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REPORT No. 133/19

PETITION 480-12

REPORT ON ADMISSIBILITY

ULPIANO ORTIZ FAJARDO AND FAMILY
COLOMBIA

Approved electronically by the Commission on August 13, 2019.

Cite as: IACHR, Report No. 133/19, Petition 480-12. Admissibility. Ulpiano Ortiz Fajardo and family. Colombia. August 13, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner	Corporación Justicia y Dignidad
Alleged victim	Ulpiano Ortiz Fajardo and family
Respondent State	Colombia ¹
Rights invoked	Articles 4 (life), 8 (fair trial), and 25 (judicial protection) of the American Convention on Human Rights ² in relation to Article 1.1

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition	March 27, 2012
Additional information received during initial review	April 24, 2017
Notification of the petition	July 24, 2017
State's first response	November 27, 2017
Additional observations from the petitioner	February 15 and July 10, 2018
Additional observations from the State	September 6, 2018

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Convention (deposit of instrument of ratification on July 31, 1973)

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

Duplication of procedures and international <i>res judicata</i>	No
Rights declared admissible	Articles 4 (life), 7 (personal liberty), 8 (fair trial), Article 11 (privacy) and Article 25 (judicial protection) of the American Convention, in relation to Article 1.1 and 2
Exhaustion of domestic remedies or applicability of an exception to the rule	Exception provided in Article 46.2.c of the Convention is applicable
Timeliness of the petition	Yes, under the terms of section VI

V. SUMMARY OF ALLEGED FACTS

1. The petitioners affirm that at dawn on August 9, 2007, Mr. Ulpiano Ortiz Fajardo (hereinafter "the alleged victim") left his house located in the municipality of Piendamó, to go to the city of Popayán and to carry out his normal commercial activities. They indicated that the driver of the bus in which he traveled said that he left the alleged victim in the bus terminal of Popayán. They point out that as Mr. Ortiz Fajardo did not communicate with his family throughout the day, so they began a search that ended without success.

2. They report that on August 10, 2007, the family members heard on local radio stations that the alleged victim and another person had died as a result of Operation Eclipse tactical mission No. 70, developed by the Twenty-ninth Brigade of the National Army in the Municipality of Timbío. They state that it was reported that the deceased were members of the National Liberation Army (hereinafter "ELN") and that they died in combat with military troops. They indicate that the same information was published by a newspaper on August 11, 2007.

¹ In accordance with the provisions of Article 17(2)(a).a of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not participate either in the discussions nor the decision in the present matter.

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

³ The observations submitted by each party were duly transmitted to the opposing party.

3. They report that on August 10, 2007, the next of kin of the alleged victim reported to the Timbío Prosecutor's Office to request the body and that upon delivery of the body, they were informed that a shotgun had been seized. They contend that it was determined that death was caused by a severe cranial brain trauma and cerebral laceration, produced by a gunshot wound. They maintain that Mr. Ortiz Fajardo was not a member of the ELN or of any subversive group, that he had no criminal record, and that there was no military or judicial police report confirming his membership to any illegal organization.

4. They affirm that an investigation was initiated in the 54th Court of Military Criminal Instruction, where four soldiers were accused of the murder of the two civilians. They state that within the framework of this process, it was determined that the military involved fired 50 rounds of ammunition, that the analysis of firing residue was incompatible with the alleged victim, and that the lofoscopic exploration carried out on the carbine allegedly belonging to Mr. Ortiz Fajardo, turned out to be negative, meaning that it did not contain their fingerprints. They state that the foregoing allows to establish that there was a disproportionate military action, which makes it impossible to affirm the existence of a combat.

5. They argue that in view of the fact that the military criminal procedure is not adequate to investigate human rights violations, on July 16, 2010 they presented a petition to the Attorney General's Office, requesting that said body take cognizance of the case. They contend that said request was not answered. In addition, they indicate that on December 16, 2011, family members requested the 54th Military Criminal Investigation Court to refer the case to the ordinary jurisdiction, without receiving any response. Faced with this situation, they maintain that in 2014 they filed a protective action against both authorities before the Criminal Chamber of the Superior Court of Cauca, which granted the appeal and ordered that the file be sent to the Superior Council of the Judiciary so that it decided on the conflict of competences. They affirm that despite the delay of the military criminal court, the Council determined on November 12, 2014 that the case be investigated by the ordinary jurisdiction. They allege that despite the requests made to the Prosecutor's Office for the process to continue at least to determine the charges, it decided to leave the process in the preliminary inquiry and repeat the evidence that had been collected legally in the military criminal process, without any progress to date.

