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REPORT No. 162/18
PETITION P-1472-08
REPORT ON ADMISSIBILITY

ATANASIO GALVIS QUINTERO AND HIS CHILDREN
COLOMBIA

Approved electronically by the Commission on December 7, 2018.

Cite as: IACHR, Report No. 162/18, Petition 1472-08. Admissibility. Atanasio Galvis Quintero and family. Colombia. December 7, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Oscar Darío Villegas Posada
Alleged victim:	Atanasio Galvis Quintero and his children ¹
Respondent State:	Colombia ²
Rights invoked:	Articles 5 (right to humane treatment), 8 (right to a fair trial) and 11 (right to privacy) of the American Convention on Human Rights ³ and Articles I (right to life, liberty and personal security), V (right to protection of honor, personal reputation and private and family life), VIII (right to residence and movement), XI (right to the preservation of health and to well-being) and XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	July 1, 2008
Additional information received at the stage of initial review:	April 21, 2010
Notification of the petition to the State:	July 3, 2014
State's first response:	August 15, 2014
Additional observations from the petitioner:	November 20, 2014 and August 30, 2018
Additional observations from the State:	July 17, 2015
Notification of the possible archiving of the petition:	November 20, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	August 30, 2018

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 (deposit of instrument of ratification made on July 31, 1973)

IV. 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 5 (right to humane treatment), 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention, in relation to its Article 1.1 (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on February 18, 2010
Timeliness of the petition:	Yes, on July 1, 2008

¹ The petition was filed on behalf of Mr. Atanasio Galvis Quintero and his three children Wilson Alejandro Galvis Klinger, Juan Gabriel Galvis Klinger and Pablo Andrés Galvis Klinger. The petition indicates that Juan Gabriel and Pablo Andrés were minors at the time of the events.

² In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in either the discussion or decision in the present case.

³ Herein after "the Convention" or "the American Convention".

⁴ Herein after "the Declaration" or "the American Declaration".

⁵ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. Oscar Darío Villegas Posada (hereinafter "the petitioner") filed the petition on behalf of Mr. Atanasio Galvis Quintero and his three sons, Wilson Alejandro Galvis Klinger, Juan Gabriel Galvis Klinger and Pablo Andrés Galvis Klinger (hereinafter "the alleged victims"), husband and children respectively of Mrs. Marta Lucía Klinger Rodríguez (hereinafter "Mrs. Klinger") who was killed by a member of the army.

2. The petitioner states that on the night of October 15, 1993, National Army Second Lieutenant Jesus Fabián Rojas Bohorquez (hereinafter "second lieutenant Rojas"), was in the "El Bosque" bar, consuming alcoholic beverages with other soldiers when, under the influence of alcohol, he had a discussion with the bar owner, pulled out a firearm and started firing. As a result, the bar owner and Mrs. Klinger, who worked in the establishment, were killed. The owner's son was also seriously injured.

3. As a consequence of these events, Second Lieutenant Rojas was prosecuted in criminal proceedings and sentenced, on May 31, 1995, by the Thirty-Sixth Criminal Circuit Court of Bogotá, to a forty-eight-year prison sentence for the offenses of homicide, concurrently with attempted homicide and illegal possession of a firearm. The second lieutenant appealed this decision, which was upheld by the Superior Court of the Judicial District of Bogotá in a decision dated September 27, 1995. He then filed a cassation appeal that was dismissed by the Criminal Cassation Chamber of the Supreme Court of Justice on April 20, 1999. Second Lieutenant Rojas was also subject to disciplinary action by the Armed Forces Deputy Prosecutor, which resulted in his discharge by resolution No. 250 of June 5, 1995.

4. On July 6, 1995, the alleged victims filed a claim for direct reparation against the State, requesting that each be awarded compensation for moral damages caused by the death of their relative. The alleged victims held the State responsible for Mrs. Klinger's death, as Second Lieutenant Rojas had a documented history of irresponsible use of firearms (unnecessary shooting into the air and against colleagues), against which the authorities had failed to take the necessary action to protect the population.

5. On August 26, 1999, the Administrative Court of Cundinamarca dismissed their claim, on the grounds that at the time of the events, Second Lieutenant Rojas was not in uniform and that the weapon he used had not been officially issued. The Court concluded that "the harmful conduct can solely be attributed to Jesús Fabian Rojas Boharquez as an individual fault unconnected in any way to the responsibility of the administration."

