

8. The events that gave rise to the adoption of precautionary measures have to do with the alleged harassment, tailing, and intimidation to which the relatives of the alleged victim were reportedly subject because of legal actions they took and, specifically, for having acted as witnesses in the criminal proceedings on the death of Mr. José Orlando Giraldo Barrera. The IACHR further took into consideration the fact that José Wilson Orlando Giraldo Barrera was allegedly the target of an attempt against his life with a firearm on May 10, 2009. The IACHR compelled the State to report on actions taken to investigate the incidents that brought about adoption of the measures.

9. Since the adoption of the measures, the IACHR has received information from the parties regarding the status of the beneficiaries, the establishment of measures, and the implementation and enforcement thereof, as well as information on domestic proceedings having to do with the facts of this case. The precautionary measures were still in effect as of the date of adoption of this decision.

III. POSITIONS OF THE PARTIES

A. The petitioners

10. As to the facts, the petitioners allege that in the early morning hours of March 11, 2006, members of the *Batallón de Alta Montaña No. 3 "Rodrigo Lloreda Cicedo"* [Rodrigo Lloreda Cicedo High Mountain Battalion No. 3] executed José Orlando Giraldo Barrera extrajudicially in the context of what was purported to be a military operation conducted in the Municipality of Santiago de Cali, Department of Valle, Colombia. Specifically, they state that the body of Mr. Giraldo was found on a farm located in the area of El Pedregal in the Corregimiento de Golondrinas [Golondrinas District], which is where he worked as a caretaker. They note that at the time of his death, the alleged victim, who was 47 years of age, was a peasant who did farm work and cared for animals.

11. The petitioners claim that on the same day this incident occurred, relatives of Mr. Giraldo went to the scene in the morning and found it was being guarded by military officers "who were hiding their official insignias," and who allegedly precluded them from entering without justification and failed to provide them any information on what had happened. They contend that the chief of intelligence of the *Batallón Alta Montaña No. 3* threatened he would "do the same thing to them" that had been done to Mr. Giraldo after their repeated insistence on an explanation as to what had happened and to call the local media to report the incident.

12. The petitioners maintain that, after persevering for several hours, Mr. Giraldo's relatives were finally able to enter the area and observe that the body of the alleged victim had suffered "extreme abuse," [and] "showed evidence of torture with wounds on the fingers of his left hand and his big toe [had been] cut in half." The petitioners further claim that "the crime scene" had "clearly been tampered with," that the body was "too clean" and "wearing only underwear," that the blood where the body lay was not proportional to the wounds the alleged victim had sustained, and that "there was grenade shrapnel on his

body” despite the fact that there were no vestiges of explosive material in the area. Note is made of the fact that family members of the alleged victim reportedly noticed that items of value were missing from the home and that it had been searched since everything was a mess. The petitioners also indicate that an “FAL”-brand rifle was found alongside the body, despite the fact that the alleged victim only had a regular weapon that had been assigned to him for guarding the farm where he worked.

13. The petitioners hold that the scene remained guarded by the military who reportedly prevented officials from the *Cuerpo Técnico de Investigación de la Fiscalía* [Technical Investigation Team of the Office of the Prosecutor] (“CTI”) from going in to remove the body. They note that the case was being handled by Military Criminal Court No. 50, the head of which showed up at the scene and determined that the matter fell under the jurisdiction of the military criminal justice system. The petitioners indicate that the alleged victim’s relatives were only told they could collect the body that night from the *Instituto Nacional de Medicina Legal y Ciencias Forenses* [National Institute for Legal Medicine and Forensic Sciences]. They allege that other key evidence was not collected adequately from the scene, that none of the military equipment of the army members who had taken part in the operation was confiscated, nor were the areas surrounding the home where the body was found searched.

