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**REPORT No. 112/10**  
INTER-STATE PETITION IP-02  
ADMISSIBILITY  
FRANKLIN GUILLERMO AISALLA MOLINA  
ECUADOR - COLOMBIA

Approved by the Commission at its session N° 1845  
held on October 21, 2010

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**I. SUMMARY**

1. On June 11, 2009, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "the Commission", or "IACHR") received a communication presented by the State of Ecuador alleging that the State of Colombia had violated Articles 4.1 (right to life), 5.1 (right to humane treatment), 8.1 and 8.2 (judicial guarantees) and 25.1 (judicial protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in connection with Article 1.1 (obligation to respect rights) of the same instrument, to the prejudice of Ecuadorian citizen Franklin Guillermo Aisalla Molina for his alleged extrajudicial execution by agents of the security forces of Colombia in the context of "Operation Phoenix" which took place on March 1, 2008, on Ecuadorian soil.

2. By virtue of the fact that both the State of Colombia as well as the State of Ecuador deposited their declarations recognizing the Commission's competence to receive and examine communications between States, on July 20, 2009, the IACHR decided to process the communication in accordance with the provisions of Articles 45 et seq. of the American Convention and transmit to the State of Colombia the communication presented by the State of Ecuador.

3. In accordance with the provisions of Articles 46 and 47 of the American Convention, as well as Articles 30 and 36 of its Rules, and after analyzing the parties' positions, the Commission decides to declare the petition admissible. Therefore, the IACHR determines to notify its decision to the parties and continue with an analysis of the merits relating to the alleged violations of Articles 4 (right to life), 5 (right to humane treatment), 8 (judicial guarantees) and 25 (judicial protection) in relation to Article 1 of the American Convention. The Commission also decides to notify this decision to the parties, publish it and include it in its Annual Report to the General Assembly of the Organization of American States.

**II. PROCEEDINGS BEFORE THE COMMISSION**

4. On June 11, 2009, the Inter-American Commission received a communication from the State of Ecuador accusing the State of Colombia "by reason of its international responsibility for the violation of the right to life (Article 4.1), the right to humane treatment (Article 5.1), to judicial guarantees (Article 8.1 and 8.2), to judicial protection (25.1), all in connection with Article 1.1 of the American Convention [...] to the prejudice of Ecuadorian citizen Franklin Guillermo Aisalla Molina (hereinafter Franklin Aisalla), who was arbitrarily deprived of his life by agents of the security forces of Colombia in the context of Operation "Phoenix", a circumstance that gave rise to a prejudice to the rights of his immediate family.<sup>2</sup> The Communication was registered by the Commission under No. IP-02 (Inter-State Petition IP-02).

5. On the same day, June 11, 2009, the Commission requested from the Secretariat for Legal Affairs of the Organization of American States (OAS) a copy of the declarations recognizing the competence of the IACHR to examine inter-State petitions according to Article 45 of the American Convention, by Ecuador and Colombia. On June 12, 2009, the Department of International Law of the said Secretariat sent a copy of the requested instruments, according to which, on July 30, 1984, the State of Ecuador accepted the competence of the IACHR to examine inter-State petitions for an unlimited

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<sup>1</sup> In accordance with the provisions of Article 17.2.a of the Commission's Rules, Commissioner Rodrigo Escobar Gil, of Colombian nationality, did not take part in either the deliberations or the decision in the present case.

<sup>2</sup> Inter-State communication presented by the State of Ecuador against the State of Colombia on June 11, 2009, page 1.

period and on condition of reciprocity.<sup>3</sup> For its part, the State of Colombia accepted the Inter-American Commission's competence to examine inter-State communications on May, 8, 1985.<sup>4</sup>

6. In a note dated June 23, 2009, the Commission acknowledged receipt of the inter-State petition presented by the State of Ecuador against the State of Colombia and requested new copies of some annexes that were partially illegible or incomplete, within a period of one month.

7. On July 14, 2009, the Commission received a communication dated July 10, 2009, in which the State of Ecuador presented the documents requested by the Commission on June 23, 2009, and made changes to the content of the inter-State petition presented on June 11, 2009, against the State of Colombia.

8. On July 20, 2009, the Commission decided to transmit to the State of Colombia the inter-State petition presented by the State of Ecuador, together with the annexes, including the communication dated July 10, 2009, in which the State of Ecuador made changes to the inter-State petition. On that occasion, the Commission informed both parties that the State of Ecuador's communication would be processed in accordance with the procedure set out in Articles 45 et seq. of the American Convention. In addition, based on Articles 30.3 and 48 of the IACHR's Rules,<sup>5</sup> it requested the State of Colombia to present a response to the inter-State petition within a time limit of two months from the date when the said communication was sent.

9. In a note of September 18, 2009, the State of Colombia requested from the Commission an additional extension of 30 days to present its response to the inter-State communication.

10. On September 21, 2009, the Commission decided to grant the State of Colombia an extension of one month from the date when the respective communication was sent. Both parties were informed of this decision on September 21, 2009.

11. On October 21, 2009, in a note dated October 20, 2009, the State of Colombia presented its response to the inter-State petition lodged against it by the State of Ecuador. This response was sent to the State of Ecuador for its consideration on October 22, 2009.

12. In a communication dated January 8, 2010, the State of Ecuador requested a hearing during the 138th period of ordinary sessions of the Commission, in order to state its position "in the matter relating to the death of citizen Franklin Aisalla".<sup>6</sup> On February 19, 2010, the Commission acknowledged receipt of the above request.

13. On the same day, February 19, 2010, the Commission addressed both States to arrange a public hearing to take place during its 138th period of ordinary sessions, to deal with issues relating to the admissibility of the inter-State petition. With its communication to the State of Colombia, the IACHR sent a copy of the note dated January 8, 2010, presented by the State of Ecuador. The public hearing was fixed for March 19, 2010, at 9:00 AM.

14. On March 8, 2010, the State of Colombia requested from the Commission that the hearing on admissibility of the inter-State petition arranged for the 138th period of sessions, should be held *in camera*.

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<sup>3</sup> Declaration of July 30, 1984, signed by the Ecuadorian Minister for Foreign Relations, Luis Valencia Rodríguez. This instrument was deposited with the General Secretariat of the OAS on August 13, 1984.

<sup>4</sup> Instrument of Acceptance dated May 8, 1985, signed by the President of the Republic of Colombia, Belisario Betancur, and countersigned by the Foreign Relations Minister, Augusto Ramírez Ocampo. This instrument of acceptance was deposited with the General Secretariat of the OAS on June 21, 1985.

<sup>5</sup> Current Article 50 of the IACHR's Rules in force.

<sup>6</sup> Said request was repeated by the State of Ecuador via communication of January 20, 2010.

15. On March 9, 2010, the Commission addressed both States in order to acquaint them with the format of the public hearing on the admissibility of the inter-State petition fixed for March 19, 2010.

16. On the same day, March 9, 2010, the Commission acknowledged receipt of the note of March 8, 2010, in which the State of Colombia requested that the hearing be held *in camera*, and informed it of its decision to hold the hearing in public, based on Article 68 of the IACHR's Rules currently in force. Both Colombia's request and the IACHR's response were sent to the State of Ecuador on the same date.

17. On March 19, 2010, during its 138th period of ordinary sessions, the Inter-American Commission held a public hearing to deal with issues relating to the admissibility of the inter-State communication<sup>7</sup> (copies of the audio recording of this hearing were sent to both States).<sup>8</sup> In accordance with the order of participation decided by the Commission and previously notified to both parties on March 9, 2010, the State of Ecuador appeared<sup>9</sup> first and thereafter the State of Colombia, whose representative stated in its appearance that it would be withdrawing from the hearing and that the State of Colombia reserved its right to present written observations on the arguments presented by the State of Ecuador during the hearing and that it would respond in writing to the questions raised by the Commission and the observations on them made by the State of Ecuador. At the conclusion of the hearing, the State of Ecuador submitted additional observations on the admissibility of the inter-State communication.

18. On July 27, 2010, in a communication dated July 26, 2010, the IACHR sent the State of Colombia the additional observations presented by the State of Ecuador with regard to the admissibility of the inter-State petition and granted it a time limit of 15 days from the date when the communication was sent to submit observations. On the same day, the Commission sent a communication to the State of Colombia recording that on June 11, 2010, it had received a document relating to the inter-State petition and that later that day Colombia had requested that said document should be deemed 'un-presented' on the ground that it was incomplete. In addition, the IACHR's communication recorded that up to that date the Commission had not received from the State of Colombia any other additional document relating to the inter-State petition.

19. In a communication of July 29, 2010, received at the Commission on August 2, 2010, the State of Colombia reiterated its allegations on the admissibility of the inter-State petition. In addition, it stated that a brief with observations on the arguments submitted by the State of Ecuador during the public hearing before the IACHR, as well as the response to the questions raised by the Commission members during the hearing, had been submitted on June 14, 2010.

20. On August 5, 2010, the IACHR sent a communication to the State of Colombia indicating that it had deemed the brief of June 14, 2010, as not submitted due to its content being identical to the brief presented on June 11, 2010, which the State of Colombia had requested be deemed not submitted because it contained incomplete information. Having clarified this point, the IACHR deemed as submitted Colombia's brief of June 14, 2010 with observations on the arguments and the questions raised during the public hearing with reference to the inter-State petition. On the same day, August 5, 2010, the Commission sent the State of Ecuador the above observations of the State of Colombia for its information.

### III. POSITION OF THE PARTIES

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<sup>7</sup> In accordance with Article 18.2.a of the IACHR's Rules, Commissioner Rodrigo Escobar Gil did not participate in the above hearing as he was prevented from doing so due to his nationality.

<sup>8</sup> In a note of March 24, 2010, the Commission sent the State of Colombia two DVD recordings of the March 19, 2010 hearing on PI-2. In addition, on April 19, 2010, the IACHR sent the State of Ecuador two DVD recordings of the said hearing.

<sup>9</sup> The State of Ecuador was represented at the public hearing by the National Procurator General, Diego García Carrión; the Director of Human Rights of the Procurator's Office; as well as by the attorneys of the Human Rights Department of the National Procurator General's Office, Rodrigo Durango, Alonso Fonseca, Gabriela León, and Carlos Espin.

21. The inter-State communication presented by the State of Ecuador alleges the international responsibility of the State of Colombia for violations of the human rights of Franklin Guillermo Aisalla Molina as a result of acts occurring in the context of Operation "Phoenix" of the Colombian military forces and the consequent breach of the human rights of his immediate family.