6. The alleged victims filed an appeal against this decision, which was transferred to the Council of State on October 12, 1999. In support of their appeal, the alleged victims submitted that the record contained no evidence supporting the conclusion that the weapon used was not officially issued; that the authorities were aware of the danger posed by the second lieutenant and that they had been recommended that he be retired, and that on previous occasions the second lieutenant had visited the "El Bosque" bar patrolling in uniform and using his service firearm to demonstrate his "authority".

7. On February 18, 2010, the 3rd Contentious Administrative Chamber of the Council of State upheld the judgment of first instance, considering that it could not be inferred the Nation was responsible or that the authorities could possibly foresee that the Second lieutenant would commit actions like those of October 15, 1993.

8. Despite these decisions, the petitioner alleges that the State is responsible for the death of Mrs. Klinger and, therefore, is liable to compensate the alleged victims, based on the following arguments: (1) That the weapon used by Second Lieutenant Rojas was an officially issued firearm, and that the judicial authorities concluded to the contrary without conducting a proper investigation; (2) That even given that the firearm was not officially issued, the State would be responsible for failing to act to protect the public despite being aware of the second lieutenant's violent nature and his history of irresponsible use of firearms; (3) That it is not true that Second Lieutenant Rojas was not on duty when he committed the offenses; instead he was on official duty, but in dereliction thereof; and (4) That on previous occasions, the second lieutenant had been in uniform at the "El Bosque" bar, so that its employees knew his rank, which he used to intimidate them.

9. The petitioner also argues that although the alleged victims resorted to domestic legal remedies, their right to access to justice was violated because there was no response in accordance with the law within a reasonable period of time. In this regard, he argues that at the time of filing the petition on July 1, 2008, more than eight years had elapsed since his appeal had been submitted to the Council of State on October 12, 1999. It was not until February 18, 2010, that the Council of State issued a decision regarding the appeal.

10. In addition to the foregoing, he argues that his right to a fair trial was violated because the criminal investigation gave no priority to establishing the truth in connection with the weapon used, and that there was a failure to consider the available evidence as a whole in the two instances of the proceedings for direct compensation. He adds that the Council of State failed to apply its own case law whereby a weapon used by a State agent is presumed to be officially issued unless there is evidence to the contrary, and that the State is responsible for offenses committed by agents of its Security Forces even when off-duty. He argues that the ineffectiveness of the domestic remedies at the internal level is demonstrated by the fact that justice has not been done and that the alleged victims have not been provided with compensation. Finally, the petitioner has no intention to use the Inter-American System as a "fourth instance", but to ensure that the entity whose omission led to Mrs. Klinger's death assumes its responsibility and takes measures to prevent individuals that are a risk to society from serving in its ranks.

11. For its part, the State considers that the petition is inadmissible on the basis of Article 47.b of the American Convention, because the facts alleged by the petitioner fail to characterize human rights violations. It argues that it has fulfilled its obligation to investigate the facts and punish the individual responsible for Mrs. Klinger's death, who was also liable to pay reparations of one thousand two hundred grams of gold "in favor of whosoever proves in due form to be directly prejudiced by the death of Marta Lucia Klinger Rodríguez".⁶ It argues that the petitioner's intention is for the Commission to act, contrary to its subsidiary nature, as a court of appeal to review the conclusions of fact and law reached in the contentious-administrative proceedings, which respected all due process guarantees. It alleges that the Council of State decided in a specific, precise and reasoned manner about the nature of the weapon used in the homicide and the absence of a causal link between the damage inflicted by the second lieutenant and the actions of the administration, and that the petitioner's allegations are merely limited to a discrepancy with the decision without demonstrating violations of due process that taint it as a jurisdictional act.