14. The petitioners further contend that the death of the alleged victim was accompanied by unfounded assertions made by military authorities; such assertions, besides being used to justify his death, caused damage to both his honor and his reputation. Based on the account and documents provided by the petitioners, the official news agency of the Colombian armed forces reported to the media that the army had “killed a FARC militant in combat” and had confiscated an “FAL”-brand rifle during an anti-insurgent operation known as “*Bombardero*” [“Bomber”]. They note that the military authorities in charge of the operation claimed that, based on intelligence work and data provided by the “army’s network of cooperators,” a determination had been made that the alleged victim was a member of the “Libardo García column” of the FARC.¹

15. In this respect, the petitioners allege that the facts contained in this petition are framed within a specific context existing in Colombia that has to do with the occurrence of extrajudicial executions committed by law enforcement authorities –specifically by the national army– the victims of which were later reported to be “guerrilla fighters killed in combat.” In this vein, they maintain that this case would not constitute an “isolated incident,” rather that the death of the alleged victim would have taken place the framework of these so-called “false positives” in Colombia and that the petition would contain proof of certain elements identified as a common pattern in this type of case, specifically with regard to oversights in the initial collection of evidence and the involvement of military authorities.

16. As to domestic proceedings, the petitioners state that relatives of the alleged victim filed a report with the Office of the Prosecutor for Human Rights and a number of different claims with the President of the Republic, the Office of the Attorney General of Colombia, and the regional and national Office of the Ombudsman. They contend, however, that they have not yet received an effective response since, on the one hand, the matter was forwarded to the same military authorities who had allegedly been involved, and on the other hand, that despite the nature of the facts being reported, the jurisdiction of the ordinary criminal justice authorities to handle the case was purportedly not invoked in a timely manner, rather, the facts were initially investigated by both the ordinary criminal justice authorities and military criminal justice authorities.

17. The petitioners maintain that the military authorities in charge of the investigation were responsible for reported delays and serious evidentiary omissions from the very moment the events occurred, thereby hindering the possibility of conducting an effective investigation. They hold that this would

¹ In this regard, the petitioners allege that 15 days prior to this event, the alleged victim reportedly received a death threat from an unknown person who, along with three others, asked him to stash a truck on the farm, saying it was the property of the national army. Mr. Giraldo is said to have found out later that it was a stolen vehicle, and thus –following instructions given to him by the farm manager– he reported the incident to the local police. They claim that the individual who is said to have threatened Mr. Giraldo ended up being the same informant to whom, based on allegations, the army had paid “two million pesos to provide the information that led to the operation” in which Mr. Giraldo died.

have “had an adverse and irreversible impact on the criminal case and on aspirations of truth [and justice] for the [alleged] victims.” The petitioners further claim that the military officers who were reportedly involved had not been not implicated in the investigation in a timely manner and remained on active duty, even receiving important promotions.²

18. The petitioners indicate that following a decision handed down on August 2, 2006 by the *Consejo Superior de la Judicatura* [Superior Council of the Judiciary], the case was taken up exclusively by the ordinary criminal justice authorities, under Office of the Prosecutor No. 38, which specializes in human rights and international humanitarian law. In that regard, they allege that as of 2008, only one military officer had reportedly been indicted in the investigation; the officer in question had been, at the time the events occurred, the “chief of intelligence” of the *Batallón Alta Montaña No. 3*, and was being charged with the crimes of aggravated homicide and “ideological falsehood in a public document.” They note that in 2009, seven more members of the Cali Third Brigade –including an army major– were charged in the investigation.

19. The petitioners state that even though the criminal proceedings have reached the trial phase, there have been undue delays, with repeated continuances, that have postponed judgments from being handed down in the cases for reasons that may be attributed to the justice authorities and the defendants’ defense teams. They point out, for example, that the trial of the battalion’s “chief of intelligence” apparently lasted a year and nine months. Based on the allegations, that individual would be the only person to have been convicted of the aggravated murder of José Orlando Giraldo. The petitioners further emphasize that several members of the military charged in this case would reportedly be serving out their pretrial detention in military garrisons, thus enabling “individuals deprived of their liberty for having committed crimes against humanity from a power structure to remain in contact with that same structure.” Furthermore, the petitioners have reported that in 2013, legal judgments ordering the release of seven of the individuals indicted in the case were issued for “lapse of the reasonable period of time for concluding oral arguments.” The petitioners claim that such judgments were reportedly issued without timely notification of the alleged victims and their representatives in the proceedings.

