

**REPORT N° 112/99\***  
Case 11.603  
ALVARO LOBO PACHECO *ET AL.* (19 MERCHANTS)  
COLOMBIA  
September 27, 1999

**I. SUMMARY**

1. On March 6, 1996, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition submitted by the Colombian Commission of Jurists (hereinafter "the petitioners") against the Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia") for the alleged forced disappearance of Alvaro Lobo Pacheco, Gerson Rodríguez, Israel Pundor, Angel Barrera, Antonio Flórez Ochoa, Carlos Arturo Riatiga, Víctor Ayala, Alirio Chaparro, Huber Pérez, Alvaro Camargo, Rubén Pineda, Gilberto Ortiz, Reinaldo Corso Vargas, Hernán Jáuregui, Juan Bautista, Alberto Gómez, Luis Sauza, Juan Montero, and Ferney Fernández (hereinafter "the victims") by members of the National Army and civilians allegedly part of a paramilitary group, from October 6 to 18, 1987, in the municipality of Puerto Boyacá, department of Boyacá, in the middle Magdalena region.

2. The petitioners allege that the State is responsible for violations of the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), respect for judicial guarantees (Article 8), and the right to judicial protection (Article 25), all in connection with Article 1(1) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"). In addition, they allege violations of those same rights pursuant to Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"). In arguing the admissibility of this case, the petitioners invoke the exceptions to the requirement to exhaust domestic remedies.

3. The State provided information on the status of the proceedings in the domestic jurisdiction to clear up the alleged disappearances without expressly questioning compliance with the exhaustion requirement.

4. After analyzing the positions of the parties and compliance with the requirements provided for in the Convention, the Commission decided to declare the case admissible.

**II. PROCESSING BEFORE THE COMMISSION**

5. On March 29, 1996, the Commission proceeded to open the case under number 11,603, and transmitted the pertinent parts of the complaint to the Colombian State, giving it 90 days to submit information.

6. On May 21 and July 31, 1996, the State requested extensions of the term for submitting its answer. On June 6 and August 8, 1996, the Commission granted the extensions requested. The State submitted its answer on September 17, 1996; the pertinent parts were transmitted to the petitioners. On December 12, 1996, the petitioners submitted their observations, which were duly transmitted to the State.

7. On March 3, 1997, during the 95th regular session, a hearing was held on the case in which the petitioners stated their interest in exploring the possibility of a friendly settlement. On June 18 and 19, 1997, the Commission requested additional information from the State on domestic remedies. On October 6, 1998, during the 100th regular session of the Commission, a third hearing was held on the case.

**III. POSITIONS OF THE PARTIES**

**A. Position of the petitioner**

8. The petitioners allege that on October 6, 1987, Alvaro Lobo Pacheco, Gerson Rodríguez, Israel Pundor, Angel Barrera, Antonio Flórez Ochoa, Carlos Arturo Riatiga, Víctor Ayala, Alirio

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\* Commissioner Alvaro Tirado Mejía, of Colombian nationality, did not participate in the discussion and decision on this Report, in keeping with Article 19(2)(b) of the Commission's Regulations.

Chaparro, Huber Pérez, Alvaro Camargo, Rubén Pineda, Gilberto Ortiz, Reinaldo Corso Vargas, Hernán Jáuregui, Juan Bautista, Alberto Gómez, Luis Sauza, Juan Montero, and Ferney Fernández, all merchants, were travelling in a caravan, in several vehicles, from the city of Cúcuta, department of Norte de Santander, to the city of Medellín, department of Antioquia. When they reached the "El Diamante" farm, in the municipality of Puerto Boyacá, department of Boyacá, they were stopped by the shooting of firearms, alleged to come from a military check-point. The alleged victims are then said to have been forced to take a detour along another road, where they were intercepted and held by a paramilitary group that allegedly operated in coordination with members of the National Army<sup>1</sup> and which is alleged to have taken control of their vehicles and merchandise. There has been no news as to their whereabouts since that time.

9. The petitioners state that the family members of the alleged victims reported the occurrence to the authorities immediately. Nonetheless, neither the Bárbula Battalion of the Army nor the Police at Puerto Boyacá or Puerto Araujo took any action to determine the whereabouts of the 17 merchants allegedly disappeared. As a result, in subsequent days the victims' families organized several search parties. The groups that went to Puerto Araujo were allegedly intercepted near the "El Diamante" farm, where they allegedly received death threats from the same paramilitary group.<sup>2</sup> On October 18, 1987, Messrs. Juan Montero, the brother-in-law of one of the disappeared merchants, and Ferney Fernández were taken by members of the paramilitary groups in the vicinity of that farm; to date, their whereabouts remain unknown.

