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REPORT No. 107/17
PETITION 535-07
REPORT ON ADMISSIBILITY

VITELIO CAPERA CRUZ
COLOMBIA

Approved by the Commission at its session No. 2098 held on September 7, 2017.
164th Special Period of Sessions.

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Colombia. September 7, 2017.



REPORT No. 107/17¹
PETITION 535-07
 ADMISSIBILITY REPORT
 VITELIO CAPERA CRUZ AND FAMILY
 COLOMBIA
 SEPTEMBER 7, 2017

I. INFORMATION ON THE PETITION

Petitioner:	Dominga Cruz Tique Vda. de Capera and Lucila Hurtado Peña
Presunta víctima: xx Alleged victim:	Vitelio Capera Cruz and family
Respondent State:	Colombia
Rights invoked:	Articles 4 (life), 8 (judicial guarantees), and 25 (judicial protection) of the American Convention on Human Rights ²

II. PROCESSING BEFORE THE IACHR³

Date petition filed:	April 30, 2007
Date State given notice of petition:	July 23, 2010
Date of the first response from the State:	November 26, 2010
Additional observations by petitioner:⁴	January 15, 2011, March 30, 2011
Additional observations from the State:	March 4, 2011

III. COMPETENCE

Competence <i>ratione personae</i>:	Yes
Competence <i>ratione loci</i>:	Yes
Competence <i>ratione temporis</i>:	Yes
Competence <i>ratione materiae</i>:	Yes, American Convention (instrument deposited July 31, 1973)

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES, AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 4 (life), 5 (humane treatment), 8 (judicial guarantees), and 25 (judicial protection) of the American Convention, in conjunction with Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law)

¹ In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the discussion or decision in this matter.

² Hereinafter "the Convention" or "the American Convention."

³ The observations of each party were duly forwarded to the other party.

⁴ Since their last substantive communication, the petitioners have sent several communications to the IACHR requesting information on the status of the petition and requesting that a decision on admissibility be reached. The last such communication is dated August 5, 2016.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception at Article 46(2)(b) of the ACHR applies
Deadline for filing:	Yes, as set forth at section VI

V. ALLEGED FACTS

1. The petitioners state that on the night of November 9, 1995, a patrol of the National Army appeared unexpectedly near an establishment for public entertainment in the town known as Vereda Las Mercedes in the municipality of Tello, department of Huila, due to the supposed presence of two members of the Fuerzas Armadas Revolucionarias de Colombia (FARC). They note that according to the testimony and statements of the townspeople, the members of the military began to shoot indiscriminately into the crowd (which included children), without the alleged guerrilla members having initiated fire or having carried out any hostile act whatsoever. As a result of that operation Vitelio Capera Cruz (22 years of age) lost his life, and three other persons were injured. The official act of inspection of the corpse confirmed that the cause of the alleged victim’s death was a gunshot wound to the occipital region of the head.

2. They argue that even though the alleged victim was a civilian and had no ties at all with the armed forces, the investigation into his death unfolded in the military criminal jurisdiction. Accordingly, on September 2, 1996 the Judge of First Instance of Neiva (Command of the Ninth Brigade) ordered the cessation of all proceedings against the accused, indicating that while a wrongful act had been committed, it had taken place in the context of legitimate self-defense, for the accused opened fire to repel an attack, and the alleged victim had been an unfortunate “neutral third party.” That decision was reviewed *sua sponte* and affirmed on January 27, 1997 by the Third Chamber of the Military Superior Tribunal, which determined that the defensive conduct of the accused was due to a state of necessity that avoided a greater wrong.

3. In addition, the alleged victim’s mother filed an action for direct reparation before the Contentious-Administrative Court of Huila, which was dismissed on May 12, 2005, arguing that the harmful act was not proven, for the individual death certificate issued free of charge granted by the National Administrative Department of Statistics was attached, and not the Civil Record of Death, which was the document needed to establish the death of a person. In the face of that refusal, arguing the validity of the document filed, and also noting that the death of the alleged victim was expressly recognized even by the respondent party, she filed an appeal on August 2, 2005, 2005. It was rejected by the Contentious-Administrative Court on August 31, 2005 on the grounds that the proceeding did not allow for an appeal, for the sum did not exceed the legal minimum established. In response to this situation petitioners state that they filed a *tutela* action that was dismissed on procedural grounds by the Fourth Section of the Council of State on January 26, 2006; it indicated that the one could not bring a *tutela* action against judicial rulings that determine the end of a proceeding.

4. Considering that the previous decision violated the right to due process, the petitioners filed a second *tutela* action with the Fifth Section of the Council of State, Chamber for Contentious-Administrative Matters, which ratified that said action could not be brought against judicial determinations in a judgment of May 18, 2006. This negative decision led to the filing of a challenge that was dismissed by the First Section of the Chamber for Contentious-Administrative Matters of the Council of State on July 27, 2006. The petitioners note that the Constitutional Court decided not to review the matter and not to file the motion of insistence (*recurso de insistencia*) by Order of September 29, 2006, notice of which was given to them on October 31, 2006.