22. The Commission notes that the inter-State communication presented by the State of Ecuador refers both to the context in which Operation "Phoenix" developed, and the surrounding circumstances in which it is argued that the alleged victim was deprived of his life, as well as the specific circumstances of Mr. Aisalla Molina's death. For its part, in its brief in reply to the inter-State petition, the State of Colombia requests that the Commission exclude from any analysis - including an examination of competence and admissibility - a series of facts and arguments which, in its view, "are not directly related to the facts and alleged violations made in the complaint."<sup>10</sup> However, it states that if the Commission considers "that any of these facts and evidence are part of the rationale for the current petition, the State of Colombia be given the opportunity to submit observations on the relevant competence and admissibility aspects."

23. As a result, the Commission will initially refer to its power to examine the information submitted by the parties on the factual context, and then will refer to the parties' position with regard to the so-called Operation "Phoenix", during which it is alleged that the death of Mr. Franklin Guillermo Aisalla Molina occurred. Lastly, it will refer to the position of the parties in relation to the alleged arbitrary deprivation of Mr. Aisalla Molina's life.

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<sup>10</sup> The State of Colombia, in its brief dated October 20, 2009, specifically requests that the facts stated in the following paragraphs to the inter-State petition be excluded from consideration: i) paras. 1-14 and 45-53, "given that these paragraphs refer to the preparation and development of 'Operation Phoenix', which exceeds the objective of the petition"; ii) paras 12-16 "where there is an account of the alleged confrontation between members of the Colombian Security Forces and FARC insurgents"; iii) paras. 17-24, 31-33, and 41-44 "for dealing with military operational matters, with possible victims of the attack other than Mr. Aisalla and/or the alleged behavior of members of the Colombian Security Forces with respect to persons present during the Operation other than Mr. Aisalla Molina"; iv) paras 25-31, with reference to the alleged weapons and military equipment used in Operation Phoenix and their alleged origin"; and v) paras. 51-53 and 76-81 "for dealing with matters unconnected with the alleged human rights violations [...] such as a violation of Ecuadorian sovereignty and other principles of international law; as well as other political statements made by different actors in the international community against Operation "Phoenix", or the crisis unleashed as a product of the said military operation." In addition, the State of Colombia requests that certain documents presented by the State of Ecuador as evidence of the facts reflected in the paragraphs cited above be excluded from the analysis and from the "international case file".

## A. Commission's Analysis of the Surrounding Circumstances

24. The Commission deems it appropriate to highlight that it has the competence to take into consideration the elements necessary to establish whether or not there has been a violation of the rights enshrined in the American Convention, as well as to place the alleged violations in their context.

25. In addition, it should be noted that at this stage of the proceedings it is not necessary to establish whether or not there has been a violation of the American Convention. For the purposes of admissibility, the Commission must decide whether the facts as stated might constitute a colorable claim, as is established in Article 47.b of the American Convention, and whether the communication is "manifestly groundless", or is "obviously out of order", according to sub-paragraph c) of the same Article. The consideration of these particulars is different to that required to decide on the merits of the complaint. The Commission only undertakes a *prima facie* analysis of the parties' allegations to determine whether the complaint offers grounds for a possible violation of a right guaranteed by the Convention, but it does not establish at this stage the existence of the said violation. Therefore it will not examine at this point which factual and evidential elements will be considered necessary to determine the existence of a violation or not, as well as to put the alleged violation into context, if necessary, since this is a part of the analysis at the merits stage.

26. Consequently, in the proceedings of the inter-State petition, the IACHR reserves the right to sustain the facts and evidence submitted before it by both parties, without excluding the points underlined by the State of Colombia in its brief.<sup>11</sup> In addition, the Commission observes that the State of Colombia will have the opportunity to make observations on these facts and evidence during the merits stage, if deemed necessary.

## B. Position of the State of Ecuador

27. The State of Ecuador maintains that on March 1, 2008, the Colombian armed forces bombed a camp of the Colombian Revolutionary Armed Forces (hereinafter FARC) located near Angostura, in the Lago Agrio Municipality, in Ecuador, 1,850 metres from the Colombian border, in connection with a military action codenamed "Operation Phoenix". In accordance with the inter-State communication, in this context Ecuadorian citizen Franklin Guillermo Aisalla Molina, who was in the bombed camp, was extrajudicially executed by members of the Colombian security forces who participated in the above operation.

### Position of the State of Ecuador in relation to Operation "Phoenix"

28. The State of Ecuador alleges in its inter-State communication that the State of Colombia had started to prepare for Operation "Phoenix" in 2007. The Colombian National Police, through the Intelligence Department --DIPOL-- was authorized by the Government to create 7 special groups, one of which was under the command of a Colonel and was entrusted with making contact with Ecuadorian and US authorities in order to undermine the FARC. The State of Ecuador adds that within this framework, the Colonel contacted 5 members of the Ecuadorian Police who had assisted Colombian Army officials in the capture of Ricardo Palmera, aka Simón Trinidad<sup>12</sup>, in January 2004, and started to liaise with

<sup>11</sup> See paras 1-14 and 45-53, "given that these paragraphs refer to the preparation and development of 'Operation Phoenix', which exceeds the objective of the petition"; ii) paras. 12-16 "where there is an account of the alleged confrontation between members of the Colombian Security Forces and FARC insurgents"; iii) paras. 17-24, 31-33, and 41-44 "for dealing with military operational matters, with the eventual victims of the attack other than Mr. Aisalla and/or the alleged behavior of members of the Colombian Security Forces with respect to persons present during the Operation other than Mr. Aisalla Molina"; iv) paras 25-31, with reference to the alleged weapons and military equipment used in Operation Phoenix and their alleged origin"; and v) paras. 51-53 and 76-81 "for dealing with matters unconnected with the alleged human rights violations [...] such as a violation of Ecuadorian sovereignty and other principles of international law; as well as other political statements made by different actors in the international community against Operation "Phoenix", or the crisis unleashed as a product of the said military operation." In addition, the State of Colombia requests that certain documents presented by the State of Ecuador as evidence of the facts reflected in the paragraphs cited above be excluded from the analysis and from the "international case file".

<sup>12</sup> Alleged Commander of the "Caribbean" unit of the FACR.

employees of the US Central Intelligence Agency (CIA) in Quito, Ecuador. He had informed all of them about the operation led by him to locate the whereabouts of Luis Edgar Devia, aka "Raúl Reyes"<sup>13</sup>.

29. The State of Ecuador continues by stating that the DIPOL Colonel responsible for the operation in the area had made contact with an alleged member of the FARC, who had confirmed to him that Raúl Reyes was in Ecuador for a few days. The pinpointing of Reyes in a camp near to Angostura, Ecuador had been undertaken by the CIA. The State of Ecuador adds that once the location of Reyes on Ecuadorian territory was known, the President of Colombia authorized the attack on Raúl Reyes there.

30. The State of Ecuador maintains that the operation was designed to be carried out in two phases. The first would consist of a bombardment by two Super Tucano aircraft of the Colombian Air Force; and the second phase, landing helicopter-borne troops to be joined by 18 men of the Colombian Police's Jungle Commando unit, 20 Army Special Forces soldiers and 8 Navy specialists. The Operation would be launched from the Tres Esquinas base in Caquetá, Colombia, although the State of Ecuador adds that there is information that the attack had been co-ordinated from the Larandia base in Caquetá. The State of Ecuador states in its complaint that both military bases belong to the United States by an agreement signed with the State of Colombia.

31. The petitioner State alleges that after midnight on March 1, 2008, aircraft and helicopters took off from the air force base of Tres Esquinas or of Larandia, Caquetá, Colombia, bound for the area near Angostura in Ecuador, located 1,850 meters from the frontier with Colombia. Around 00:20 a.m. they bombed the camp within a 2 hectare radius where there were approximately 50 people, among them FARC insurgents, and 5 Mexican citizens and an Ecuadorian citizen.

32. According to the State of Ecuador, around 03:30 a.m., the Colombian Air Force carried out another bombing raid to prevent members of the guerrillas escaping and taking the dead and wounded with them. In addition, it maintains that at 08:30 a.m., the Commander of the Ecuadorian Joint Command received a telephone call from the Commander of the Colombian Military Forces informing him of the coordinates of the Colombian military forces' engagement with "illegal Colombian armed groups (GIAC)". The State of Ecuador adds that the said coordinates were not precise, and around 09:00 a.m., General Mario Montoya, Commander of the Colombian Army passed on new coordinates for the location where the facts took place, to the General Commander of Ecuadorian Ground Forces.

33. The complaint states that at 11:00 a.m. on March 1, 2008, Ecuadorian soldiers made radio contact with a patrol of 18 Colombian anti-narcotics police who needed assistance in Ecuador to leave the area, and who allegedly stated that they had two wounded guerrillas in custody, 15 dead and various AK47-N16 rifles. It adds that the Major of the Colombian Police had stated that the wounded and killed had already been evacuated. The State of Ecuador maintains that in view of the above, it sent two groups of 38 soldiers each to search for the Colombian police. At 15:00, the Colombian police Major again made radio contact with the Ecuadorian unit. Its Captain had asked whether there were wounded and the Major of the Colombian patrol answered 'yes', and that they were "stable on I.V. saline."

34. The State of Ecuador maintains that at 17:30 the same day, the President of Ecuador ordered that they follow the Security Manual which the Armies of both countries share and which establishes that "the invading troops hand over their weapons to the authorities of the invaded country", that the situation be clarified, that details are taken and that "the foreigners be accompanied to the border".

35. According to the State of Ecuador, when Ecuadorian troops managed to reach the area of the bombardment, they confirmed the presence of 12 bodies, and of 3 women with shrapnel injuries. In addition, they identified 10 craters caused by the bombardment and together with the bodies they found arms, munitions and explosives allegedly belonging to the FARC. The State petitioner adds that

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<sup>13</sup> Alleged member of the FARC Inner Council.

there were no Colombian police at the camp, and according to survivors of the bombing, the police had been evacuated from the area in helicopters.

36. The State of Ecuador alleges that at 18:30, an Ecuadorian military commander received a call from the Commander of the Jungle Brigade No.27 of the Colombian Army, informing him that a Colombian Unit was lost in Ecuadorian territory and required assistance. It maintains that the Ecuadorian Commander responded that the said Unit should comply with the provisions of the Security Manual, so that it was necessary to know the radio frequency to establish contact and to coordinate their surrender on Ecuadorian territory. The Colombian Commander was obliged to send a radio operator to the 'international' bridge over the River San Miguel to make the link-up for the surrender, but according to the State of Ecuador the said radio operator never turned up.