10. In terms of the investigations in the domestic jurisdiction, petitioners note that on October 27, 1987, the Eighth Judge of Criminal Investigation of Cimitarra allegedly initiated an investigation into the victims' disappearance. They allege that despite the statements of several witnesses and other evidence as to who was responsible for the acts and the place where the merchants were supposedly executed and their vehicles destroyed, the judicial authorities did not carry out the judicial inspection required to clear up the facts and collect the victims' corpses. They allege that the evidence points to members of the National Army and of the above-noted paramilitary group as the persons responsible for the disappearances of the 19 merchants. The investigation was in the hands of the Office of the Regional Prosecutor of Cúcuta, yet no one was called to testify. On March 31, 1995, the Office of the Regional Prosecutor handed down called a number of civilians to testify and issued arrest warrants.<sup>3</sup> In September 1995, the investigation was transferred to the Human Rights Unit of the Office of the Prosecutor-General.<sup>4</sup> On April 9, 1996, Army Major Oscar de Jesús Echandía Sánchez and Sergeant Otoniel Hernández Arciniegas were called to testify. The sergeant was arrested and placed at the disposal of the Human Rights Unit. On May 29, 1996, an arrest warrant was

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1 The petitioners allege that the merchants were executed on the "El Diamante" farm, owned at the time by Mr. Henry Pérez, according to a report drawn up by the Intelligence Unit of the Departamento Administrativo de Seguridad (DAS), May 10, 1988.

2 The petitioners allege that the DAS report indicates that at the time of the events the paramilitary group under the command of Henry de Jesús Pérez, owner of "El Diamante," totally controlled the sector that includes parts of the municipalities of Puerto Boyacá (department of Boyacá) and Puerto Berrío (Antioquia), and enjoyed the support of the Association of Ranchers and Farmers of the Middle Magdalena Region (ACDEGAM: Asociación de Ganaderos y Agricultores del Magdalena Medio), known drug-traffickers from the region, and the military commanders of the National Army assigned to the Bárbula Battalion, as well as the members of the National Police at Puerto Boyacá and Puerto Berrío, among other municipalities.

3 On March 31, 1995, the Office of the Regional Prosecutor of Cúcuta issued arrest warrants for the preventive detention of Nelson Lesmes Leguiazón, Carlos Alberto Yepes Londoño, and Wilson de Jesús Pérez Durán, who were arrested on June 5; the same decision was made with respect to Marcelino Panesso Ocampo, who was convicted of perpetrating the La Rochela massacre of September 5, 1995, against Alonso de Jesús Baquero Agudelo.

4 On January 29, 1996, the investigation was partially closed with respect to Nelson Lesmes Leguiazón, Carlos Alberto Yepes Londoño, Wilson de Jesús Pérez Durán, and Marcelino Panesso Ocampo. Jairo Iván Galvis Brochero was also called to testify. On February 7, 1996, an arrest warrant was issued for Luis Alberto Arrieta Morales, for the crimes of extorsive kidnapping, aggravated homicide, and an infraction of Article 2 of Decree 1194 of 1989 (crimes of paramilitarism and paid assassination). He was held in the maximum security prison at Itagüí. On March 7, 1996, the investigation concluded with an indictment of Carlos Alberto Yepes Londoño and Marcelino Panesso Ocampo, for the crimes of extorsive kidnapping, aggravated homicide, and an infraction of Article 2 of Decree 1194 of 1989 (crimes of paramilitarism and paid assassination), of Nelson Lesmes Leguiazón for the crimes of extorsive kidnapping and aggravated homicide; and of Wilson de Jesús Pérez for violation of Article 2 of Decree 1194 of 1989 (crimes of paramilitarism and paid assassination). On March 29, 1996, it was ordered that Waldo Patiño García and Robinson Gutiérrez de la Cruz be called to testify. On May 14, 1996, Oscar de Jesús Echandía Sánchez, Jairo Iván Galvis Brochero, Waldo Patiño García, and Robinson Gutiérrez de la Cruz were ordered to appear, and on May 25 they were declared to be in absentia. On August 9, 1996, it was ordered that they be arrested and held in preventive detention.