5. The State indicated that the alleged victim’s death occurred in the context of Operations Order No. 98 “Cazador” carried out by the Command of the Ninth Brigade, due to the presence of members of the FARC in the region. It notes that the guerrilla fighters fired when they noted the presence of the government forces and that the alleged victim was killed and three other persons were wounded as a result of the military response to that attack. Accordingly, it argues that the facts do not tend to establish violations of human rights since they occurred in the course of the Army carrying out its constitutional mission. Therefore, it states that the decisions handed down by the military tribunals that determined the cessation of

investigations are legitimate and legal, since this jurisdiction was competent to inquire into and pass judgment on the alleged offense. It also argues that the disciplinary investigation into the members of the armed forces involved was archived by the Office of the Procurator General, Human Rights Division (Procuraduría Delegada para la Defensa de los Derechos Humanos) on September 19, 1997, for it considered that the members of the military were merely performing their duties.

6. The State also alleges that in light of the principle of subsidiarity and complementarity, the IACHR is not a court of appeals with the authority to examine and review decisions handed down by domestic courts with jurisdiction that have been unfavorable to the interests of the alleged victims, and that were it to do so it would be intervening as a court of “fourth instance”; and that therefore the petition is inadmissible. In this regard, it notes that in all the proceedings initiated by the petitioners, in both the military criminal jurisdiction and the contentious-administrative jurisdiction, the domestic courts examined the merits issues and made decisions that were duly reasoned.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

7. The petitioners state that impunity persists in the case, for the investigations into the death of the alleged victim took place in the military jurisdiction, which was not suitable for clarifying the facts and which also decided to archive the proceedings that have been initiated against the persons implicated. Moreover, they argue that as regards the reparations proceeding in the contentious-administrative jurisdiction, domestic remedies were exhausted with the order of September 29, 2006 handed down by the Constitutional Court, notice of which was given on October 31, 2006. The State, in turn, emphasizes that adequate remedies were guaranteed in the domestic legal system for each of the proceedings initiated.

8. The Commission has indicated repeatedly that the military jurisdiction does not constitute an appropriate forum and therefore does not offer an adequate remedy for investigating, prosecuting, and punishing violations of the human rights enshrined in the American Convention allegedly committed by members of the armed forces or National Police or with their collaboration or acquiescence.⁵ In that regard, with respect to the facts set forth, the IACHR notes that by pursuing and concluding the investigations in the military criminal justice system, it was not possible for the family members of the alleged victim to participate in the proceeding, present evidence, and pursue remedies to appeal the decisions handed down in favor of the persons allegedly responsible. Therefore, the Commission notes that the exception set out at Article 46(2)(b) of the Convention applies, as the alleged victim has not been allowed access to domestic remedies, or was impeded from exhausting them.

9. In addition, as for the processes of direct reparation before the contentious-administrative jurisdiction, the Commission has stated time and again that said jurisdiction does not offer a suitable remedy for the purposes of analyzing the admissibility of a claim of this nature⁶, since it is not adequate for providing integral reparation, which includes clarifying the facts and justice for the family members. Without prejudice to this, while in the instant case a criminal proceeding is the suitable remedy for investigating the facts, it is observed that the petitioners also allege specific violations in the context of the action for direct reparation. Accordingly, given the link between the two processes, the Commission takes into account that in the contentious-administrative jurisdiction domestic remedies were exhausted with the decision not to review the matter taken by the Constitutional Court on September 29, 2006, and notified on October 31, 2006.

10. Therefore, in view of the characteristics of the case the IACHR considers that the petition was filed within a reasonable time and that the admissibility requirement regarding time of filing should be considered to have been satisfied.

⁵ IACHR, Report No. 50/17, Petition P-464-10B. Admissibility. José Ruperto Agudelo Ciro and family. Colombia. May 25, 2017, para. 9. IACHR, Report No. 34/15, Petition 191-07 and others. Admissibility. Álvaro Enrique Rodríguez et al. Colombia. July 22, 2015, para. 247.

⁶ IACHR, Report No. 72/16. Petition 694-06. Admissibility. Onofre Antonio de La Hoz Montero and family. Colombia. December 6, 2016, para. 32.

VII. COLORABLE CLAIM

11. In view of the elements of fact and law set forth by the parties and the nature of the matter put before it, the Commission considers that the arguments presented with respect to the death of the alleged victim as a result of military actions, the lack of effective judicial protection with respect to these facts, and the impossibility of his family members appealing a judgment on direct reparation in view of the minimum sum⁷, if true, tend to establish possible violations of Articles 4 (right to life), 5 (right to humane treatment), 8 (judicial guarantees), and 25 (judicial protection) of the American Convention in relation to Articles 1(1) (obligation to respect the rights) and 2 (obligation to adopt provisions of domestic law), to the detriment of the alleged victim and his family.

VIII. DECISION

1. To find this petition admissible in relation to Articles 4, 5, 8, and 25 in conjunction with Articles 1(1) and 2 of the American Convention;
2. To notify the parties of this decision;
3. To continue with the analysis of the merits; and
4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights in the city of México, on the 7 day of the month of September, 2017. (Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.

⁷ In previous cases the Inter-American Commission has admitted petitions on the alleged lack of a mechanism for reviewing administrative actions in Colombia based on the amount in controversy. IACHR, Report No. 71/09, Petition 858-06, Massacre of Belén – Altavista. Colombia. August 5, 2009, para. 44; and IACHR, Report No. 69/09, Petition 1385-06, Rubén Darío Arroyave Gallego, August 5, 2009, para. 37.