37. According to the inter-State petition, 25 people died in operation "Phoenix", between them civilians and guerrillas. The State of Ecuador maintains that among the dead were: Verónica Natalia Velásquez Ramírez, 30 years of age; Fernando Franco Delgado, 28; Soren Ulises Aviles Ángeles, 33 years old and Juan González del Castillo, 28 years old, all Mexican citizens and students of the National Autonomous University of Mexico. It adds that "Raúl Reyes" was also killed, and, according to the first reports, together with him Guillermo Enrique Torres, aka "Julián Conrado", another member of the FARC. In addition, Colombian soldier Carlos Edilson León was killed in the operation as a result of an attack by the FARC, but the State of Ecuador alleges that according to a later report, this soldier was killed when a tree fell on him.

38. On the other hand, the State of Ecuador maintains that the sole survivors of the attack were Martha Pérez, 24 years old and Doris Bohórquez Torres, 21 years old; both Colombian citizens and alleged members of the FARC; as well as Lucía Morett, 27 years old, and a Mexican student. It adds that Lucía Morett stated that she was the victim of an assault and insinuations of a sexual nature by Colombian soldiers and police, who had abandoned her and the other survivors despite being wounded.

39. The State of Ecuador alleges that once they had reached the FARC camp, the troops and the technical staff of the National Ecuadorian Police, as well as high-ranking Ecuadorian Government officials, confirmed the scale of the destruction caused by the GBU-12 bombs and the machine-gun fire from the helicopters.

40. In addition, it maintains that the results of the autopsies performed in Ecuador on the bodies found at the camp "showed the practice of extra-judicial executions on individuals who were defenseless". It adds that the General Public Prosecutor of Ecuador requested a second opinion from French experts, who confirmed that they had died as a result of bullet wounds from guns fired at short range.

41. The inter-State complaint points out that at the site of the bombing "stabilizing fins of smart bombs" and other evidence were found that would indicate that this was not carried out by Super Tucano aircraft, as the State of Colombia had claimed. The State of Ecuador adds that due to this contradiction of the Colombian Government with respect to the type of technology used in the bombing raid, in a meeting that took place on May 21, 2008 in Panama, the Colombian Armed Forces had stated that A 37 aircraft had participated in it although, according to Ecuador, their technology would not permit operations of the kind undertaken near Angostura. In its complaint, Ecuador states that despite two other meetings taking place regarding this issue, the Colombian authorities did not provide enough information to verify whether the aircraft taking part in the bombing raid in Angostura had been Colombian.

42. Related to the above, the State of Ecuador alleges that although the Colombian authorities maintained that the aircrafts had attacked the camp from Colombian territory and that otherwise the Ecuadorian military radar would have detected them, the said radar in the area was turned off on the day of the events.

43. Referring to the context surrounding the facts complained of in the present inter-State petition, the State of Ecuador mentions the extraordinary session held on March 4, 2008, at the



Organization of American States --OAS-- where the Minister of Foreign Affairs of Ecuador denounced the violation by Colombia of Ecuador's territorial sovereignty. It adds that on March 5, 2008, the Permanent Council of the OAS issued a resolution condemning the incursion by Colombian military forces and police onto Ecuadorian territory, which occurred on March 1, 2008.

44. In addition, the State of Ecuador indicates that on March 7, 2008, in the 20th Rio Group Summit held in San Domingo, Dominican Republic, the President of Colombia recognized the breach of international obligations and offered his apologies for what happened.

45. Lastly, the State of Ecuador points out that a Commission of the OAS, led by the Secretary General of the Organization, travelled to Ecuador to verify the situation at the site of the events and was able to admit the scale of the bombardment.

**Position of the State of Ecuador in relation to the case of Mr. Franklin Guillermo Aisalla Molina**

46. According to the inter-State complaint, once the attacks had finished, the bodies of "Raúl Reyes" and what was believed to be "Julián Conrado" were taken by Colombian troops to Colombian territory.

47. The State petitioner maintains that around 21:30 on March 1, 2008, the coroner of the National Institute of Legal Medicine and Forensic Science of Colombia (hereinafter "INMLCF") performed an autopsy on whom was believed to be " Julián Conrado". According to the State of Ecuador, the forensic report indicated that the body examined presented wounds to the skull and the back, produced by penetrating and explosive material. On the March 3 following, the Director of INMLC announced to the media that the body did not belong to "Julián Conrado".

48. It adds that in Ecuador, Franklin Guillermo Aisalla Molina's family saw videos circulating on the Internet on the events of March 1, 2008, in Operation "Phoenix" and identified the alleged victim in one of the images.

49. According to the inter-State petition, Franklin Aisalla was born on May 21, 1970, was the son of Guillermo Aisalla Yáñez and Teresa Molina. He was single and he had three sisters and one brother. Mr. Aisalla Molina was a locksmith by trade and earned on average six hundred (600) US dollars per month, which he used for his and his parents' support.

50. The State of Ecuador argues that according to the alleged victim's immediate family, Mr. Aisalla Molina left the locksmith's where he worked on February 21, 2008, without his tools or telling anyone where he was going. It adds that on February 27, following, Mr. Aisalla Molina called his mother and told her that he was well.

51. According to the inter-State petition, on March 23, 2008, the National Public Prosecutor's Office of Ecuador received a report from the Under-Department of Technical Science of the Judicial Police of the Criminology Department of Pichincha, Ecuador, confirming the identity of the body in Colombia and indicating that the body initially thought of as belonging to "Julián Conrado" belonged instead to Franklin Guillermo Aisalla Molina.

52. It adds that on March 26, 2008, a Commander of the Colombian Army stated that there was no doubt that the Ecuadorian citizen taken to Colombia as Julián Conrado was an important FARC link whose name was Franklin Ponelia Molina, since he had been thus identified by mid 2003 by military intelligence while monitoring " Simón Trinidad". In addition, the Commander stated that in Ecuador, the Ecuadorian citizen had been identified as "Franklin Guillermo Aizalia Molina" by his immediate family and by the authorities.

53. The State of Ecuador alleges that on March 26, 2008, the Director of the INMLCF of Colombia also confirmed the true identity of the body first said to have been Julián Conrado and then

Franklin Ponelia, as belonging to Franklin Aisalla. According to the State of Ecuador, the Director of the INMLCF stated that Mr. Aisalla Molina had been killed as a result of injuries to the region of the cranium and brain, caused by shrapnel fragments of an explosive blast.

54. The inter-State petition maintains that on March 26, 2008, the 20th Prosecutor of the National Counter-Terrorism Unit requested that the Municipal Civic Registry of the Municipality of Puerto Asís, Colombia, issue a Civil Death Certificate for Franklin Guillermo Aisalla Molina who had died on March 1, 2008 in Puerto Asís from lacerations of the brain and skull. A death certificate in the same terms had been issued in Bogotá on the same day, March 26, 2008.

55. The State of Ecuador alleges that due to the Colombian authorities' handling of the case, it decided to perform an alternative examination on Franklin Aisalla's body. The conclusion of the said analysis revealed that the bone trauma lesions on the alleged victim's skull were the result of various blows delivered with force and that his attacker had been behind the victim. It adds that on May 6, 2008, the Government Minister of Ecuador revealed the results of the examination which, together with a non-lethal bullet wound in the back, showed that the alleged victim had died as a result of blows that cracked his skull open and that his body did not present traces of having been impacted by an explosion.

56. The complaint maintains that there is information showing that Franklin Aisalla had been under surveillance since 2003 by the Colombian Army and the Administrative Department for Security of Colombia (DAS). For its part, intelligence organs in Ecuador had undertaken monitoring of the alleged victim between 2003 and 2005 for having possibly contacted the FARC. The surveillance was suspended in 2005 for unknown reasons.

57. With regard to the rights allegedly violated by the State of Colombia in the context of the facts mentioned, the State of Ecuador maintains that Colombia violated the right to life contained in Article 4 of the American Convention in relation to Article 1.1 of the same instrument to the prejudice of the Ecuadorian citizen Franklin Guillermo Aisalla Molina, as a consequence of the arbitrary deprivation of life occurring during the military operation carried out by Colombian State agents in the territory of Ecuador.

58. In addition, the State of Ecuador alleges that Colombia is responsible for the violation of Article 5.1 of the American Convention to the prejudice of Mr. Franklin Aisalla Molina's immediate family, by reason of the suffering caused as a consequence of the extrajudicial execution of the alleged victim. In this sense, the State of Ecuador points out that the family members immediately affected by the death of Mr. Aisalla Molina are his parents, Teresa Molina and Guillermo Aisalla, as well as his uncle, Marco Molina. It adds that the State of Colombia also violated the right to the victim's family's personal integrity, contained in Article 5.1 of the American Convention, due to the lack of a complete and effective investigation into the facts, which has provoked feelings of anguish, desperation, insecurity and frustration.

59. Lastly, the State petitioner maintains that Colombia has violated the rights to judicial guarantees and to judicial protection enshrined in Articles 8.1, 8.2 and 25.1 of the American Convention to the prejudice of the alleged victim's family. According to the State of Ecuador, the above is due to the State of Colombia's failure to undertake a criminal investigation, which would lead to specific information on the circumstances of Mr. Franklin Aisalla's death. It adds that an investigation was the adequate legal remedy and that the omission prevented access to an effective protection.

60. The specific allegations on the admissibility of the inter-State complaint lodged by the State of Ecuador will be described in the sections this report devotes to examining such issues.

## **B. Position of the State of Colombia**

61. As was pointed out at the beginning of this section, in response to Ecuador's inter-State communication, the State of Colombia requested that the Commission exclude from any analysis certain facts and documentary evidence presented by the State petitioner, considering that they exceed the purpose of this petition and that it should be limited to the alleged violation of the rights to life (Article 4.1),

humane treatment (Article 5.1), judicial guarantees (Articles 8.1 and 8.2) and judicial protection (Article 25.1) of the American Convention to the prejudice of Franklin Guillermo Aisalla Molina and his immediate family (in relation to the alleged violation of the right to humane treatment).<sup>14</sup>

62. In addition, the position of the State of Colombia with respect to the inter-State petition under examination refers to allegations of a lack of jurisdiction by reason of the place and by reason of subject matter, as well as the alleged inadmissibility of the petition for a failure to exhaust domestic remedies. The arguments advanced by the State of Colombia in this regard will be described in the section, which this Report devotes to analyzing these questions.

#### **IV. ANALISIS ON JURISDICTION AND ADMISSIBILITY**

##### **A. Preliminary Question**

63. Before starting an analysis of jurisdiction and admissibility in the present case, the Commission considers it relevant to make a preliminary statement. The State of Ecuador includes in its allegations a reference to individuals other than the alleged victim, who have been affected by the acts alleged in the inter-State petition. Taking into account that the State petitioner presented a list of alleged victims and by virtue of the fact that sufficient factual elements have not been presented concerning the circumstances in which other additional persons have been affected, the Commission understands that the reference to these individuals in recounting the facts belongs to a contextual question and not to the inclusion of new alleged victims.

