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REPORT No. 137/20
PETITION 1369-09
REPORT ON ADMISSIBILITY

ESAU ROJO CARMONA
COLOMBIA

Approved electronically by the Commission on June 9, 2020.

Cite as: IACHR, Report No. 137/20, Petition 1369-09. Admissibility. Esau Rojo Carmono. Colombia. June 9, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Roberto Fernando Paz Salas, Blanca Atala Carmona de Rojo and family
Alleged victim:	Esau Rojo Carmona
Respondent State:	Colombia
Rights invoked:	No specific provisions invoked

II. PROCEEDINGS BEFORE THE IACHR¹

Filing of the petition:	November 2, 2009
Notification of the petition to the State:	May 7, 2014
State's first response:	September 23, 2014
Additional observations from the petitioner:	November 13, 2014
Additional observations from the State:	February 12, 2015

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

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 4 (Life), 8 (Fair Trial) and 25 (Judicial Protection) of the Convention, in relation to Articles 1.1 and 2 of the same instrument.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes
Timeliness of the petition:	Yes

¹ The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. This petition concerns the alleged violation of the rights of Esau Rojo Carmona (the alleged victim) and his surviving family, following his death as result of an attack on a military base.

2. According to the petition, the alleged victim was a member of the Armada Nacional (Navy) and stationed at a military base in the town of Iscuandé, Department of Nariño. In the early morning of February 1 2005 (between 3 am and 6 am), the petitioners allege that an attack was carried out on the military base by members of Revolutionary Armed Forces of Colombia (the "FARC") (with the use of explosives and other weapons) that resulted in the death of 15 soldiers, including the alleged victim. According to press articles cited by the petitioners², the government and the Navy accepted responsibility for the massacre, indicating that there had been several errors of supervision, control, vigilance, and a failure to ensure that there was adequate security in place to prevent or repel the attack. The petitioners also mentioned that the government acknowledged that there had been infiltration of the military base by the FARC guerrillas. In this regard, the petitioners allege that some individuals had been detained in connection with the massacre – primarily Raul Obando Obando ("Obando") and Ignacio Garces Grueso ("Grueso"), individuals who had passed intelligence information to FARC regarding the military base, including the movement of soldiers, changes of sentries, together with other information. Notwithstanding petitioners added, that the investigation has not been effective or diligent in order to identify and prosecute all those responsible for the massacre.

3. The petitioners state that there were three different domestic proceedings following the death of the alleged victim: (a) military criminal proceedings; (b) regular criminal proceedings and (c) an action for reparation. From the record, it appears that Obando and Grueso, together with other individuals were, in March 2005, placed in preventative detention by the military on suspicion of having committed certain offences such as crimes of cowardice by omission, trade with the enemy, and illegal use of uniforms and insignias. Based on the record, the military proceedings did not result in any convictions, but instead the military authorities transferred the criminal proceedings to the Fiscalía General de la Nación. In or about 2006, Obando and Grueso and others were subsequently prosecuted before a criminal court (*El Segundo Penal del Circuito del Municipio de San Juan de Pasto*) for multiple counts of aggravated homicide, attempted homicide, terrorism and rebellion. Obando and Grueso were convicted of these offences, while their codefendants were acquitted. However, on June 24 2009, Obando and Grueso were later also acquitted upon appeal to *El Tribunal Superior del Distrito Judicial Sala de Decision Penal*. Based on the record, there were no further proceedings taken against the codefendants of Obando and Grueso.

4. On January 31, 2007, an action for reparation was initiated by the family of the alleged victim (against the Ministry of Defense/Navy) before *El Juzgado Quinto Administrativo de Pasto*, Department of Nariño. The petitioners claim that in February 2007, the court ruled that the action was inadmissible for failure to comply with certain formal requirements³. The petitioners emphasize that the situation that led to the death of the alleged victim was due to the negligence of the State, given (a) the vulnerability of the military base to attack; (b) the lack of adequate security to prevent the attack, as well as errors of supervision, control and vigilance. Based on press articles cited by the petitioner, the petitioner also emphasizes that there was clear admission by State authorities that it failed to take the requisite measures to prevent the attack. The petitioners further submit that the dismissal of the action for reparation resulted from the State placing greater emphasis on formality than substance.

5. The State rejects the petition as inadmissible principally on the ground that it has taken all relevant steps to ensure access to justice for the petitioners; that the petitioners are ultimately dissatisfied with

² The petitioners refer to a news article entitled *Hubo Errores Militares* in the publication "Diario El Tiempo" of January 3, 2005 in which the President of Colombia alleged accepted responsibility for the massacre. The petitioners also refer to an article published in *Rueda de Prensa* on February 8, 2005, where Mauricio Soto, the Almirante de la Armada Nacional alleged acknowledged that there were errors with respect to supervision, intelligence and other factors that contributed to the massacre.