20. The petitioners further hold that investigations into the alleged commission of acts of torture have not been opened, nor has anyone been charged with such crime. They also claim that no charges have been filed for the commission of other crimes such as “falsehoods in orders and missions, illegal possession of weapons, and conspiracy to commit crimes against humanity.” The petitioners likewise allege that lack of consideration of the apparent “widespread practice” of extrajudicial executions in Colombia by members of law enforcement has constituted a “factor of impunity” and that has fostered a situation in which no analysis is being done of the potential levels of responsibility of high-ranking military officers and national civilian authorities in these types of acts.

21. The petitioners also allege that the State has failed to provide “minimum guarantees” so that the relatives of Mr. Giraldo might learn the truth about what transpired, and that because of the legal actions his relatives have taken, their lives and physical safety have been in jeopardy, which are facts the IACHR became aware of during the process to grant precautionary protection measures to them (see paragraph II(B) above).

22. The petitioners further note that actions have been initiated in both the disciplinary and the administrative courts by virtue of which the Office of the Attorney General of Colombia would reportedly be responsible for a disciplinary investigation, and direct reparations would be made pending judgment, against the Colombian army and Ministry of Defense.

23. In view of the foregoing, the petitioners contend that eight years after the events occurred, it has still not been possible to punish all the officials involved, nor to establish all the levels of responsibility in the acts related to the death of the alleged victim. Because of this, they claim that domestic remedies have not

² They point out, for example, that the captain who had commanded the patrol during the operation in which the alleged victim died was promoted to the rank of major in the Colombian army two years later.

been effective in remedying the alleged violations, which has led to an unwarranted delay in the imparting of justice, and thus, the exception provided for under Article 46(2)(c) of the American Convention would apply to this petition.

B. Position of the State

24. In response to the petition, the State maintains that it is inadmissible as domestic remedies have not been exhausted and because the facts being alleged do not likely constitute violations of rights enshrined in the Convention. It claims, on the one hand, that its authorities have been meeting their justice-related obligations, and on the other, that the facts refer to the conduct of “legitimate military operations” intended to ensure the security and defense of the nation. The State further contends that assertions made by the petitioners regarding the supposed existence of a State policy with regard to the facts being alleged in the petition should be rejected. The State maintains that it has effectively implemented a “state policy of zero tolerance for violations of human rights committed by law enforcement” and that domestically there is a regulatory framework in place to appropriately punish “arbitrary deprivations of life and the deaths of protected persons,” as well as a legal framework to ensure the investigation, prosecution, and punishment thereof and a comprehensive framework to guarantee full reparations.

25. As to the facts, the State notes that “what is known for sure” is that on March 11, 2006, members of the *Batallón de Alta Montaña No. 3* “killed Mr. Orlando Giraldo Barrera in the context of a military operation known as ‘*Bombardero*.’” In that regard, the State maintains that the petition was submitted without domestic proceedings designed to shed light on the facts having concluded. Consequently, the State contends that the requirement to exhaust [domestic remedies] must be examined bearing in mind the criteria of reasonable periods of time as well as the complexity of the matter and the significant progress that has been made in domestic proceedings. It claims that in the case of this petition, the alleged victims have had adequate and effective remedies and thus, the exhaustion thereof domestically becomes “obligatory” due to the subsidiary nature of the inter-American system.

26. The State asserts that based on investigations and efforts undertaken by the Colombian authorities, significant progress has been made in determining all levels of responsibility in the death of the alleged victim. It points out that responsibility for the investigation has been seriously and diligently assumed by the State since the very moment it became aware of the events.

27. As to how the proceedings have unfolded, the State notes that the competent authorities launched different investigative processes to determine the alleged responsibility of any state agents involved. With respect to the case being in the hands of military criminal justice authorities, the State claims that the respective investigation was begun bearing in mind the fact that the death of the alleged victim reportedly took place “during a national army military operation.” The State clarifies, however, that because of investigative efforts and the “quality of the evidence collected,” the case was ultimately transferred to the ordinary criminal justice system by means of an August 2, 2006 decision of the *Consejo Superior de la Judicatura*. In this respect, the State claims that the matter regarding which authority was competent to handle the case was resolved expeditiously and via a decision made by independent judicial authorities just five months after the incidents occurred and while investigations in the ordinary criminal justice system continued.