64. Consequently, the Commission will consider the analysis of the requirements for admissibility against the alleged violations committed by the State of Colombia to the prejudice of Franklin Guillermo Aisalla Molina and his immediate family.

##### **B. Initial Considerations relating to the Proceedings of the Inter-State Petition**

65. In this section, the Commission will examine the rules, which authorize and govern the procedure by the Commission in those cases where a State Party alleges that another State Party has violated the human rights set out in the Convention.

66. Section 3 of Chapter V of the American Convention determines the competence of the Inter-American Commission on Human Rights. Article 45 of the Convention determines the competence of the Commission to receive and examine communications in which one State Party alleges that another State Party has violated the human rights established in the Convention, if and when both the State presenting the communication as well as the State against which it is presented have made a declaration, at the time of depositing their instrument of ratification or accession to the Convention or at any time thereafter, that they recognize the competence of the Commission to receive and examine communications in which one State Party alleges that another State Party has violated the human rights established in the Convention. The declarations recognizing jurisdiction can be made for an indefinite time, for a specific period, or for specific cases.

67. Articles 46 and 47 of the American Convention, for their part, refer to the prerequisites for admissibility that both petitions presented in accordance with Article 44 as well as communications presented in accordance with Article 45 must equally fulfill. Next, Section 4 of Chapter V of the Convention regulates the terms on which the Commission must proceed to receive a petition presented in accordance with Article 44, or to receive a communication presented in accordance with Article 45, whenever a violation of any of the rights enshrined in the Convention is alleged.

68. From the foregoing it can be seen that both the American Convention as well as the Commission's Rules have foreseen that communications in which one State Party alleges that another

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<sup>14</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, page 2.

State Party has breached the human rights established in the Convention will be governed by the same rules of procedure and must fulfill the same requirements as petitions containing complaints or accusations presented by any individual, provided that they also fulfill the specific requirements set out in Article 45 of the Convention. This is without prejudice to the fact that the applicable procedures and requirements must take into account the special characteristics and purposes of the mechanism of communications between States.<sup>15</sup>

**C. Requirements for the Commission's Competence established by Article 45 of the American Convention**

69. The first paragraph of Article 45 of the American Convention requires the express acceptance of the State Parties for the Commission to be able to examine inter-State communications. As the Inter-American Court has stressed, the Convention differs from other international human rights instruments when it enables the right to individual petition against a State Party as soon as it ratifies the Convention, without requiring any special declaration to this effect. However such a declaration is required in the case of inter-State complaints.<sup>16</sup>

70. In this case, the communication was presented by the State of Ecuador against the State of Colombia. It must therefore be established whether both States have made a declaration accepting the Inter-American Commission's jurisdiction to receive and examine communications in which one State Party alleges that another State Party has violated the human rights established in the Convention.

71. The second paragraph of Article 45 of the Convention states, in the first place, that communications made under the said Article may only be admitted and examined if they are presented by a State Party that has made a declaration whereby it recognizes the said jurisdiction of the Commission. It must therefore be established whether the State of Ecuador has made such a declaration.

72. According to the records of the OAS General Secretariat, in a declaration of July 30, 1984, the State of Ecuador recognized the jurisdiction of the Inter-American Convention on Human Rights to receive and examine inter-State communications, established in Article 45.1 of the American Convention. The deposit of the said instrument of acceptance with the OAS General Secretariat took place on August 13, 1984.

73. The second paragraph of Article 45 of the Convention also states that the Commission shall not admit any communication against a State Party that has not made a declaration to this effect, so that it must be established whether the State of Colombia has made such a declaration.

74. According to the records of the OAS General Secretariat, on May 8, 1985, the State of Colombia declared its acceptance of the Commission's jurisdiction to receive and examine inter-State communications. The deposit of the said instrument of acceptance with the OAS General Secretariat took place on June 21, 1985.

75. The third paragraph of Article 45 of the Convention does not establish a requirement but an opportunity for States to define whether their declarations on acceptance of jurisdiction are made for an indefinite time, for a specific period, or for specific cases.

76. From a reading of the declarations made by both States recognizing the Commission's jurisdiction to receive and examine inter-State communications, it is possible to conclude that neither of the two States has made use of this opportunity to place a temporal or any other type of limitation on the Commission's competence. The Commission will examine below as from when the said declarations begin to take effect.

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<sup>15</sup> IACHR Report No. 11/07, Inter-State Case 01/06, *Nicaragua v Costa Rica*, March 8, 2007, para. 127.

<sup>16</sup> I/A Court H.R., *In the Matter of Viviana Gallardo et al.* Series A No. 101, para. 22.

77. In view of the above considerations, the Commission finds that in the processing of this inter-State communication, all the provisions of the Convention and the Rules governing the procedure in which one State Party alleges that another State Party has violated the human rights established in the American Convention have been fulfilled, and that the inter-State communication under consideration satisfies the requirements established in Article 45 of the American Convention. Therefore the Commission now turns to whether it has competence to examine this communication and if the requirements for admissibility laid down by the Convention have been complied with, both for the proceedings for individual petitions as well as inter-State communications.

**D. Requirements for the Commission's Competence *ratione loci*, *ratione personae*, *ratione temporis* and *ratione materiae***

**1. Competence *ratione loci***

78. In the inter-State complaint it is alleged that the State of Colombia took control of areas in the territory of Ecuador during a military operation extending from midnight until 11:00 a.m. on March 1, 2008 and that in the encampment in which the said operation unfolded there were approximately 50 people, among them the alleged victim, who were subjected to the control and authority of Colombian state agents.<sup>17</sup> It adds that Colombia had jurisdiction at the time of the military action "and had effective control over the outcome of the circumstances, especially the obligation to respect the rights of persons under its control."<sup>18</sup> Due to the foregoing, the State of Ecuador alleges that the State of Colombia exercised jurisdiction.

79. For its part, in its written observations to the inter-State petition, the State of Colombia alleges that the Inter-American Commission lacks jurisdiction *ratione loci* due to fact that the alleged victim was not subject to the jurisdiction of Colombia, as required by Article 1.1 of the American Convention.<sup>19</sup>

80. In this respect, the State of Colombia alleges that as a general rule, the concept of "jurisdiction" must be interpreted in a territorial sense. It adds that in interpreting Articles 1.1 and 2 of the American Convention the conclusion must be drawn that the law --the main tool that States have to protect the rights and freedoms of persons under their jurisdiction-- is characterized by territorial application. "Consequently, in order for the protection to be effective, the persons who would benefit from the said protection must be located within the territory of the said State."<sup>20</sup> The State of Colombia argues that given the territorial dimension of the term "jurisdiction" laid down in Article 1.1 of the American Convention, the death of Ecuadorian national Mr. Aisalla occurred in Ecuador, is not subject to the jurisdiction of the State of Colombia.<sup>21</sup>

81. In addition, the State of Colombia maintains that according to international law, the only two possible exceptions to the rule establishing territorial jurisdiction relate to military operations or the acts of diplomatic or consular agents in the territory of other States; and that to consider that a State has exercised its jurisdiction in an extraterritorial manner by an outside military operation, it must be shown that there was a military occupation, or that the State that deployed the military operation exercised control over the territory of the other State.<sup>22</sup>

<sup>17</sup> Inter-State communication presented by the State of Ecuador against the State of Colombia on June 11, 2009, page 51, read together with the Communication presented by the State of Ecuador on July 14, 2009, referring to the correction to para. 93.

<sup>18</sup> Inter-State communication presented by the State of Ecuador against the State of Colombia on June 11, 2009, page 54.

<sup>19</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, pp. 5-20.

<sup>20</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, pp. 10 and 11.

<sup>21</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 11.

<sup>22</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 30.

82. The State of Colombia alleges that Operation "Phoenix" did not amount to either military occupation or control over Ecuadorian territory, since for there to be an occupation the presence of troops of one State on the territory of another it is not sufficient, but the former must act in such a way as to replace the authority of the occupied State.

83. With regard to control over the territory, the State of Colombia argues that there are two types of control: general control, which implies the participation of a State in the organization, formation, equipping and financing of a military group or paramilitary organization; and special control, which apart from implying total control of these forces, implies the drawing up of specific instructions.<sup>23</sup>

84. According to the State of Colombia, both for an occupation as well as control there are two common elements: on the one hand, the presence of armed forces of the State deploying the military action on the foreign territory, and on the other, that the said forces assume some, or the totality of, the public powers that would normally fall under the prerogatives of the State where the military operation is undertaken, totally or partially displacing the authorities of the local Government.<sup>24</sup>

85. The State of Colombia alleges that Operation "Phoenix" did not amount to either military occupation or control over the territory since there was no permanent presence of military forces in Ecuador and the Colombian armed forces did not seek to overthrow, replace or substitute either the Government of Ecuador or its military forces.

86. In conclusion, the State maintains that in the present case the necessary prerequisites in order to consider that as a result of Operation "Phoenix" Colombia exercised jurisdiction in an extraterritorial manner over the territory of Angostura (Ecuador) and the persons present there, are absent.<sup>25</sup>

87. With regard to the territorial application of the American Convention, Article 1.1 of the Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." [Emphasis added]

88. The terms of a treaty are interpreted in good faith in accordance with the ordinary meaning in their context and in the light of the object and purpose of the treaty.<sup>26</sup> In addition, unless it is established that the parties intend that a special meaning be given to a term, there shall be taken into account any relevant rules of international law applicable in the relations between the parties.<sup>27</sup> Applying these rules, the word "jurisdiction" in Article 1.1 of the American Convention must be understood and applied in its ordinary meaning as a term of international law, unless it is clear that the parties intended otherwise.

89. The drafting history of the Convention does not indicate that the parties intended to give a special meaning to the term "jurisdiction." The *travaux préparatoires* for the American Convention reveal

<sup>23</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, paras. 37-39.

<sup>24</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 40.

<sup>25</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 49.

<sup>26</sup> Vienna Convention on the Law of Treaties, Art. 31(1).

<sup>27</sup> Vienna Convention on the Law of Treaties, Art. 31(3)(c).

that the initial text of Article 1.1 provided that: "[t]he States Parties undertake to respect the rights and freedoms recognized in this Convention and to ensure to all persons within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."<sup>28</sup> [Emphasis added].

90. At the time of adopting of the American Convention, the Inter-American Specialized Conference on Human Rights chose to omit the reference to 'territory' and establish the obligation of the State parties to the Convention to respect and guarantee the rights recognized therein to all persons subject to their jurisdiction. In this way, the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction.

