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REPORT No. 48/19

PETITION 1257-09

REPORT ON ADMISSIBILITY / INADMISSIBILITY

JORGE ALIRIO PULGARÍN DUQUE, JUAN AMADO PULGARÍN
DUQUE AND FAMILY
COLOMBIA

Approved electronically by the Commission on April 24, 2019.

Cite as: IACHR, Report No. 48/19, Petition 1257-09. Admissibility. Jorge Alirio Pulgarín Duque, Juan Amado Pulgarín Duque and Family. Colombia. April 24, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Óscar Dario Villegas Posada
Alleged victim:	Jorge Alirio Pulgarín Duque, Juan Amado Pulgarín Duque, and family ¹
Respondent State:	Colombia ²
Rights invoked:	Articles 4 (life), 5 (humane treatment), 8 (judicial guarantees) y 11 (protection of honor and dignity) of the American Convention on Human Rights ³ , and other international treaties ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	October 7, 2009
Additional information received at the stage of initial review:	April 20, 2011
Notification of the petition to the State:	September 2, 2014
State's first response:	June 4, 2015
Additional observations from the petitioner:	May 22, 2017
Additional observations from the State:	October 19, 2017

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 (deposited instrument of ratification 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), 5 (humane treatment), 8 (judicial guarantees), 11 (protection of honor and dignity), and 25 (judicial protection) of the American Convention on Human Rights in relation to its Articles 1(1) and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exceptions at Article 46(2)(b) y (c) of the Convention applied.
Timeliness of the petition:	Yes, in the terms of section VI

¹ The petition identifies the following family members: Gabriel Antonio Pulgarín Castro (father), María Ernestina Duque Delgado (mother), Flor Angela Pulgarín Duque (sister), Carlos Eduardo Pulgarín Duque (brother), Reinaldo de Jesús Pulgarín Duque (brother), Adan de Jesús Pulgarín Duque (brother), Sor Teresita Pulgarín Duque (sister), Hermelia del Socorro Pulgarín Duque (sister), and Blanca Elisa Pulgarín Duque (sister).

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

³ Hereinafter "the American Convention" or "the Convention."

⁴ Articles I and XVIII of the American Declaration of the Rights and Duties of Man.

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

V. ALLEGED FACTS

1. The petitioner alleges that on February 26, 1993, brothers Jorge Alirio Pulgarín Duque and Juan Amado Pulgarín Duque (hereinafter “the alleged victims” or “the Pulgarín Duque brothers”), drivers of public service vehicles in the department of Antioquia, were transporting four passengers from the municipality of Segovia to the municipality of Remedios, when several members of the military from 42nd Infantry Battalion of Bomboná of the National Army ordered that they bring their vehicle to a halt. Once stopped, and in response to the demand to inspect the vehicle, one of the passengers began to shoot at the soldiers, who opened fire on them, causing the death of the Pulgarín Duque brothers and the four passengers they were transporting.

2. He maintains that the death of the Pulgarín Duque brothers was due to the excessive use of force by members of the National Army who shot disproportionately at all the occupants of the vehicle, without the alleged victims being related to the passengers who triggered the events.⁶ Petitioner notes that the failure to investigate and clarify the facts in relation to the deaths of the Pulgarín Duque brothers has negatively impacted the dignity and reputation of both the alleged victims and their family members.

3. Petitioner further indicates that on March 1, 1993 an order was issued to open a criminal investigation for the crime of kidnapping and homicide at the Unit of the Office of the Attorney General in Segovia, in which, beginning with the official judicial act of removing the corpses, a series of inspections were carried out. These include: the medical examinations of the six corpses found, a visual inspection of the vehicle the Pulgarín Duque brothers used for the transportation services they offered, and a third inspection of the objects of value found at the site. Later statements were taken from seven soldiers who were at the place of the confrontation, and from the owner of the vehicle. In those statements the persons questioned were asked to narrate the facts and specifics with respect to the moment and the persons who carried out the attacks, from which it appears that the passenger who began to shoot at the soldiers was in the rear of the vehicle. He reports, nonetheless, that there are irregularities in terms of the time of the events, and whether there were more persons around the site attacking the soldiers when the passenger opened fire on them.

4. One also notes the presence of Aldemar Areiza Torres, a passenger in the vehicle the Pulgarín Duque brothers were driving, who, according to the investigation, was found in the trunk of the automobile, and who that same night had been violently kidnapped from his home. For this reason, he indicates that the appearance of Areiza Torres’s corpse led to involving the alleged victims as part of the group that participated in his kidnapping, despite the statement by a police inspector indicating that no marks of violence were observed on the body.