issued for him. On June 25, 1996, it was ordered that Col. Hernando Navas Rubio and Gen. Farouk Yanine Díaz appear to testify. The Commander of the Army asserted a jurisdictional dispute with the Human Rights Unit of the Office of the Prosecutor General. On November 26, 1996, the Superior Council of the Judiciary decided to transfer the investigation and trial of the members of the military implicated to the military courts. The victims' families were unable, it is argued, to appeal this decision. On June 18, 1997, the military judge of first instance halted the proceedings, so as to favor the officials called to testify. On March 17, 1998, the Superior Military Tribunal affirmed that ruling.

11. The petitioners have questioned the legality of the decision by the Superior Council of the Judiciary to transfer to the military courts the trial of the Army members called to testify in the investigation by the Office of the Prosecutor-General. They point out that the Colombian Constitution gives the Supreme Court of Justice jurisdiction in trials of Generals and Admirals of the Armed Forces and National Police once they have been indicted by the Office of the Prosecutor General. They consider that former Army Gen. Farouk Yanine Díaz, implicated in the proceedings for having planned the forced disappearance and extrajudicial execution, had to be tried by the Supreme Court of Justice, since the crimes of which he was accused had allegedly been committed when he was an Army general. They also allege that all the other members of the Army implicated in the trial by the Office of the Prosecutor General are retired from the military, and, therefore, under the Constitution, may only be investigated and tried by regular courts. They allege that the accused should have been tried in the regular courts, with the Prosecutor-General as accuser and the Supreme Court of Justice sitting in judgment. They consider, therefore, that the decision of the Judicial Council to transfer the case to the military courts violates domestic law.

12. In summary, petitioners allege that domestic remedies have not been effective in clarifying the facts and in bringing to trial and punishing the persons responsible. They consider that the State has failed to comply with its duty to judicially investigate the forced disappearance and extrajudicial execution of the victims pursuant to the standards of the Convention. They allege that the nine-year investigation of the crimes committed has extended beyond a reasonable time without the persons responsible being punished. They allege that in this case, by transferring the investigation and trial of the retired military officers allegedly involved to the military courts, the State has denied the victims and their families the right to an impartial and independent trial and the right to judicial protection, thus they consider that domestic remedies have not been effective to redress the alleged violations.

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

13. The State partially questioned the facts as presented by the petitioners. In the hearing held on October 6, 1998, the State argued that the alleged victims were involved in contraband-related activities and that they took a detour from their route not because of the shots allegedly coming from a military check-point, but precisely to elude the check-point.

14. The State has provided information on the status of the domestic proceedings, but has refrained from expressly calling into question compliance with the requirement to exhaust domestic remedies or petitioners' assertions regarding the effectiveness of the remedies pursued to clarify the case in the domestic jurisdiction.

15. As for trial of the officers with rank of general by the military jurisdiction, the State alleged that this measure was justified by the need not to delay "unnecessarily" the proceedings against the accused.<sup>5</sup> As for the responsibility of members of the Army in the facts of the case, the State noted that based on the judgments of the military criminal courts, while Gen. Yanine Díaz had participated in the formation of *autodefensa* groups, he was not aware of their criminal activities. In addition, it was alleged that at the time of the events he was serving as Director of the School of Advanced Studies of the Army and did not have official duties in the region.

## **IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY**

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<sup>5</sup> Judgment of the Superior Military Tribunal of March 17, 1998, p. 9.

## **A. Jurisdiction**

16. The Commission has *prima facie* jurisdiction to examine the petition in question. The facts alleged in the petition took place when the obligation to respect and ensure the rights established in the Convention had already entered into force for the Colombian State.<sup>6</sup>

17. In terms of the alleged violation of the provisions of the American Declaration, it should be noted that from the entry into force of the American Convention for Colombia on July 18, 1978, the Convention, and not the Declaration, became the applicable source of law,<sup>7</sup> so long as the petition refers to an alleged violation of rights that are substantially identical in both instruments, and does not involve a continuing violation.<sup>8</sup> In this case, the rights allegedly violated by the Colombian State under the Declaration are similarly protected under the Convention, and the facts that gave rise to the petitioners' claim took place in 1987, i.e., after the American Convention had entered into force for Colombia. Therefore, the Commission shall only refer to the alleged violations of the Convention, not of the Declaration. The Commission proceeds, then, to analyze whether the requirements established in Articles 46 and 47 of the American Convention have been satisfied in the instant case.