6. Finally, they maintain that the alleged victim's next of kin filed a claim for direct reparation, which was rejected by the Fourth Overflow Court of Popayán on March 31, 2014. They state that said decision was confirmed on December 10, 2014. 2015 by the Contentious Administrative Court of Cauca, arguing that it was not possible to attribute responsibility for service failure, because the military involved had performed actions in accordance with their mandate. They argue that neither of the two instances valued the criminal file and the evidence that indicated that the alleged victim's case was one of thousands of false positives. Therefore, they filed an appeal for review before the Council of State that has not yet been resolved.

7. For its part, the State maintains that on November 12, 2014, the Superior Council of the Judiciary ruled that the case should be heard by the ordinary jurisdiction. Thus, it affirms that the Specialized Prosecutor's Office for Human Rights and International Humanitarian Law, develops criminal investigations with due diligence, and guarantees the presence of those involved through security measures. By virtue of the foregoing, it indicates that the domestic resources have not been exhausted.

8. It also affirms that the alleged facts do not constitute violations of human rights, since a serious and impartial investigation was initiated *ex officio*, that it is in active investigation stage and has respected all the procedural guarantees.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

9. The petitioners maintain that the case configures the exceptions contained in subsections a. and c. of Article 46.2 of the Convention, because the military jurisdiction does not constitute an adequate or effective remedy to investigate the death of the alleged victim, and that, to date, there is an unjustified delay. In turn, the State affirms that the remedies were not exhausted in the domestic courts, since the criminal proceeding in the ordinary jurisdiction is still pending, and due to the complexity of the case there is no delay justice. It affirms that the Prosecutor's Office has conducted multiple investigative activities aimed at clarifying the facts such as inspections, ballistic trajectory analysis, graphological and lab studies. Additionally, it argues that the process followed in the contentious administrative jurisdiction has not been exhausted.

10. The Commission has repeatedly stated that military jurisdiction does not constitute an appropriate forum and therefore does not provide an adequate remedy to investigate, prosecute and punish the alleged violations of human rights enshrined in the American Convention, allegedly committed by members of the public force or with their collaboration or acquiescence. Therefore, it considers that in the instant case, as the investigation for an alleged extrajudicial execution was carried out in the military criminal justice system, there was an obstacle to investigate the facts through the appropriate remedy, triggering the exception established in Article 46.2. b. of the Convention. In the same way, the Commission notes that since November 2014 the case was referred to the ordinary jurisdiction; however, to date, there is no final decision. Therefore, because of the characteristics of this case and the existing precedents regarding similar facts, the Commission considers that the exception to the exhaustion of domestic remedies contemplated in Article 46.2.c of the American Convention is applicable.

11. In addition, in regards to the direct reparation proceedings before the contentious-administrative jurisdiction, the Commission has repeatedly held that said remedy does not constitute an appropriate remedy for analyzing the admissibility of a claim of the nature of the present case, as it is not adequate to provide comprehensive reparation that includes clarification and justice for family members. Notwithstanding, although in the instant case the criminal proceeding is the appropriate remedy for the investigation of the facts, it is noted that the petitioners also allege specific violations in the context of the claim for direct reparation. Therefore, given the connection between the two processes, and considering that until now there is no final decision in the contentious-administrative jurisdiction, the Commission concludes that the exception provided for in Article 46.2.c of the American Convention is applicable.

12. Finally, the IACHR considers that the petition was presented within a reasonable timeframe and that the requirement of admissibility in relation to the time of presentation is met.

VII. COLORABLE CLAIM

13. Based on the factual and legal arguments presented by the parties and the nature of the subject matter, the Commission considers that the alleged extrajudicial execution of the alleged victim, the transfer of his body to pose as a guerrilla member killed in combat and the lack of effective judicial protection over these facts could establish a possible violation of Articles 4 (life), Article 5 (humane treatment), Article 7 (personal liberty), Article 8 (fair trial), Article 11 (privacy) and Article 25 (judicial protection) of the American Convention on Human Rights in relation to Article 1.1 and 2.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 7, 8, 11, 25 of the American Convention, in accordance with Articles 1.1 and 2;

2. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 13th day of the month of August, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren, and Flávia Piovesan, Commissioners.