91. In international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well. In this sense, the IACHR has established that "under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain."<sup>29</sup> Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under Inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.<sup>30</sup> This position accords with that of other international organizations that in analyzing the sphere of application of international human rights instruments have assessed their extraterritoriality.

92. The Human Rights Committee -- even when the International Covenant on Civil and Political Rights (ICCPR) was drafted in a more restrictive manner in establishing the States' obligation to respect and guarantee human rights "to all individuals within its territory and subject to its jurisdiction" -- has admitted the extraterritorial application of the Covenant on the basis of the requirement of authority or effective control in multiple cases.<sup>31</sup> In addition, it is established in General Observation 31 that:

State parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. [...] the enjoyment of Covenant rights is not limited to citizens of State parties but must also be available to all individuals, regardless of nationality or statelessness [...] This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.<sup>32</sup>

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<sup>28</sup> "Inter-American Specialized Conference on Human Rights", San José, Costa Rica, November 7-22, 1969, Acts and Documents, OEA/Ser.K/XVI/1.2, Washington D.C., 1973, p. 14.

<sup>29</sup> IACHR Report No. 109/99, Merits, Case 10.951, *Coard et al.* (United States). September 29, 1999, para. 37.

<sup>30</sup> IACHR Report No. 86/99, Case 11.589, *Armando Alejandro Jr. et al.* (Cuba). April 13, 1999.

<sup>31</sup> See *López Burgos v Uruguay*, Doc. UN CCPR/C/13/D/52/1979, July 29, 1981; *Celiberti v Uruguay*, Doc. UN CCPR/C/13/D/56/1979, July 29, 1981; Final Observations on Cyprus, Doc. UN CCPR/C/79/Add.39, September 21, 1994, para.3; Final Observations on Israel, Doc. UN CCPR/C/79/Add.93, August 18, 1998, para.10; Final Observations on Israel, Doc. UN CCPR/CO/78/ISR, August 21, 2003, para. 11; Final Observations on Belgium, Doc. UN CCPR/C/79/Add.99, November 19, 1998, para. 14; Final Observations on the Netherlands, Doc. UN CCPR/CO/72/NET, August 27, 2001, para. 8; and Final Observations on Belgium, Doc. UN CCPR/CO/81/BEL, August 12, 2004, para. 6.

<sup>32</sup> General Comment No.31, General Comments adopted by the Committee for Human Rights, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7, p. 192 at p.194 et seq., para. 10.

93. For its part, the International Court of Justice, in analyzing the scope of the International Covenant on Civil and Political Rights in its Advisory Opinion on the legal consequences of the construction of a wall on occupied Palestinian territory, stated that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory" and that "[c]onsidering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."<sup>33</sup> It ruled in the same sense in deciding the case *Democratic Republic of the Congo v. Uganda*, when it stated that international human rights law is applicable in respect of acts carried out by a State in the exercise of its jurisdiction outside its own territory.<sup>34</sup>

94. The European Court of Human Rights has also concluded that the term "jurisdiction" is not limited to the national territory of a State party, as it may incur responsibility for acts of its authorities which produce an effect outside its territory.<sup>35</sup> The exercise of jurisdiction is a necessary condition for a state to be held responsible for acts or omissions imputable to it which give rise to an infringement of protected rights and freedoms.<sup>36</sup> In the case *Loizidou v Turkey*, the European Court ruled that where a State exercises effective control over a territory, as in the case of military occupations, it exercises jurisdiction.<sup>37</sup> The European Court expressed it in the following terms:

In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. [...] the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory [...].

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."<sup>38</sup>

95. In its decision in the case of *Bankovic and Others v. Belgium and Others*<sup>39</sup> the European Court insisted that the meaning of the term "jurisdiction" is one derived from international law and is primarily, but not exclusively territorial. *Bankovic* was declared inadmissible because the aerial bombing that took place was held not to constitute effective control over the area in question.

96. In the case of *Issa et al. v Turkey*, the European Court restated that the responsibility of a State may be incurred by the violation of rights and freedoms of persons who are in the territory of another State, but who are under the control and authority of agents of the first State who were operating, legally or illegally, in the territory of the second. The test applied is one of overall "effective control". According to the European Court, the responsibility in these types of situation results from the fact that Article 1 of the European Convention cannot be interpreted in such a way as to permit a State party to

<sup>33</sup> ICJ, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 109, July 9, 2004, available at: [http://www.icj-cij.org/homepage/sp/advisory/advisory\\_2004-07-09.pdf](http://www.icj-cij.org/homepage/sp/advisory/advisory_2004-07-09.pdf)

<sup>34</sup> CIJ, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), December 19, 2005, para. 216. Available at: <http://www.icj-cij.org/docket/files/116/10455.pdf>

<sup>35</sup> Eur. Ct. HR, Drozd and Janousek v France and Spain, Judgment of June 26, 1992, para. 91. See also the decisions of the European Commission on Human Rights in relation to admissibility of petitions 1611/62, X v Federal Republic of Germany, September 25, 1965; Petition no. 6231/73, Hess v United Kingdom, May 28, 1975; petitions 6780/74 and 6950/75, Cyprus v Turkey, May 26, 1975; petitions 7289/75 and 7349/76, X and Y v Switzerland, July 14, 1977; Petition 9348/81, W. v United Kingdom, February 28, 1983.

<sup>36</sup> Ilascu and Others v. Moldova and Russia, Judgment of July 8, 2004, para. 311

<sup>37</sup> Eur. Ct. HR, Loizidou v Turkey (Preliminary Objections), Judgment of March 23, 1995, para. 62 and Eur. Ct. HR, Loizidou v Turkey, Judgment of December 18, 1996.

<sup>38</sup> Eur. Ct. HR, Loizidou v Turkey (Preliminary Objections), Judgment of March 23, 1995, para. 62.

<sup>39</sup> Bankovic and Others v. Belgium and Others, Judgment of December 12, 2001, paras. 59-61.



commit violations of human rights in the territory of another State which it could not commit on its own territory.<sup>40</sup>

97. In *Issa*, as in the present case, the respondent State is accused of engaging in a cross-border military operation aimed at pursuing and eliminating alleged terrorists. The European Court accepted that as a consequence of such an action the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory in which it was conducting the military operation. If so, this could result in a finding that the victims were within the jurisdiction of the respondent State. However, it appeared that at the relevant time there were no military activities in the area where the applicants' relatives were killed and therefore the deaths could not be attributed to the State. In the present case, there is no dispute over the fact that the death here occurred in the territory where the Colombian military operation took place.

98. In a way similar to the international organs previously mentioned, the Inter-American Commission has considered that it has competence *ratione loci* with respect to a State for acts occurring on the territory of another State, when the alleged victims were subjected to the authority and control of its agents.<sup>41</sup> There would otherwise be a legal *lacuna* in the protection of those individuals' human rights that the American Convention seeks to protect, which would run counter to the object and purpose of this instrument.<sup>42</sup>

99. Thus, the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.

100. What has been stated above does not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State's territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted. Instead, the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment.

101. The allegations of the State petitioner provide a context in which 25 people died in the area bombed and three persons survived with injuries. In addition, it is alleged that after the bombing raid, Colombian agents were present at the bombed camp for some hours during which they exercised acts of authority over the survivors and disposed of some of the bodies of the dead, as well as objects found at the site.

102. Although at this stage it is not appropriate to consider the allegations in the inter-State communication as proved, the Commission observes that there is no disagreement between the parties that members of Colombia's armed forces made an incursion onto Ecuador's territory on March 1, 2008; that they were present at a camp located at Angostura, Ecuador, and that they removed two bodies of "Raúl Reyes" and Franklin Guillermo Aisalla Molina to Colombian territory. In addition, according to the allegations in the complaint and not contested by the State of Colombia, during those hours when they remained at the Angostura camp, the Colombian officials had under their control the survivors, the bodies of the dead and the objects in the camp. Consequently, the Commission considers that there are

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<sup>40</sup> Eur. Ct. HR, *Issa et al. v Turkey*, Judgment of November 16, 2004, para. 71.

<sup>41</sup> IACHR Report No. 109/99, Case 10.951, *Coard et al.* (United States). September 29, 1999, para. 37; IACHR Report No. 14/94, Petition 10.951, *Callistus Bernard et al.* (United States). February 7, 1994, paras. 6 and 8; IACHR Report No. 31/93 Case 10.573, *Salas* (United States), October 14, 1993, para. 6.

<sup>42</sup> Eur. Ct. HR, *Case of Cyprus v. Turkey*, Judgment of May 10, 2001, para. 78.

sufficient indications to conclude that in the present case the State of Colombia exercised extraterritorial jurisdiction over the area attacked.

103. As a result of the foregoing, the Commission concludes that it has competence *ratione loci* to examine this inter-State communication since it alleges violations of rights protected in the American Convention attributed to state agents of one State party to the said instrument on the territory of another State party.

## **2. Competence *ratione personae***

104. The Commission notes that the State of Colombia has been a State party to the American Convention since July 31, 1973, the date on which it deposited its instrument of ratification, while the State of Ecuador has been a State party to the American Convention since December 8, 1977, the date on which it deposited its instrument of ratification. In addition, the States parties to the Convention have the ability in Article 45 of the American Convention to present communications before the IACHR alleging that the other State party has violated the human rights established in the Convention, since they have declared that they recognize the Commission's jurisdiction to receive and examine such communications.

105. The State of Ecuador alleges that the Inter-American Commission has competence *ratione personae* to examine the present petition. It adds that the State of Colombia has passive standing for having recognized the jurisdiction of the IACHR to examine inter-State complaints on June 21, 1985. In addition, the State of Ecuador maintains that it has *locus standi* for having accepted the Commission's jurisdiction provided for in Article 45 of the American Convention on July 4, 1984.<sup>43</sup> It adds that the material facts in the petition were perpetrated against an Ecuadorian citizen, Mr. Franklin Guillermo Aisalla Molina, and his immediate family.

106. The Commission observes that in the present case the requirements of active and passive standing to file inter-State communications have been fulfilled, given that the State of Ecuador deposited its instrument recognizing the IACHR's jurisdiction contemplated in Article 45 of the American Convention on August 13, 1984, whilst Colombia deposited its instrument recognizing the said jurisdiction of the Commission on June 21, 1985.

107. Consequently, in accordance with the analysis and conclusion with respect to jurisdiction *ratione loci*, the Commission concludes that it is competent *ratione personae* to examine the present inter-State petition since the claim presents as a victim an individual who, according to the allegations, was under the control and authority of Colombian state agents and that therefore it behoove Colombia to respect and guarantee his rights under the American Convention.

