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REPORT No. 179/19
PETITION 507-09
REPORT ON ADMISSIBILITY

OMAR DARÍO CLAVIJO GUTIERREZ
COLOMBIA

Approved by the Commission on December 5, 2019 in San Salvador, El Salvador.

Cite as: IACHR, Report No. 179/19, Petition 507-09. Admissibility. Omar Darío Clavijo Gutierrez. Colombia. December 5, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Omar Darío Clavijo Gutiérrez
Alleged victim:	Omar Darío Clavijo Gutiérrez
Respondent State:	Colombia ¹
Rights invoked:	Articles 8 (fair trial), 11 (privacy), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights ²

II. PROCEDURE BEFORE THE IACHR³

Filing of the petition:	April 28, 2009
Notification of the petition to the State:	April 1, 2015
State's first response:	August 3, 2015
Additional observations from the petitioner:	June 1, 2016
Additional observations from the State:	January 18, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes. American Convention (deposit of instrument of ratification 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, under the terms of Section VI
Rights declared admissible	Articles 8 (fair trial), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention in relation to its Articles 1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. Mr. Omar Darío Clavijo Gutiérrez (hereinafter “the alleged victim” or “the petitioner”) submits that given his incapacity for work, on May 21, 2002, he was discharged from the infantry battalion of the Colombian National Army, on a discretionary and discriminatory basis, with disregard for his judicial guarantees. He argues that he was a non-commissioned officer of the Colombian National Army from March 1,

¹ Pursuant to the provision of Article 17.2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not participate in the discussion or the voting on this matter.

² Hereinafter “American Convention” or “Convention.”

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

1992, until February 2002, when he was recovering from a surgical procedure. He alleges that on February 12, 1994, he was severely wounded in a clash with a guerrilla group, which has caused him permanent incapacity for work: his left thumb and part of his right forefinger were amputated; he has two bullets embedded in his chest for life and suffers from hearing loss caused by acoustic trauma. He indicates that while in the military service, he received several commendations after his performance tests.

2. The alleged victim denounces the State of Colombia for discharging him from the National Army's infantry battalion based on a resolution from the Examining Board of the National Army. He claims that his termination did not observe the legal framework and, thus, violated his human rights, as he was dismissed on the grounds of his physical impairment, which was caused by wounds suffered while on duty. He believes that the authorities should have applied the procedure established in Article 100, paragraph 5 of Decree-Law 1790 of 2000 regarding the loss of psychosocial capacity for work. He submits that in discharging him, the authorities violated his rights to social security and pay.

3. The petitioner also alleges that he resorted to the adequate courts of law by filing an action of nullity to the Court for Contentious Matters of Cundinamarca, Section Two, Subsection B, which rejected his petition on June 2, 2004. According to him, he was unable to access a court of appeals because when he filed the legal action, Decree 597 of 1988 was in force and it ruled that matters involving damages below \$5,350,000.00 had to be heard in a single instance of jurisdiction. Therefore, the State Council denied his appeal of April 8, 2005, and on November 9, 2006, it rejected the action for constitutional relief that he lodged against that judgment. Finally, he resorted to the Constitutional Court, which on December 15, 2008, notified him of its decision to dismiss his action because it did not meet a formal requirement. He argues that his discharge constitutes an inhuman and illegal act of exclusion. He claims damage to his name and dignity because the criteria applicable to administrative decisions on the termination of active members were not duly observed since he was discharged on account of his physical condition and to avoid granting compensation.

4. The State controverts the facts presented by the alleged victim. It contends that Colombia has special rules for careers in the military and that under Article 125 of the Colombian Constitution, jobs in state bodies are career jobs, except for elected office, jobs of free appointment and removal, those of official staff, and others established by the law. It also claims that the armed forces are responsible for defending the sovereignty, independence, integrity, and constitutional order of the State and that careers in the military are governed by special rules that allow legislators to decide on the system of replacement, promotion, benefits, and disciplinary proceedings, which are provided for in Decree-Law 1790 of 2000.

5. The State submits that these rules grant discretionary power concerning removals, which is constitutionally possible given the nature of their function. It indicates that this is not to say that constitutional flexibility should lead to arbitrariness or disregard for constitutional principles themselves; that, therefore, discretionary power should be exercised only according to the law. It believes that discretionary power is not opposed to due process, for a dismissal resulting from the exercise of such a power is not the result of a sanction but a discretionary act. Such dismissals do not violate the right to equality because they are based on a study of each case and the identification of specific circumstances that justify the removal of a public servant.