28. The State holds that the petitioners’ claim regarding the supposed ineffectiveness of domestic remedies is unfounded in that it reveals their dissatisfaction with some aspects of the proceedings without acknowledging that these have been corrected and that justice-related efforts and investigations have enabled significant progress to be made towards shedding light on the facts. It maintains that the petitioners have been “very brief” in the details they have offered on the domestic proceedings, and that, in any case, the petition should be limited to the initial allegations since, the State believes, the information furnished subsequently lacks sufficiency of evidence to attribute possible international responsibility to the State.

29. To support its allegation, the State provides details on the proceedings initiated in the domestic justice system with respect to clarification of the facts being alleged in the petition, specifically actions deployed in the ordinary justice system. In that vein, the State indicates that the investigation has been the responsibility of Office of the Prosecutor No. 38, which specializes in human rights and international humanitarian law. In the context of the investigation, progress has been made in collecting evidence that is likely to shed light on the facts and charges have been filed against several members of the military. The State further claims that judicial and administrative authorities have ensured the involvement of relatives of the alleged victim in the proceedings begun and thus, there are no obstacles to exhaustion of domestic remedies.

30. The State notes that on March 12, 2008, Municipal Criminal Court No. 26, in a supervisory capacity, issued a pretrial detention order against a former military intelligence chief, and that the following May 14 and 16, he was arrested and a preliminary hearing was held to formalize the arrest and formulate charges, respectively. The State indicates that, by means of judicial order, preventive detention in a penitentiary in the Department of Valle del Cauca, with no opportunity for release on bond, was ordered. The State further indicates that, by May 2009, the case involving this individual had reached the trial phase at Criminal Circuit Court No. 9, and in June 2010, oral arguments continued.

31. According to the State, in the proceedings being handled by Office of the Prosecutor No. 38, pretrial detention was also ordered for an army major, a sergeant, three corporals, and three professional soldiers, who were incarcerated in the Military Prison of the Cali Third Brigade. The State notes that on August 21, 2009, the Office of the Prosecutor filed charges against and requested pretrial detention for seven members of the military, and in June 2010, the case was in the oral arguments phase at Criminal Court No. 13.

32. The State indicates that there are also disciplinary proceedings underway that are being overseen by the Delegated Disciplinary Prosecutors Office for the Defense of Human Rights, an authority that is engaged in a formal investigation in the context of which it prepared a statement of objections for "serious and willful offenses" against several members of the Colombian army assigned to the *Batallón de Alta Montaña No. 3*. The State likewise notes that a direct reparations action is awaiting a judgment to be rendered by the contentious administrative authority, which is an ideal mechanism for establishing the institutional responsibility of the State for acts or omissions by their agents and/or entities, and based on the information available, would also not have been exhausted.

33. In light of the foregoing, the State is challenging the allegations being made by the petitioners regarding the impunity that supposedly exists in the case, reiterating that the criminal and disciplinary investigations have been conducted and executed both diligently and expeditiously, and that members of law enforcement who were reportedly involved in the incident have been effectively charged the case. With this in mind, the State further contends that it bears no international responsibility since it has ensured effective access to justice for the family members of the alleged victim.

34. Lastly, the State claims that the complex nature of the facts being alleged in the petition should be taken into account in the sense that they occurred under special circumstances, namely, they were associated with the conduct of a military operation. In this regard, the State holds that the facts also fail to demonstrate potential violations of the American Convention since they have to do with the conduct of military activities, in observance of both domestic and international laws intended to defend the interests of the community and national sovereignty.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione materiæ, ratione personæ, ratione temporis, and ratione loci*

35. The petitioners are entitled, under Article 44 of the American Convention, to file complaints with the Commission. The petition names as alleged victims individuals on whose behalf the State of Colombia undertook to respect and ensure the rights enshrined in the American Convention. Regarding the State, the Commission notes that Colombia has been party to the American Convention since July 31, 1973,

and to the Inter-American Convention to Prevent and Punish Torture since January 19, 1999, when it deposited the respective instrument of ratification. The Commission, therefore, has *ratione personae* to examine the petition. The Commission likewise has *ratione loci* to examine the petition inasmuch as it alleges violations of rights protected under the American Convention that are said to have taken place within the territory of Colombia, a state party to said treaty.