## **3. Competence *ratione temporis***

108. The Commission will examine in this section whether the allegations in the petition took place when the obligation to respect and ensure the rights established in the American Convention were already in force for the State of Colombia and whether the Commission's competence to examine allegations on the violation of the Convention in the context of an inter-State petition was already in force.

109. In the first place, in accordance with the third paragraph of Article 45 of the American Convention, States are entitled to draft their declaration recognizing the jurisdiction of the Inter-American Commission for a indefinite time, for a specific period or for specific cases. In relation to the two States involved in the present inter-State communication, the IACHR observes that neither of them established a temporal or any other type of limitation on the Commission's jurisdiction.

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<sup>43</sup> Inter-State communication presented by the State of Ecuador against the State of Colombia on June 11, 2009, page 50.

110. Thus the temporal limitations to the Commission's jurisdiction are only those laid down in the Convention itself. The American Convention clearly establishes that both the State presenting the communication as well as the respondent State must have recognized the Commission's jurisdiction to process inter-State communications in order for the Commission to be able to exercise jurisdiction in a specific case. In the present case, both States have recognized this jurisdiction.

111. Thus to establish the point in time when the Commission's competence to examine the complaint of one State party against another applies, the condition of reciprocity must be verified that must govern the communications between States. This is due to the fact that the Convention itself has established that inter-State communications may only be admitted and examined if presented by a State party that has made a declaration recognizing the Commission's jurisdiction to examine inter-State communications and if presented against a State party that has made a similar declaration.<sup>44</sup>

112. Considering the dates when the declarations recognizing the Commission's jurisdiction to receive and examine inter-State communications were deposited by the States of Ecuador and Colombia, and that the events that the allegations refer to occurred on March 1, 2008, the Commission observes that it has competence *ratione temporis* to examine the present complaint.

#### 4. Competence *ratione materiae*

113. According to the State of Ecuador, the IACHR has competence *ratione materiae*, since the complaint alleges violations of Articles 4.1, 8.1, 8.2 and 25.1 in relation to Article 1.1 of the American Convention.

114. For its part, the State of Colombia maintains that Article 45 of the American Convention only permits the IACHR to examine inter-State communications dealing with violations of the rights contained in the aforementioned instrument and that the acts of Operation "Phoenix", as well as the death of Mr. Franklin Aisalla are governed by international humanitarian law (hereinafter "IHL"). In this sense, the State of Colombia argues that IHL has more detailed rules for the protection of human rights during an armed conflict; and as *lex specialis*, derogates the more general law, which, in its view of the present case, would be international human rights law.

115. It adds that only through IHL may it be "established whether or not the deprivation of the right to life of an individual resulting from hostilities associated with a military operation which in turn unfolded in the context of an armed conflict, was arbitrary."<sup>45</sup> The State of Colombia states that as a result the Commission lacks competence *ratione materiae* to examine the present inter-State petition.

116. Before analyzing the Commission's competence *ratione materiae* to examine the present case, it is necessary to clarify the interrelationship between international human rights law and IHL, as well as the legal basis permitting the IACHR to interpret the relevant provisions of the American Convention by reference to the rules of International Humanitarian Law.

117. In common with other universal and regional human rights instruments, the American Convention and the 1949 Geneva Conventions share a common core of non-derogable rights and the mutual goal of protecting the physical integrity and dignity inherent in the human being.<sup>46</sup>

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<sup>44</sup> IACHR Report No. 11/07, Inter-State Case 01/06, *Nicaragua v Costa Rica*, March 8, 2007, para. 215.

<sup>45</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 82.

<sup>46</sup> IACHR Report No. 55-97, Case 11.137 *Juan Carlos Abella* (Argentina), November 18, 1997, para. 158. See also, African Commission on Human and Peoples' Rights, Communication 227/99- D.R. Congo v Burundi, Ruanda and Uganda, 33rd ordinary Session of the African Commission, May 2003, paras. 64 and 65.

118. Thus both Common Article 3 of the Geneva Conventions as well as Article 4 of the American Convention protect the right to life and, consequently, prohibit extrajudicial executions under any circumstances. Thus, the complaints alleging arbitrary deprivation of the right to life, attributable to state agents, are clearly within the Inter-American Commission's jurisdiction. However, as the existence of an armed conflict has been established, it is indispensable to refer to IHL as a source of authorized interpretation which permits the American Convention's application -- with due consideration to the particular set of circumstances in this situation.

119. The Inter-American Court has emphasized that "there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment)"<sup>47</sup> and repeated that "the provisions relevant to the Geneva Conventions may be taken into account as interpretative elements for the American Convention itself".<sup>48</sup>

120. For its part, the Commission has stated that:

[t]he Commission considers that the circumstance that some of the facts alleged had occurred in the context of an armed conflict does not negate the power of this Commission to rule on them. Article 27 of the Convention allows for the suspension of certain rights in the context of armed conflicts, but by no means does it suspend the force of the Convention in its entirety, nor deprive this Commission of its powers. While these considerations are put forth here, the IACHR must still analyze the obligations of the State that emanate from the Convention in light of the provisions of international humanitarian law, which will be used in the interpretation as *lex specialis*.<sup>49</sup>

121. Due to their similarity and the fact that both norms are based on the same principles and values, international human rights law and IHL may influence and reinforce each other, following as a interpretative method that enshrined in Article 31.3.c of the Vienna Convention on the Law of Treaties, which establishes that in interpreting a norm "any relevant rules of international law applicable in the relations between the parties"<sup>50</sup> may be considered. The foregoing shows that international human rights law may be interpreted in the light of IHL and the latter may be interpreted in the light of international human rights law, as required.

122. In this way, although the *lex specialis* with respect to acts taking place in the context of an armed conflict is IHL, this does not mean that international human rights law is inapplicable. On the contrary, it means that when applying the law of human rights, in this case the American Convention, International Humanitarian Law, as the specific rule governing armed conflict, is resorted to for interpretation.<sup>51</sup>

123. The Inter-American Commission, as established in its Statute, must examine the complaints alleging a violation of a right protected within the framework of the American Convention or the American Declaration. The fact that the resolution of such a complaint may require a reference to another treaty does not remove its jurisdiction, and the Inter-American Court has reflected the Commission's practice of invoking "other treaties relating to the protection of human rights" in its

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<sup>47</sup> I/A Court H.R. *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 209.

<sup>48</sup> I/A Court H.R. *Case of Las Palmeras. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67, paras. 32-34.

<sup>49</sup> IACHR Report No. 11/05 (Admissibility), Petition 708/03, *Gregoria Herminia, Serapio Cristián and Julia Inés Contreras*, El Salvador, February 23, 2005, para. 20.

<sup>50</sup> Vienna Convention on the Law of Treaties, 1969, Article 31.3 (c).

<sup>51</sup> IACHR Report No. 109/99, Merits, Case 10.951, *Coard et al.* (United States). September 29, 1999, para.42. See also ICJ, *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 25.

decisions and reports.<sup>52</sup> If the Commission were to decline jurisdiction in such a case, it would risk leaving certain fundamental rights without protection, in contravention of the mandate entrusted to it.<sup>53</sup>

124. The approach of the Inter-American Commission and Court are consistent with general international law. As expressed by the International Court of Justice in the Advisory Opinion on the Wall:

"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, Save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards i:he relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be excli-sively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others maybe matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."<sup>54</sup>

125. In the present case, the State petitioner alleges the commission of an extrajudicial execution of a citizen of Ecuador by agents of the State of Colombia, in the context of a military operation on the territory of Ecuador. Therefore the norms of IHL may be relevant, depending on the established circumstances, to decide whether or not the alleged deprivation of Franklin Guillermo Aisalla Molina's life was "arbitrary" in accordance with Article 4.1 of the Convention.

126. By virtue of the above considerations, the Commission has competence *ratione materiae*, because the inter-State communication alleges violations of human rights protected by the American Convention.

#### **D. Other Requirements for the Admissibility of the Inter-State Communication**

##### **1. Colorable Claim**

127. It is a matter for the Inter-American Commission to determine if the allegations in the inter-State communication may constitute colorable claims on the violation of rights enshrined in the American Convention, in conformity with Article 47.b; or if the petition, in accordance with Article 47.c should be rejected for being "manifestly groundless" or "obviously out of order". At this procedural stage, it is a matter for the IACHR to undertake a *prima facie* evaluation, not with the aim of establishing alleged violations of the American Convention, but to examine whether the petition states claims, which may potentially represent colorable claims on the violation of rights guaranteed in the American Convention. This examination does not imply a prejudgment or an anticipated opinion on the merits of the claim.

128. In this sense, the Inter-American Commission observes that, in the case that the State of Ecuador's allegations on the arbitrary deprivation of Mr. Franklin Guillermo Aisalla Molina's life by members of Colombia's armed forces are proved, these may constitute violations of Article 4 of the American Convention. Additionally, such allegations could involve violations of the right to humane treatment of the alleged victim's immediate family by reason of the suffering caused by his death and the circumstances in which it took place. On the other hand, should it be proved that the alleged extrajudicial execution remains in impunity by virtue of the lack of an efficient investigation, and taking into account the alleged suffering that a denial of justice will have caused the alleged victim's immediate family, the IACHR considers that this could involve a violation of Articles 8 and 25 of the American Convention, to the prejudice of Mrs. Teresa Molina, Messrs. Guillermo Aisalla and Marco Molina, as well as the other

<sup>52</sup> I/A Court H.R. "*Other treaties*" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 43.

<sup>53</sup> IACHR Report No. 109/99, Merits, Case 10.951, *Coard et al.* (United States). September 29, 1999, para. 43.

<sup>54</sup> ICJ, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 106, July 9, 2004, available at: [http://www.icj-cij.org/homepage/sp/advisory/advisory\\_2004-07-09.pdf](http://www.icj-cij.org/homepage/sp/advisory/advisory_2004-07-09.pdf)

members of the alleged victim's family who are identified at the merits stage. The IACHR considers admissible all the Articles of the American Convention previously mentioned in relation to Article 1.1 of the same instrument.

129. From this analysis of the inter-State communication, the Commission considers that the State of Ecuador's allegations are not included in the provisions of subparagraphs b) and c) of Article 47 of the American Convention and that therefore those admissibility requirements in the Convention have been satisfied.

## 2. Duplication of Proceedings and *Res Judicata*

130. The Commission understands that the subject matter of the inter-State communication is not pending before another international proceeding for settlement, nor that the petition or communication is substantially the same as one previously studied by this or another international organization. Therefore the requirements set out in Articles 46.1.c and 47.d of the Convention are satisfied.