5. On May 12, 1993, the Regional Prosecutor reversed the order of March 1, 1993, by which the investigation had been opened, ordering that the matter be wound back to the preliminary inquiry phase. On June 10, 1993, the Office of the Regional Director the Office of Attorney General of Medellín declared that it did not have jurisdiction to take cognizance of the case for the crimes of homicide and kidnapping, thus it ruled to remove the matter to the military criminal jurisdiction of the State, and to declare the criminal action extinguished, since those who could have been involved in the facts died then and there. Therefore, on July 12, 1993, the 50th Court of Military Criminal Investigation assumed jurisdiction over the matter.

⁶ From the documents related to the preliminary investigation in the military criminal jurisdiction one notes from the statements of the soldiers involved in the confrontation that there was only one passenger in the back of the vehicle being driven by the Pulgarín Duque brothers who opened fire against one of the agents. Also based on those statements one notes that the attack occurred as they “were passing” through the area, and it was not part of an official military checkpoint.

One of the agents said that there were 41 persons, counting soldiers and commanders, who were in the area of the confrontation; that most of them were able to observe the vehicle in the area. Based on the seven statements one notes that those agents were carrying their weapons the day of the confrontation and shot at the vehicle in which the Pulgarín Duque brothers and the rest of the passengers were travelling. In addition, from the death certificates one notes that the cause of death of the alleged victims and the passengers they were transporting was due to “multiple gunshot wounds” (“*múltiples disparos de arma de fuego*”). Finally, based on the judicial inspection that was conducted of the vehicle one observes that several of the parts, such as the body, the chassis, and the glass were perforated.

6. On June 30, 1994, the 50th Judge of Military Criminal Investigation refrained from instituting a criminal proceeding, as he considered that the soldiers involved acted in legitimate self-defense in response to the attack and imminent danger to their personal security, and that those engaged in those acts pursuant to their functions as members of the armed forces of the State, in defense of its interests; this circumstance was seen as a grounds for not being held liable. In addition, the petitioner indicates that no disciplinary action was instituted, and no soldier was sanctioned.

7. He notes that in November 1994 Carlos Eduardo Pulgarín Duque, brother of the alleged victims, filed a complaint with the Office of the Procurator General for the Department of Antioquia, to begin a criminal investigation for the crime of homicide of his brothers, in search of a response to the events of February 23, 1993. By decree of June 27, 1995, the Office of the Procurator General ordered that the investigation be taken further, as the responsibility of the National Army had not been shown. That investigation resulted in the referral of the documents relating to what had been done by the Office of the Attorney General Unit in Segovia and by the 50th Court of Military Criminal Investigation. Without prejudice to the foregoing, the petitioner indicates that no disciplinary proceeding whatsoever was instituted, and the soldiers involved were not sanctioned, as they were released of criminal liability as they acted in legitimate self-defense, for the only proceeding instituted was in the military criminal jurisdiction; no proceeding has been instituted in the regular criminal jurisdiction.

8. Petitioner indicates that on January 25 and February 23, 1995, respectively, the parents and siblings of the alleged victims brought a proceeding for direct reparation in the contentious-administrative jurisdiction, to have the State -Ministry of Defense/National Army- found monetarily liable for the damages suffered as a result of the death of the Pulgarín Duque brothers. Both proceedings were before the Contentious-Administrative Tribunal of Antioquia, which, by rulings of September 17 and December 3, 1998, considered that it was not possible to find the State responsible for the damages claimed, as it was not possible to show the responsibility of the State for the facts set forth, since the soldiers acted lawfully in defending themselves from the attack initiated by one of the occupants. This decision was appealed and went to the Third Section of the Chamber for Contentious-Administrative Matters of the Council of State.

9. The Council of State, prior to the joinder of the proceedings, by resolution of November 20, 2008 ordered the judgments overturned and found the State -Ministry of Defense/National Army- liable, and ordered that the families be paid to make reparation for the harm. The family members of the alleged victims filed a request for an addition to the ruling, arguing that the State had not guaranteed reparation for the moral harm in its entirety; that request was denied on April 1, 2009, on considering that the Council of State was not authorized to reform or overturn its own decisions.