36. The Commission is competent *ratione temporis* because the obligation to respect and ensure the rights protected in the American Convention was already in force for the State when the facts alleged in the petition are said to have occurred. Lastly, the Commission is competent *ratione materiae* because the petition alleges possible violations of human rights protected by the American Convention and the applicable provisions of the Inter-American Convention to Prevent and Punish Torture.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

37. Article 46(1)(a) of the American Convention provides that for a petition filed with the Inter-American Commission pursuant to Article 44 of the Convention to be admitted, the remedies under domestic law are required to have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) of the Convention, for its part, recognizes three circumstances in which the rule of prior exhaustion of domestic remedies does not apply: (i) When the domestic legislation of the state concerned does not afford due process of law for the protection of the right or group of rights that have allegedly been violated; (ii) 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; and (iii) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

38. In this case, the State claims that the petition fails to meet the requirement of having exhausted domestic remedies since there are proceedings still underway in the ordinary criminal justice system and that, due to the complexity of the matter and to the actions taken by Colombian authorities, the exceptions provided for in Article 46(2) would not apply. For their part, the petitioners maintain that there has been unwarranted delay in the domestic proceedings, bearing in mind the nature of the facts being alleged, that the case was initially handled in the military justice system, and that eight years after the incident and the launch of the criminal investigation, the corresponding criminal liability has apparently not been definitively established, nor have all punishable acts been investigated or punished, specifically, as regards the alleged commission of acts of torture.

39. In view of the allegations being made by the parties, it is first necessary to clarify which domestic remedies must be exhausted in this petition bearing in mind existing jurisprudence in the inter-American system. Because this petition involves the purported responsibility of state agents in the alleged execution of a civilian, the Commission observes that the ideal remedy for shedding light on the facts is a criminal investigation conducted in the ordinary justice system in order to establish the criminal responsibility of the State agents involved.³ The Commission further observes that the facts being alleged regarding the apparent extrajudicial execution of José Orlando Giraldo Barrera translate, in domestic law, into prosecutable criminal conduct, the investigation and prosecution of which should be driven by the State itself.⁴

³ IACHR, Report No. 8/11, *Anibal Aguas Acosta*, March 22, 2011, paragraph 30.

⁴ Extrajudicial execution is not criminalized as such in domestic Colombian law. Nonetheless, the Colombian Criminal Code contains a title devoted to crimes against persons and property protected by international humanitarian law. In that vein, Article 135 of that Code establishes: "Homicide of protected persons. Those who, during and in the course of armed conflict, cause the death of a person protected under international human rights conventions ratified by Colombia, shall receive prison sentences of four hundred and eighty (480) to six hundred (600) months, fines of two thousand six hundred and sixty-six point sixty-six (2,666.66) to seven thousand five hundred (7,500) current legal monthly minimum salaries, and shall be ineligible to exercise public duties and functions for two hundred and forty (240) to three hundred and sixty (360) months."

40. In that regard, the IACHR observes that following the events of March 11, 2006, preliminary investigations were initially conducted both in the regular criminal justice system and in the military criminal justice system. Along these lines, indication is given that the relatives of the alleged victim filed a criminal complaint that was handed over to the Office of the Special Prosecutor for Human Rights and International Humanitarian Law on April 7, 2006, and a criminal investigation was ordered open under file no. 110016000099200600005. Military Criminal Investigating Court No. 50, for its part, likewise took up an investigation, ordering recovery of the body that very March 11. Based on the allegations, the initial investigative and evidence collection efforts were primarily made by military authorities.

41. According to information provided to the IACHR by both parties, following a judgment rendered on August 2, 2006 by the Disciplinary Chamber of the *Consejo Superior de la Judicatura*, the matter of jurisdiction in this case was resolved in favor of the ordinary criminal justice system and as a result, the matter was handed over exclusively to Office of the Special Prosecutor No. 38. In this regard, the Commission notes that there were reportedly criminal proceedings for the violations being alleged in the petition brought in the ordinary criminal courts against several members of the military charged in the investigation in 2008 and 2009.