## 3. Exhaustion of Domestic Remedies

131. Article 46.1.a of the American Convention provides that, for a communication presented before the Inter-American Commission to be admissible in conformity with Article 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement has as its aim to permit the national authorities to examine the alleged violation of a protected right and, if appropriate, resolve it before being brought before an international tribunal. It is relevant to state that the rule about the exhaustion of domestic remedies applies in principle both to communications between States as to individual petitions.<sup>55</sup>

132. The requirement of the prior exhaustion applies when, in effect, the available measures in the domestic system measures are adequate and effective to remedy the alleged violation. In this sense, Article 46.2 specifies that the requirement does not apply when the domestic legislation does not afford due process of law for the protection of the right in question; or if the alleged victim did not access to the remedies under domestic law; or if there has been unwarranted delay in rendering a decision on the aforementioned remedies. According to the provisions laid down in Article 31 of the Commission's Rules, when the petitioner alleges one of these exceptions, it is a matter for the respondent State to demonstrate that the domestic remedies have not been exhausted, unless this is clearly demonstrated in the case file.

### **Allegations of the Parties in relation to the Requirement of the Exhaustion of Domestic Remedies**

133. It is a matter for the IACHR to examine, at the outset, the allegations of the parties in relation to the exhaustion of domestic remedies. According to the State of Ecuador, in the present case, when a violation of the right to life is involved, it is the duty of the State of Colombia to undertake *ex officio* the criminal investigation to establish the circumstances surrounding Mr. Franklin Guillermo Aisalla Molina's death, as well as those responsible.

134. It adds that according to the description in the death certificate and the civil registry issued by the Colombian authorities, Colombia "assumed and stated that Mr. Franklin Aisalla Molina's death occurred on Colombian territory."<sup>56</sup> It also maintains that it was the responsibility of the State of Colombia to initiate the investigations since it concerned an act against life and thus was subject to public prosecution. The State of Ecuador alleges that if Colombia pointed out in official documents that Mr. Aisalla's death occurred on Colombian territory, it had a duty to expedite the criminal proceedings to its conclusion, as part of its obligation to preserve public order.

135. The State of Ecuador alleges in its inter-State petition that, according to information supplied by the National Public Prosecutor's Office of Colombia on December 4, 2008, on the date of this communication no investigations had been initiated with respect to the death of the alleged victim due to their having occurred on Ecuadorian territory.<sup>57</sup> It also maintains that the Executive Department of the Colombian Military Criminal Courts indicated that on December 1, 2008, there was no investigation in the

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<sup>55</sup> IACHR Report No. 11/07, Inter-State Case 01/06, *Nicaragua v Costa Rica*, March 8, 2007, para. 231.

<sup>56</sup> Inter-State communication presented by the State of Ecuador against Colombia received on June 11, 2009, page 56.

<sup>57</sup> Inter-State communication presented by the State of Ecuador against Colombia received on June 11, 2009, page 57.

military courts. It adds that the National Procurator General's Office had announced on November 20 and December 1, 2008, that there were no proceedings of a disciplinary nature underway before it.<sup>58</sup>

136. The State of Ecuador also stresses in its complaint that on March 17, 2008, on the orders of the General Prosecutor of the State, a request for international criminal assistance was sent to Colombia requesting information and all the documents relating to the attack perpetrated by the armed forces of the said country at the FARC camp on March 1, 2008, including "the names of the officials and other personnel who participated in the said military operation, as well as the individual in command."<sup>59</sup> According to the State petitioner, this request for international criminal assistance was repeated on various occasions without the Colombian authorities responding to the requirements stated, so that it considers that they have obstructed the action in the courts of Ecuador since "the individualization and identification of the personnel who acted as perpetrators or masterminds of the extrajudicial execution of Franklin Guillermo Aisalla Molina"<sup>60</sup> could not be permitted or made possible."

137. Thereafter, based on the observations presented by the State of Colombia to the inter-State petition according to which an investigation was undertaken *ex officio* into the events occurring on March 1, 2008, the State of Ecuador argued that the inter-State complaint was presented based on the fact that nine months after Mr. Aisalla Molina's death occurred, the Colombian authorities had stated that there was no investigation whatsoever into this event and that it was not until shortly after the transmission of the inter-State petition to Colombia that the National Public Prosecutor of that country issued a press release informing that there was a pending investigation on Mr. Aisalla Molina's situation as from March 1, 2008.<sup>61</sup>

138. According to the State of Ecuador, the inconsistency of the State of Colombia with respect to the existence of a judicial investigation into the material facts in the inter-State communication "has effects in the international sphere and contravenes the principles of public international law and international human rights law".<sup>62</sup> In this sense, it alleges that this ambiguity changed the legal situation of Mr. Aisalla's immediate family since the lack of an investigation was a factual and legal basis to make a claim before the Inter-American system. The State petitioner also maintains that due to this ambiguity, the State of Colombia damages the principle of good faith between the parties that should govern the entire process.

139. The State of Ecuador argues that there has been undue delay on the part of Colombia for two years in undertaking a serious and effective investigation, so that the exception to the exhaustion of domestic remedies set out in Article 46.2.c of the American Convention applies.<sup>63</sup>

140. On the other hand, the State of Ecuador alleges that the respondent State initiated an ineffective criminal investigation to the exclusion of the victims in the present case, so that there has been no due process of law for the protection of the rights in accordance with Article 46.2.a of the American Convention. In this respect, it maintains that the victim's family members in particular were excluded on two occasions from criminal proceedings undertaken regarding the facts of the complaint in the present petition: on the first occasion, in response to a request made by Mr. Aisalla's parents to the National Public Prosecutor's Office of Colombia on November 12, 2008, when this organ informed them that there was no investigation into the alleged victim's death; on the second occasion, when the Colombian

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<sup>58</sup> Inter-State communication presented by the State of Ecuador against Colombia received on June 11, 2009, page 58.

<sup>59</sup> Inter-State communication presented by the State of Ecuador against Colombia received on June 11, 2009, page 60.

<sup>60</sup> Inter-State communication presented by the State of Ecuador against Colombia received on June 11, 2009, page 62.

<sup>61</sup> Brief presented by the State of Ecuador on March 19, 2010 during the hearing in the 138th period of ordinary sessions of the Commission on the Admissibility of inter-State Petition PI-2, pages 56 and 57.

<sup>62</sup> Brief presented by the State of Ecuador on March 19, 2010 during the hearing in the 138th period of ordinary sessions of the Commission on the Admissibility of inter-State Petition PI-2, page 57.

<sup>63</sup> Brief presented by the State of Ecuador on March 19, 2010 during the hearing in the 138th period of ordinary sessions of the Commission on the Admissibility of inter-State Petition PI-2, page 59.



Prosecutor withdrew this statement on July 30, 2009, and stated that an investigation was underway into Mr. Aisalla Molina's death. Ecuador adds that since that time, Mr. Aisalla's immediate family has not been included in the proceedings underway in Colombia, nor have they been informed about them.<sup>64</sup> Lastly, the State of Ecuador argues that the inefficiency of the criminal process in Colombia was foreseeable by reason of the public announcements made by that country's authorities, as well as the how the Colombian authorities handled the crime scene.<sup>65</sup>

141. For its part, the State of Colombia argues that the present inter-State communication should be declared inadmissible by the Commission since domestic remedies have not been exhausted before the Colombian courts. The State of Colombia alleges that its National Public Prosecutor initiated an investigation *ex officio* on the same day that the events occurred near Angostura, including the death of Mr. Franklin Aisalla. In addition, it maintains that the criminal investigation going into the aforementioned events is a judicial remedy that will allow clarification of what happened on March 1, 2008 and, if necessary, punish the perpetrators.<sup>66</sup>

142. It adds that the criminal investigation is currently being pursued by the 20th Prosecutor of the Anti-Terrorism Unit of the National Public Prosecutor's Office, an information communicated to the State of Ecuador on April 3, 2008.<sup>67</sup> In addition, it maintains that the State of Ecuador was continually informed about this investigation and that Mr. Aisalla Molina's death was being investigated in the course of the said procedure, which, according to the State of Colombia, was evident from announcements of the General Procurator of Ecuador itself prior to the petition being lodged with the IACHR.<sup>68</sup>

143. Colombia alleges that from the beginning it registered its concern that Ecuador stated in its petition the alleged lack of a criminal investigation in Colombia. By virtue of the judicial assistance requested by Ecuador and provided by the State of Colombia, Ecuador was fully aware of the existence of the criminal investigation being undertaken by the National Public Prosecutor of Colombia. The State of Colombia adds that there was a relationship of mutual cooperation between the two nations in criminal matters in which Colombia fulfilled the requests issued in accordance with the Convention on Mutual Assistance in Criminal Matters.<sup>69</sup>

144. In regard to Ecuador's arguments on the alleged ambiguity of Colombia's position, the latter maintains that even when it is true that in response to a petition for information, the National Directorate of Prosecutors of Colombia initially reported that there was no record of investigations initiated on account of Mr. Aisalla Molina's killing, in a later communication the same Directorate had supplemented its report by clarifying that there was an investigation under way under the name of Luís Edgardo Devia Silva, aka "Raúl Reyes", that also refers to Mr. Aisalla Molina's death.<sup>70</sup>

145. The State of Colombia also maintains that on April 3, 2008, it sent Ecuador a letter rogatory informing it of the criminal investigation underway in the Public Prosecutor's Office of Colombia

<sup>64</sup> Brief presented by the State of Ecuador on March 19, 2010, during the hearing in the 138th period of ordinary sessions of the Commission on the Admissibility of inter-State Petition PI-2, page 63.

<sup>65</sup> Brief presented by the State of Ecuador on March 19, 2010, during the hearing in the 138th period of ordinary sessions of the Commission on the Admissibility of inter-State Petition PI-2, page 64-69.

<sup>66</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 36, para. 74.

<sup>67</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 43, para.92.

<sup>68</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, paras. 112-114.

<sup>69</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 115.