6. It further submits that the alleged victim was able to file legal proceedings, such as an action for nullity in labor matters before the Administrative Court of Cundinamarca, which denied his claims on considering that the case met all the legal requirements for a discretionary dismissal. It claims that he also had the opportunity to appeal to a court of second instance, the State Council, which ruled the appeal inadmissible given the low amount of the bill of damages. It indicates that the petitioner challenged this decision before the Fourth Section of the Division for Contentious-Administrative Matters of the State Council, which dismissed the action for constitutional relief on deeming it out of order. It notes that the Constitutional Court rejected the action for constitutional relief on considering that the matter did not meet the grounds for the exceptional applicability of constitutional protection and that the petitioner did not meet the requirement of immediacy. Consequently, the State believes that although at the national level, several courts have studied

this case, the alleged violations invoked by the petitioner have never been proven. Therefore, it considers that the petitioner seeks that the IACHR work as a court of fourth instance.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

7. The alleged victim asserts having exhausted the domestic remedies since, on December 15, 2008, the Constitutional Court of the Republic of Colombia notified him of its denial of his action for constitutional relief. The State believes that the filing of his petition was overdue, as it was after the six months established in the American Convention. It claims that the petition was filed almost four years after a national court passed the final decision, which it says was the judgment of second instance, the State Council, of April 8, 2005. It argues that the action for constitutional relief is not suitable for a “reset of deadlines,” regarding the period established in Article 46.1.b of the Convention. In this regard, and as to the State’s claim of the petition being overdue, the Commission recalls that although the alleged victim’s exhaustion of ordinary domestic remedies may suffice in this case, if special remedies have been exhausted with the reasonable prospect of obtaining a favorable outcome, these may be considered as validly exhausted for meeting the requirements for this petition.

8. The Inter-American Commission believes that the domestic remedies were definitively exhausted with the Constitutional Court’s ruling of December 15, 2008, by which the said court ruled to dismiss the alleged victim’s action for constitutional relief. In this sense, the Commission notes that the case could have been selected for review by the constitutional jurisdiction since this was in principle an appropriate judicial way to protect the judicial situation violated within the domestic legal system. Further, given that the Commission received the petition on April 20, 2009, within the six months following that judgment, the petition satisfies the admissibility requirements set forth in Article 46.1 (a) and (b) of the American Convention.⁴

VII. ANALYSIS OF COLORABLE CLAIM

9. In view of the factual and legal elements submitted by the parties and the nature of the matter brought to its attention, the Commission deems that, if proven, the alleged facts (the purported discriminatory discharge based on the alleged victim’s incapacity, with disregard for his judicial guarantees, and the denial to appeal given the low bill of damages involved) could establish violations of the rights protected under Articles 8, 24, 25, and 26 of the American Convention in relation to its Articles 1 and 2. In the present case, the Commission will examine at the merit stage if the abovementioned proceedings regarding that the alleged victim was unable to access a second instance of jurisdiction, that is, to challenge the judgment of the Administrative Court of Cundinamarca, Section Two. For when he filed an action, Decree 597 of 1988 was in force and ruled that cases involving a bill of damages below \$5,350.000.00 would be heard in a single instance of jurisdiction—presents issues about the obligation set forth in Article 2 of the American Convention, in relation to the safeguards provided in Article 8 thereof.⁵

10. Concerning the alleged violation of Article 11 (privacy) of the Convention, the Commission notes that the petitioner has not submitted elements to warrant *prima facie* consideration of a possible violation of this Article; therefore, that claim must be declared inadmissible.

11. 9. As regards the State's argument about a fourth instance, the Commission notes that, by declaring this petition admissible, it does not seek to replace the domestic authorities' competence to reverse a judgment unfavorable to an alleged victim or assess possible interpretation mistakes made by the domestic courts, which in principle correspond to the domestic courts. In the merits stage, the Commission will determine if the domestic legal proceedings complied with the right of due process and legal protection and, thus, ensured the victims' right of access to justice under the American Convention.

⁴ IACHR, Report No. 48/17, Petition 338-07. Admissibility. Luis Fernando Leyva Micota. Colombia. May 25, 2017, par. 10.

⁵ IACHR, Report No. 108/17, Petition 562-08. Admissibility. Pedro Herber Rodríguez Cárdenas. Colombia. September 7, 2017, para. 16.

VIII. DECISION

1. To declare this petition admissible with regard to Articles 8, 24, 25, and 26 of the American Convention on Human Rights in accordance with its Articles 1 and 2;
2. To declare the instant petition inadmissible in relation to Article 11 of the Convention; and
3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 5th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli and Flávia Piovesan, Commissioners.