42. Based on the information available, in 2008 the Office of the Prosecutor is said to have filed charges against the former chief of intelligence of the *Batallón Alta Montaña No. 3* for the crimes of aggravated homicide and “ideological falsehood in public documents.” The petitioners have indicated that this individual was reportedly convicted of the crimes of which he had been accused. The State, for its part, failed to provide information as to whether a definitive judgment had been handed down in that case. There are likewise indications that the Office of the Prosecutor indicted seven other members of the military, including a Colombian army major, on October 20, 2009. According to assertions made by both parties, up through mid-2010, the case remained in the trial phase.⁵ In addition, the petitioners reported that on September 20 and October 2, 2013, release orders were apparently issued for the seven individuals indicted in the case due to “lapse of the reasonable period of time for concluding oral arguments.” They claim that the Prosecution has not appealed such decision and that the alleged victims’ representatives were not notified during that process and therefore were unable to intervene in a timely fashion.⁶ The IACHR lacks information about the current status of the proceedings initiated and, specifically, about which crimes the officials allegedly implicated might have been charged with. The petitioners have nevertheless repeated their allegation of unwarranted delays in domestic proceedings, which is precisely what would have led to the order to release the defendants. Likewise, based on assertions made by the petitioners, no charges were reportedly ever filed for the crime of torture, which is criminalized in Colombian criminal legislation.⁷

43. The Commission observes that the information provided by both parties indicates that the investigation meant to shed light on the facts remains open, presumably without all levels of responsibility having yet been fully established in terms of who the masterminds and perpetrators of the incidents being alleged in this petition were. Consequently, given the nature of this petition and the time that has transpired since the facts being alleged herein occurred, the Commission believes that the exceptions provided for under Article 46(2)(c) of the American Convention with respect to unwarranted delay in rendering a final judgment under domestic remedies apply and that the requirement regarding prior exhaustion of domestic remedies is unenforceable.

⁵ In its second response, the State indicated that on June 23 and 24, 2010, the oral arguments hearing in the trial of an army major charged in the criminal case was held. It further notes that on June 28, 2010, an “appeals hearing” against [the major] was held at the Criminal Circuit Court of Cali. The State’s response was received on August 31, 2010.

⁶ The petitioners provided a copy of the action for protection filed with the Criminal Bench of the Cali Superior Court, dated December 15, 2013, claiming violations of the right of access to justice due to the fact that the alleged victims were reportedly not called to appear at the hearings to decide on the release of the defendants, and requesting that such judgments be reversed as they are “patently unlawful.”

⁷ The crime of torture is criminalized under Article 178 of the Criminal Code (published under Law 599 of 2000) and was subject to interpretation by the Constitutional Court under decision C-148/05 of February 22, 2005.

44. As to the information available regarding proceedings launched in the disciplinary and administrative courts, the Commission reiterates that exhaustion of the pending remedies referred to by the State before resorting to the inter-American system is unenforceable whenever such remedies fail to offer a sufficient avenue for prosecuting, punishing, and providing reparations for violations of human rights. And in the case of direct reparations, it has to do with a mechanism that seeks oversight of State administrative activities and that only permits compensation for damages caused by abuse of power.⁸

45. It only remains to note that invocation of the exceptions to the rule on exhaustion of domestic remedies provided for under Article 46(2) of the Convention is closely linked to the determination of potential violations of certain rights enshrined therein, such as the right to access to justice. However, Article 46(2), because of its nature and objective, is a provision with autonomous content vis-à-vis the substantive provisions of the Convention. As a result, a determination as to whether the rule on exhaustion of domestic remedies applies to the case at hand should be made both before and separately from the analysis of the merits of the case since it relies on a standard of consideration different from the one used to determine potential violations of Articles 8 and 25 of the Convention. It is important to clarify that the causes and effects that prevented domestic remedies from being exhausted are to be examined in the report adopted by the Commission on the merits of the case in order to determine if violations of the American Convention exist.