12. The State also alleges that the petition contains no violations of human rights attributable to the State, because the criminal, disciplinary and administrative proceedings proved that Second Lieutenant Rojas acted in a private capacity without availing himself of his status as an army officer and without using army resources or weapons. It argues that, contrary to the petitioner's allegations, the second lieutenant's service record did not contain annotations or obvious signs that would account for his violent behavior.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. The petitioner seeks to have the State recognize its responsibility for the death of Mrs. Klinger and compensate her husband and children. With respect to the allegations regarding the State's responsibility in the death of Ms. Klinger and the errors in the criminal proceedings to determine the State's omission, the Commission observes that it does not have sufficient information on the steps taken by the petitioner and the development of the criminal proceedings. The Commission only has information on the outcome and the appeals filed by the defendant until his final conviction. For this reason, and in view of the particular nature of this case, the Commission considers that this part of the petition is inadmissible because it does not fulfill the requirements of Article 46.1.a of the Convention.

⁶ Gold in grams was the measure used in monetary judgments prior to 2001 in Colombia. According to the average rate of exchange for 1995 –given by the Central Bank of Colombia – 1,200 grams of gold were approximately equivalent to 14,520 US dollars.

14. On the other hand, the Commission notes that, for purposes of asserting the claim for compensation at the domestic level, the alleged victims filed a direct reparation action on July 6, 1995, and that an appeal was filed in these proceedings on October 12, 1999, and it was not until February 18, 2010, that the Council of State issued the final decision regarding this appeal. The State has failed to refer to additional remedies that the petitioner could attempt at domestic level. In view of this and the information presented in the file, the Commission concludes that this aspect of the petition meets the requirement of exhaustion of domestic remedies pursuant to Article 46.1.a of the American Convention only in connection with this issue.

15. In view of the fact that the decision that exhausted the domestic remedies was issued on February 18, 2010, and the petition was received by the Commission on July 1, 2008, the claim fulfills the timeliness requirement established in Article 46 (1) (b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

16. The petitioner seeks to establish that a degree of responsibility pertaining the death of Mrs. Klinger is attributable to the State, which would entail the right of the alleged victims to receive compensation. For its part, the State alleges that the petitioner intends for the Commission to act as a court of appeal to review the conclusions of fact and law reached by the domestic courts that found no State responsibility as alleged by the petitioner and, therefore, that there was no obligation to compensate the alleged victims.

17. The Commission observes that the petitioners have not submitted sufficient arguments or evidence to sustain *prima facie* that the criminal proceedings failed to comply with the guarantees of due process and judicial protection, in the terms of the American Convention. However, the IACHR notes that it is an incontrovertible fact that proceedings before the Council of State were begun on July 6, 1995; that a first decision issued on August 26, 1999; that the alleged victims appealed that decision on October 12, 1999; and that it was resolved (against them) on February 18, 2010.

18. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, the Commission considers that, if proven, the alleged violations of due process in relation to the direct reparation action, including the alleged unjustified delay in the resolution of the appeal before the Council of State, could characterize violations of the rights recognized in Articles 5 (right to humane treatment), 8 (right to a fair trial) and 25 (right to judicial protection) of the Convention, in relation to its Article 1.1.

19. Regarding the allegations made by the State concerning the "fourth instance formula", the Commission observes that by admitting this petition it does not intend to replace the domestic judicial authorities. Rather, it will analyze at the merits stage whether the domestic judicial proceedings complied with the guarantees of due process and judicial protection in the contentious administrative process.

20. With respect to the alleged violation of the American Declaration, the Commission has previously established that, once the American Convention enters into force in relation to a State, the Convention and not the Declaration becomes the primary source of law applied by the Commission, provided that the petition refers to the alleged violation of identical rights in both instruments. In the present case, the claims under the American Declaration are protected in the Convention in its Articles 4, 5, 11, 17, 21, 22 and 26.

21. With respect to the claims on alleged violations of Article 11 (right to privacy) of the American Convention and the rights to life, personal liberty,; protection of the right to honor, personal reputation and private and family life; right to freedom of residence and movement; preservation of health and to well-being and benefits of culture, the Commission notes that the petitioners have not submitted sufficient allegations or evidence to consider *prima facie* their possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8 and 25 of the American Convention in relation to Article 1.1;

2. To find the instant petition inadmissible in relation to Article 11 of the American Convention and the rights to life, personal liberty, the right to honor, personal reputation and private and family life; the right to freedom of movement and residence; the right to the preservation of health and to well-being and the right to the benefits of culture.

3. To notify the parties of this decision; to continue with the analysis on the merits; and 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 on the 26th day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.