³ According to the record, the documents filed in support of the action did not contain the signature of one of the claimants – Biderman Rojo Carmona – brother of alleged victim.

the outcome of the domestic proceedings, and that that is not a basis for the intervention of the IACHR. For the State, the petition is manifestly groundless. The State confirms that there were both military and civil proceedings, indicating that following the acquittal of Obando and Grueso by *the El Tribunal Superior Del Distrito Judicial Sala De Decision Penal*, the prosecutor subsequently filed an appeal to the *Corte Suprema de Justicia*, which reinstated the conviction of Obando Obando and Grueso⁴. With regard to the action for reparation, the State contends that the law of Colombia requires claimants/plaintiffs to sign the litigation documents. In this regard, the State contends that the court granted the petitioners five days to correct the documents (i.e. obtain the signature of Biderman Rojas Carmona), but that the petitioners never took this corrective step. Accordingly, their action was not only found inadmissible, but ultimately dismissed altogether. The State argues that the petitioners therefore failed to exhaust this domestic remedy. The State further denies that the press articles cited by the petitioners provide any basis for concluding that the State had accepted responsibility for the death of the alleged victim, or the surrounding circumstances that led to his death.

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

6. Following the death of the alleged victim, the Commission notes that there were three separate set of domestic proceedings – military criminal investigation, ordinary criminal proceedings and an action for reparation. The Commission has long established that, in situations related to possible violations of the right to life, the domestic remedies to be taken into account for the purposes of admissibility of the petition are those related to the investigation and punishment of the perpetrators, which under domestic legislation are offenses prosecutable *ex officio*. Further, that military jurisdiction does not constitute an appropriate forum and therefore does not provide an adequate remedy to investigate, prosecute and punish alleged violations of human rights enshrined in the American Convention.

7. In this case, the State has confirmed that two persons (Obando and Grueso) were ultimately prosecuted and convicted in ordinary criminal proceedings in 2010 for offences connected with the attack that resulted in the death of the alleged victim, among others. These persons had been previously acquitted of the offences in on June 24, 2009 following which the petition was filed on November 2, 2009 and therefore, the IACHR considers that the petition was filed in a timely manner.

8. Regarding the action for reparation, the Commission does note that the petitioners' action for reparation was ultimately dismissed for failure to comply with certain formal requirements (the absence of a signature of one of the claimants). However, the Commission also recalls that in a claim such as this, for purposes of admissibility the action for reparation does not constitute a suitable jurisdiction and need not be exhausted, considering that it is not adequate for providing full reparation and justice to the family members.

VII. ANALYSIS OF COLORABLE CLAIM

9. The principal complaint of the petitioners is that the State has failed to adequately redress the rights of the alleged victim or his family by way of criminal investigation and by reparation. As the Commission has previously noted, the absence of, or delay in conducting a criminal investigation (to clarify what happened, identify all possible material and intellectual perpetrators and to establish the appropriate criminal sanctions) may give rise to a *prima facie* violation of the rights of the alleged victim and his family. In this case the State conducted a criminal investigation which ultimately resulted in the conviction of two persons (Obando and Grueso). However, given that there were other persons who were identified but not ultimately prosecuted or convicted, the Commission therefore considers that the State did not fully satisfy its obligation to investigate all those possible responsible of the alleged facts and that accordingly, there is a colorable violation of the rights of the alleged victim or his family in this regard. In view of the elements of fact and law laid out by the parties and the nature of the matter before it, the Commission considers that the other claims of the petitioners are also not manifestly unfounded and require substantive study on the merits as the alleged facts regarding the lack of compensation to alleged victim or his family caused by the homicide of the alleged victim, together with

⁴ According to external research, this ruling was issued by in June 2010.

the absence of a full investigation, if proven, could give rise to violations of Article 4 (Life), 8, (Fair Trial) and 25 (Judicial Protection) of the Convention, in relation to Articles 1.1 and 2 of the same instrument - to the detriment of the alleged victim and his surviving family.

10. Finally, the State argued that the petitioner is using the Commission as a fourth instance, insofar as it seeks to review the decisions handed down by the administrative and judicial authorities acting within their sphere of competence. With this respect, the Commission recognizes that it is not competent to review judgments handed down by national courts acting within the scope of their jurisdiction and observing due process and judicial guarantees. However, the Commission reiterates that within its mandate it is competent to declare a petition admissible and rule on its merits when the petition refers to domestic proceedings that could be in violation of rights protected by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 8 and 25 of the American Convention, in conjunction with Article 1.1 and 2 of the same instrument; 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 9th day of the month of June, 2020.
(Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.