2. Timeliness of the petition submitted to the Commission

46. The American Convention provides that for petitions to be deemed admissible by the Commission, they must be filed within a period of six months following notification of the final judgment to the alleged victim. In the case at hand, the IACHR has already ruled that exceptions to the rule requiring the exhaustion of domestic remedies apply pursuant to 46(2)(c) of the American Convention. In that connection, Article 32 of the Commission's Rules of Procedure provides that in those cases where the exceptions to the requirement for prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time as determined by the Commission. To that end, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

47. In the case at hand, the petition was received on April 26, 2006, and the facts being alleged occurred on March 11, 2006. At that time, and based on the information available, the domestic criminal case was being handled by the military justice system, despite the complaints and rights to petition filed by relatives of the alleged victim for purposes of getting an investigation to be carried out under the terms required by the American Convention. Subsequently, in 2008, 2009, 2010, and 2014, the petitioners submitted allegations regarding reported shortcomings in the criminal case underway in the ordinary criminal justice system; this is a position they maintain with respect to later incidents. In light of the context and nature of this petition, as well as of the fact that the criminal proceedings remain pending, the Commission believes that the admissibility requirement for filing deadlines has been met.

3. Duplication of proceedings and *res judicata*

48. The case file does not indicate that the substance of the petition is pending in any other international settlement proceeding or that it is substantially the same as another petition already examined by this Commission or any other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the American Convention have been met.

4. Characterization of the alleged facts

49. In the case of this petition, the State holds that the facts being alleged do not constitute violations of the American Convention since the death of the alleged victim occurred within the context of a

⁸ IACHR, Report No. 12/12, Petition No. 1447-05, Admissibility, *Omar de Jesús Lezcano Lezcano, Ángel José Lezcano Vargas, Et. Al.* (Colombia), March 20, 2012, paragraph 30; and IACHR, Report No. 25/03, Petition No. 289/2002, Admissibility, *Santo Domingo* (Colombia), March 6, 2003, paragraph 23.

legitimate military operation. The State further claims that thorough proceedings were undertaken domestically to address the facts being alleged in both the military and ordinary criminal justice systems and in the administrative and disciplinary courts and thus, the State had been meeting its justice-related obligations. For their part, the petitioners maintain that the alleged victim was executed extrajudicially and that the acts have not been duly prosecuted or punished.

50. Neither the American Convention nor the IACHR's Rules of Procedure require the petitioner to identify the specific rights allegedly violated by the State in the matter submitted to the Commission, although the petitioners may do so. It falls to the Commission, based on the system's jurisprudence, to determine in its admissibility reports what provision of the relevant inter-American instruments applies and could establish a violation in the facts are proven sufficiently.

51. In view of the elements of fact and of rights submitted by the parties and the nature of the matter put to it, the IACHR finds that, at this stage, it is necessary to establish whether the allegations being made by the petitioners regarding the reported denial of the right to life of José Orlando Giraldo Barrera by state agents, the purported commission of acts of torture prior to his death, and claims made regarding him belonging to an illegal armed group to justify his death in alleged combat might constitute violations of the rights protected under Articles 4, 5, 7, and 11 of the American Convention, pursuant to Article 1(1) thereof, with respect to José Orlando Giraldo Barrera. In addition, given the nature of the alleged violations described in this petition –including reports of torture and a lack of judicial clarification– the Commission believes that, during the merits stage, the potential responsibility of the State for the alleged violation of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture must be determined.

52. The IACHR further considers that the allegations regarding a lack of judicial clarification of the facts being claimed, the impact on the relatives of the alleged victim, bearing in mind the threats and harassment the alleged victim reportedly suffered and that prompted adoption of international protection measures for him, might constitute violations of the rights protected under Articles 5, 8, and 25 of the American Convention with respect to the alleged victim.⁹

53. As to whether the petition is groundless or out of order, the IACHR concludes that the petitioners have made a *prima facie* case for the limits required under Article 47(b) of the American Convention.

V. CONCLUSION

54. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention. Based on the foregoing considerations of fact and law and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To rule this petition admissible as regards Articles 4, 5, 7, 8, 11, and 25 of the American Convention, pursuant to Article 1(1) thereof, and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2. To notify the Colombian state and the petitioners of this decision.
3. To continue its analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

⁹ The alleged victims are the relatives identified in paragraph 7 of this report.

Done and signed in the city of Washington, D.C., on the 3rd day of the month of April, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; José de Jesús Orozco, Rosa María Ortiz, Paulo Vannuchi and James Cavallaro, Commissioners.