<sup>70</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, paras. 116 and 117.

for the events occurring on March 1, 2008. Colombia adds that in the said letter it requested that the Ecuadorian judicial authorities lend criminal judicial assistance by authorizing the presence of the Prosecutor charged with the case and two employees of the Judicial Police and to send certain information to the State of Colombia. Colombia alleges that the State of Ecuador not only failed to respond to Colombia's request, but did not permit the Prosecutor and his assistants charged with the investigation into the events in Colombia to travel to that country.<sup>71</sup>

146. The State of Colombia alleges that once this information had been clarified, the State of Ecuador could not argue that Colombia took an ambiguous position with regard to the existence of a criminal investigation nor could it attribute procedural consequences to the said ambiguity. It also stresses that "the contradiction that could attract the IACHR's attention" is Ecuador's in "recognizing the existence of the criminal investigation by referring to documents contained with the case file under investigation, as well as its participation in the channels of judicial cooperation and then denying its existence based on alleged extra-procedural evidence, such as the document responding to the right of petition."<sup>72</sup>

147. With respect to Ecuador's allegations over the evident inefficiency of the criminal investigation underway in Colombia for the events in the present case, the State of Colombia maintains that the statements issued by the Colombian authorities and quoted by Ecuador in its inter-State complaint do not affect either the investigation led by the Prosecutor into the events or the independence of the public judicial power of Colombia.<sup>73</sup> The State of Colombia alleges that it has shown that the criminal investigation was initiated in a timely way, as well as diligence in pursuing it. It adds that to judge the reasonableness of the time in which the criminal investigation developed three elements must be considered: the complexity of the case, the procedural activity of those interested and the conduct of the judicial authorities.

148. The respondent State maintains that the complexity of the present case is due to the fact that the criminal investigation refers to all the acts of Operation "Phoenix", which includes another two dead victims, in addition to Mr. Franklin Aisalla Molina (a Colombian soldier Carlos Edison Hernández León and Luís Edgar Devia, aka "Raúl Reyes"), a wounded victim (Andrés Escobar Buriticá), two indirect victims (Ulvio Hernández Burbano, Carlos Edison Hernández León's father, and Guillermo Aisalla, Franklin Guillermo Aisalla's father) as well as other direct victims yet to be identified and for which judicial cooperation was requested from the Ecuadorian authorities who inspected the 19 bodies of the persons killed in the events.<sup>74</sup>

149. In addition, the State of Colombia alleges that the complexity of the investigation is also a result of needing to include an analysis of whether or not there was an excessive use of force, to see whether a military aim was involved or not and to determine the responsibility of any of the victims in conduct in breaching public security, through a study of the computer hard drive and other elements gathered at the site of the events.<sup>75</sup> The State of Colombia also alleges that it was impossible for the Colombian judicial authorities to advance the collection of evidence at the site of the events, the lack of cooperation of Ecuador and maintains that it made the investigation become even more complex.<sup>76</sup>

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<sup>71</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 118.

<sup>72</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 132.

<sup>73</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, paras. 156-161 and 164.

<sup>74</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 40, para. 84.

<sup>75</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 40, para. 85.

<sup>76</sup> Communication dated October 20, 2009, Observations of the State of Colombia to the inter-State petition PI-2, p. 41, para. 86.

150. Lastly, it states that it has demonstrated that the investigations into the events denounced in the inter-State petition were carried out within a reasonable time and according to its remit.<sup>77</sup> The fact that, to date, no perpetrators have been identified does not mean in any way that the investigation undertaken by the competent authorities was not diligent.<sup>78</sup>

151. From the foregoing, the State of Colombia concludes that it is not possible to claim there has been an unwarranted delay in the conduct of the criminal investigation and therefore alleges that the exception to the failure to exhaust domestic remedies set out in Article 46.2.c of the American Convention does not apply.

### **Commission's Considerations in relation to the Exhaustion of Domestic Remedies**

152. The rule of prior exhaustion has as its aim to give the national authorities an opportunity to examine the alleged violation of a protected Convention right and apply the available procedures of domestic law to remedy the situation before being examined by an international organ.

153. To consider the fulfillment of the requirement of the exhaustion of domestic remedies, the Commission must determine what is the adequate remedy to pursue in light of the circumstances of the case and the possibility to resolve the legal situation breached.<sup>79</sup> In those cases alleging the arbitrary deprivation of life, the adequate remedy is the criminal investigation and trial initiated and pursued *ex officio* by the State to identify and punish the perpetrators.<sup>80</sup>

154. In relation to the allegation of unwarranted delay, the IACHR analyzes the particular circumstances of each case to determine whether there has been an undue delay. As a general rule, the Commission determines that "a criminal investigation must be undertaken promptly to protect the victims' interests and preserve evidence."<sup>81</sup> To establish whether an investigation has been undertaken "promptly", the Commission considers a series of factors, such as the time that has elapsed since the crime was committed, if the investigation has passed the preliminary stage, the measures adopted by the authorities and the complexity of the case.<sup>82</sup>

155. The State of Colombia has alleged the failure to exhaust domestic remedies since its first communication with the Commission, justifying its application in that it initiated the corresponding criminal investigation and that this has advanced by all possible means given the complexity of the facts.

156. It is appropriate to point out that in the case under consideration, given the allegation on the arbitrary deprivation of the life of an individual, Franklin Guillermo Aisalla Molina, the adequate domestic remedy is the criminal investigation and trial which, according to the State of Colombia and the information in the case file, was initiated under file No. 865686107570200880264. However, the Commission observes that the State of Colombia has not provided updated information as to the progress

<sup>77</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, paras. 173-175.

<sup>78</sup> Communication of the State of Colombia, DVAM.DIDHD.GOI. No. 31461/1312 dated June 10, 2010, received by the IACHR on June 14, 2010, para. 178.

<sup>79</sup> IACHR Report No. 23/07 of March 9, 2007, Petition 435-2006 *Eduardo José Landaeta Mejías et al.*, para. 43; IACHR Report No. 51/08 of July 24, 2008, Petition 299-07 *Robert Ignacio Díaz Loreto et al.*, Venezuela, para. 47.

<sup>80</sup> IACHR Report No. 23/07, *Eduardo José Landaeta Mejías et al.*, Petition 435-2006, Admissibility, para. 43, March 9, 2007; IACHR Report No. 15/06, *María Emilia González, Paula Micaela González and María Verónica Villar*. Petition 618-01, Admissibility, para. 34, March 2, 2006; IACHR Report No. 52/97, Case 11.218, Arges Sequeira Mangas, *Annual Report 1997*, paras. 96 and 97. See also Report No. 55/97, para. 392, Report No. 55/04 para. 25 and Report 51/08, para. 47.

<sup>81</sup> IACHR Report No. 16/02, *Servellón García* (Honduras), Petition 12.331, Admissibility, para. 31 (February 27, 2002). See also IACHR Report No. 51/08 of July 24, 2008, Petition 299-07 *Robert Ignacio Díaz Loreto et al.*, Venezuela, para. 48.

<sup>82</sup> IACHR Report No. 51/08, Admissibility, Petition 299-07 *Robert Ignacio Díaz Loreto et al.*, Venezuela, July 24, 2008, para. 48.

of the said investigation, which would permit the conclusion that the judicial authorities were proceeding in a diligent manner. In its arguments as to the procedural steps undertaken, the respondent State merely stresses the different requests for international criminal assistance made to the Ecuadorian authorities, without describing the proceedings being taken domestically to determine the circumstances of the events and the possible perpetrators more than two and a half years after the events occurred.

157. When a State alleges the complexity of facts as factor to be taken into account in determining whether or not there has been an unwarranted delay and to examine whether the authorities have acted diligently in the investigations, it must explain specifically in what way this complexity and other difficulties caused the delay.<sup>83</sup>

158. Considering that in deciding the exhaustion of domestic remedies, the Commission does not take into account the state of the domestic proceedings at the time it received the petition, but at the time it issues its Report, and that throughout the proceedings in the inter-State communication it has received very limited information relating to the domestic judicial proceedings in the case connected with this communication, the Commission considers that the State of Colombia has failed to discharge the burden of proof upon it as to the effectiveness of the domestic remedies when the petitioner alleges any of the exceptions to Article 46.2 of the American Convention.<sup>84</sup>

159. On the other hand, at the merits stage, the Commission will analyze in detail whether in the course of the criminal investigation for the events in the present complaint, the State of Colombia has provided an effective remedy with due guarantees for the alleged victim's family.

160. The Commission considers that the above elements are sufficient to conclude that in relation to the events surrounding Franklin Guillermo Aisalla Molina's death, there has been an unwarranted delay in the criminal investigation. Consequently, the State of Ecuador is exempted from the requirement of the exhaustion of domestic remedies by virtue of Article 46.2.c of the American Convention.

#### **4. Timeliness**

161. In accordance with the provisions of Article 46.1.b of the Convention, for a petition or communication to be admissible, it must be presented with a time limit of six months from the date on which the party alleging a violation was notified of the final judgment issued at the national level. The six months rule ensures legal certainty and judicial stability once that a decision has been taken.

162. Article 46.1.b establishes that for a petition to be admissible, it must be filed within six months from the date on which the party alleging a violation was notified of the final judgment exhausting domestic remedies. This rule does not apply when the Commission finds that any one of the exceptions to the exhaustion of domestic remedies enshrined in Article 46.2 of the Convention applies. In such cases, the Commission must determine whether the petition was presented within a reasonable time in conformity with Article 32 of its Rules.

163. In the circumstances of the present case, the IACHR has already established the applicability of an exception to the rule of the exhaustion of domestic remedies, so that it must determine whether the petition was presented within a reasonable period of time. In this regard, the Inter-American Commission observes that, in principle, it is at the moment of the approval of the report on admissibility that compliance with this requirement must be shown. Therefore, taking into account the circumstances of the present case, particularly the date of the alleged victim's death and the proceedings in the criminal investigation, the Inter-American Commission concludes that the petition was presented within a reasonable period of time and finds that the requirement of Article 32.2 of the IACHR's Rules is fulfilled.

<sup>83</sup> IACHR Report No. 65/09, Admissibility, Petition 616-06, *Juan Carlos Flores Bedregal*, Bolivia, August 4, 2009, para. 54.

<sup>84</sup> IACHR Report No. 50/08, Petition 298-07, *Néstor José Uzcátegui et al.*, Venezuela, July 24, 2008, para. 46.

**V. CONCLUSIONS**

164. Based on the preceding analysis, the Commission concludes that it is competent to examine the claims filed by the State of Ecuador against the State of Colombia on the alleged violation of Articles 4, 5, 8 and 25 of the American Convention in conjunction with Article 1.1 of the same instrument and that the said claims are admissible, in accordance with the requirements established in Articles 45, 46 and 47 of the American Convention.

165. Based on the above arguments of fact and law, and without prejudice to the merits of the claim,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,****DECIDES:**

1. To declare that the present petition is admissible in accordance with Article 46 (a) of the Convention.
2. To notify this decision to the parties.
3. To publish the present report in its Annual Report.

Done and signed in the city of Washington, D.C., on the 21<sup>st</sup> day of the month of October 2010.  
(Signed): Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, and José de Jesús Orozco Henríquez, members of the Commission.