10. The State, in turn, argues that the petition is inadmissible, for the petitioners seek review of decisions made in judicial proceedings. It affirms that the actions brought by the parties and those promoted by the State *sua sponte* were examined in depth by the competent judicial organs, in keeping with the domestic law. Accordingly, it argues that admitting the petition would be tantamount to a fourth-instance review by the Commission. It also states that with respect to the sum recognized in the judgment handed down by the Council of State in relation to the contentious-administrative proceeding, it is the maximum amount, and even though they are two persons, it does not imply two independent sets of damages that must be paid separately, since the impairment is single and indivisible.

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

11. The State indicates that it has facilitated, promoted, and concluded the adequate remedies in terms of criminal justice to satisfy the Pulgarín Duque family. The petitioner argues that the facts continue in impunity to this day, since on June 30, 1994 the 50th Judge of Military Criminal Investigation opened an investigation into the death of the alleged victims, which concluded with the judge finding himself unable to proceed. The State further notes that the military criminal courts had jurisdiction to hear the complaint filed by the alleged victims' family.

12. In relation to the contentious-administrative jurisdiction, the State argues that adequate remedies were pursued and concluded, and that the part of the petitioner's claim related to the study of the amounts granted for moral harm should be analyzed with respect to the indivisible nature of the harm. Now the petitioner states that while there is economic compensation, reparation for the harm has been partial, since it does not constitute full reparation for the harm, as there was no analysis of the impairment of their constitutional rights; in addition, since that compensation was not satisfactory as per precedents, the State continues to violate their right to truth and justice.

13. With respect to the use of the military jurisdiction, the Commission has ruled repeatedly that it is not an appropriate forum for investigating the death of a civilian, since it does not offer the guarantees required and therefore does not offer an adequate remedy for investigating, prosecuting, and punishing alleged violations of the human rights enshrined in the American Convention.⁷ In view of the foregoing, the Commission applies the exception provided for at Article 46(2)(b) and (c) of the Convention.

14. As regards the proceeding for direct reparation instituted by the petitioners in the contentious-administrative jurisdiction, the Commission has held repeatedly that said jurisdiction does not constitute a suitable remedy for the purpose of analyzing the admissibility of a claim such as the instant one, since it is not adequate to provide integral reparation and justice to the family members. Notwithstanding what has been established, in the instant case one observes that the petitioners also argue allege specific violations related to speedy process in the context of direct reparation. Accordingly, given the link between the two procedures, the IACHR takes into account that the in the contentious-administrative jurisdiction domestic remedies were exhausted with the ruling of April 1, 2009 handed down by the Chamber for Contentious-Administrative Matters, Third Section, of the Council of State, which denied the request for a clarification with respect to the judgment handed down on November 20, 2008, in which the Chamber held that the Nation/ Ministry of Defense/National Police was economically liable for the damages caused the family of the alleged victims as a result of their deaths.

15. Finally, the petition was submitted on October 7, 2009, the alleged facts began on February 26, 1993, and their purported effects extend to the present day. Therefore, in view of the context and the characteristics, the Commission considers that the petition was filed within a reasonable time, and that one should consider the admissibility requirement satisfied.

VII. ANALYSIS OF COLORABLE CLAIM

16. In view of the elements of fact and law set forth by the parties, and the nature of the matter put before it, the Commission considers that the alleged extrajudicial execution of the alleged victims by agents of the National Army, the subsisting impunity, and the lack of effective judicial protection in the judicial proceedings that have unfolded related to the fact tend to establish possible violations of Articles 4 (life), 5 (humane treatment), 8 (judicial guarantees), 11 (protection of honor and dignity), and 25 (judicial protection) of the American Convention on Human Rights, in relation to its Articles 1(1) and 2; and to the detriment of the alleged victims and their family members.

17. With respect to the State's arguments regarding the fourth instance formula, the Commission recognizes that it is not competent to review the judgments handed down by domestic courts that act within the scope of their jurisdiction, and that apply due process and judicial guarantees. Nonetheless, it reiterates that within the framework of its mandate it is competent to find a petition admissible and rule on the merits when it refers to domestic proceedings that may entail violations of the rights guaranteed by the American Convention.

⁷ IACHR, Report No. 70/14. Petition 1453-06. Admissibility. Maicon de Souza Silva. Renato da Silva Paixão et al. July 25, 2014, para. 18.

VIII. DECISION

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

2. 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 24th day of the month of April, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, and Flávia Piovesan, Commissioners.