## **B. Admissibility requirements**

### **a. Exhaustion of domestic remedies and time requirement for filing the petition**

18. The Commission notes that the State has not expressly raised an objection on grounds of failure to exhaust domestic remedies, even though it provided information on the status of domestic proceedings. Petitioners, for their part, have alleged that the investigation that the State should have undertaken on its own initiative for the purpose of clarifying the disappearances, and to try and punish the persons responsible, has been prolonged for an unreasonable time, has not been effective, and has generated impunity. They request, therefore, that the case be declared admissible under Article 46(2) of the American Convention, which provides that the prior exhaustion requirement and the six-month rule on filing of petitions do not apply when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

19. The Commission considers that in this case the question of exhaustion of domestic remedies is closely linked to the allegations of fact and law regarding the alleged failure of the duty to provide access to justice and judicial protection pursuant to Articles 8 and 25 of the American Convention. In this respect, one should recall that the Inter-American Court of Human Rights has noted that:

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<sup>6</sup> Colombia ratified the American Convention on Human Rights on July 31, 1973.

<sup>7</sup> In issuing its pronouncement on the legal value of the American Declaration, the Court affirmed that, in principle, for the States Parties to the Convention, the specific source of obligations in relation to the protection of human rights is the Convention itself. Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, of July 14, 1989, para. 46. The Inter-American Commission has ruled in similar terms, see Report 38/99, Argentina, Annual Report of the IACHR 1998, para. 13.

<sup>8</sup> The Commission has established that it has jurisdiction to examine violations of the Declaration and the Convention so long as it is a continuing violation of the rights protected in these instruments, such as that caused, for example, by a denial of justice that originates before the State in question has ratified the Convention and continues after the expression of consent and the entry into force of the Convention for that State. See, e.g., Res. 26/88, Case 10,190, Argentina, Annual Report of the IACHR 1987-1988.

when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. Thus, the question of domestic remedies is closely tied to the merits of the case.<sup>9</sup>

20. Therefore, the decision on the application of the objections set forth in Article 46(2) must be deferred to the merits stage, in which the Commission will determine whether the investigation of the facts and the trial of the persons responsible undertaken by the State's organs meets the standards set forth in the American Convention.

21. The Commission considers that compliance with the requirement of submitting a petition within six months of notification of the final decision in the domestic courts is related to the availability of adequate and effective remedies to prosecute the persons responsible for the disappearance of the alleged victims. Therefore, the Commission must also defer determination as to whether the time period established in Article 46(1)(b) of the American Convention applies in this case. In any event, it should be noted that the State has not called into question the timeliness of the petition's submission.

**b. Duplication of procedures**

22. It does not appear from the record of the case that the subject matter of the petition is pending before any other international procedure for settlement or that it reproduces a petition already examined by this or another international organ. Therefore, the Commission considers that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

**c. Characterization of the facts alleged**

23. The Commission considers that the arguments of the petitioners relating to the alleged violation of the rights to life, physical integrity and liberty as well as the delay in the investigation and the failure to effectively prosecute and sanction the responsible, could constitute a colorable claim of violation of the rights protected in Articles 4, 5, 7 and 8 in conjunction with Article 1(1) of the American Convention. As the claims stated in the complaint are not manifestly groundless or out of order, the Commission considers the requirements established in Articles 47(b) and (c) to have been met.

**V. CONCLUSIONS**

24. The Commission considers that it has jurisdiction to examine the claim submitted by the petitioners and that the case is, in principle, admissible, pursuant to the requirements established at Articles 46(1)(c) and 47 of the American Convention.

25. Based on the arguments of fact and law set forth above, and without prejudging on the merits,

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

1. To declare this case admissible.
2. To report this decision to the Colombian State and to the petitioner.
3. To continue to analyze the merits.
4. To place itself at the disposal of the parties in order to reach a friendly settlement based on respect for the rights protected in the American Convention and to invite the parties to set forth their views on such a possibility; and,

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<sup>9</sup> I/A Court HR, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, para. 91.

5. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., September 27, 1999. (Signed:) Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice-Chairman; Jean Joseph Exumé and Carlos Ayala Corao, Commissioners.