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**REPORT No. 284/21**  
**PETITION 165-14**  
REPORT ON ADMISSIBILITY

JOSÉ JOAQUÍN PÁEZ MONSALVE  
COLOMBIA

Approved by the Commission electronically on October 26, 2021.

**Cite as:** IACHR, Report No. 284/21, Petition 165-14. Admissibility. José Joaquín Páez Monsalve. Colombia. October 26, 2021.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Germán Humberto Rincón Perfetti
<b>Alleged victim:</b>	José Joaquín Páez Monsalve
<b>Respondent State:</b>	Colombia
<b>Rights invoked:</b>	Articles 8 (fair trial), 24 (equality before the law) and 25 (judicial protection) of the American Convention on Human Rights <sup>1</sup> in relation to its article 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects) thereof and article 6 (right to work) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights <sup>2</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>3</sup>**

<b>Filing of the petition:</b>	January 31, 2014
<b>Additional information received at the stage of initial review:</b>	August 29, 2017
<b>Notification of the petition to the State:</b>	September 23, 2019
<b>State's first response:</b>	March 26, 2021
<b>Additional observations from the petitioner:</b>	April 30, 2021

**III. COMPETENCE**

<b>Competence <i>Ratione persone</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument of accession deposited on July 31, 1973) and Protocol of San Salvador (instrument of accession deposited on December 23, 1997)

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 8 (fair trial), 24 (equality before the law) 25 (judicial protection) and 26 (progressive development) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, on August 2, 2013.
<b>Timeliness of the petition:</b>	Yes

<sup>1</sup> Hereinafter "the American Convention" or "the Convention".

<sup>2</sup> Hereinafter "Protocol of San Salvador".

<sup>3</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. FACTS ALLEGED

1. The petitioner claims that the State of Colombia breached judicial guarantees, the right to equality, due process and the right to work of Mr. José Joaquín Páez Monsalve by discretionally discharging him as Captain of the National Army, economically affecting his family circle.

2. The petitioner narrates that in 1994 Mr. Páez Monsalve joined the National Army as a Cadet of the José María Córdova Military Academy; in 1996 he attained the rank of ensign; on December 2, 1999 he was promoted to the rank of second lieutenant after completing his studies; and as of December 1, 2004 to the rank of Captain, from which he was discharged, by means of resolution 1777 from June 8, 2006 in spite of having over sixty positive assessments on his resume.

3. Mr. Páez Monsalve requested to know the reasons which motivated this last decision and he received memorandum No. 23 of May 4, 2006 in which the Committee of Assessment of Military Forces recommended retirement for reasons of service and in a discretionary manner; as well as memorandum No. 5 of May 8, 2006 from the Advisory Board of the Ministry of National Defense which unanimously recommended to relieve five officers from active duty for discretionary retirement including Mr. Páez Monsalve -the petitioner provides copies of these two memoranda to the IACHR- and the retirement of a sixth officer due to the reduction in his physical capabilities. The petitioner claims that neither the memoranda, nor the administrative act motivated the retirement of Mr. Páez Monsalve from the army, for which reason, in his view the decision had been arbitrary. In addition, on April 7, 2006 a criminal investigation was initiated against Mr. Páez Monsalve of which he was unaware until being discharged, and that had been archived on June 16, 2009.

4. The remedies filed by the alleged victim were a remedy of annulment and restoration of right, resolved on April 15, 2006 by the Second Administrative Court of Ibagué which dismissed the claim due to the following reasons: a) the lack of motivation of the Advisory Board of the Defense Ministry is not a presumption of illegality of the resolution; b) the retirement had to occur after insight from the of the Committee of Assessment; c) the State needed no justifications, nor investigations to relieve him from his duty. This decision was appealed, and confirmed on November 10, 2009 by the Administrative Court of Tolima, on his appeal, the petitioner had claimed a breach of the right to access to the administration of justice because the first instance judge addressed a different matter from the one raised in the claim; and the rejection by the court was based on the fact that the presumption of legality of resolution 1777 of June 8, 2006 was not doubted, and therefore the first instance sentence was adjusted to the law.

5. Finally, the alleged victim filed a remedy of review which intended the annulment of the resolution from June 8, 2006 and requested a substitutive resolution. However, via a sentence April 17, 2013, notified on August 2, 2013, the State Council dismissed the remedy in considering that it was not suitable to redress deficiencies of procedural acts nor to intend to gather new evidence.

6. Consequentially, the petitioner holds that the case centers in the lack of protection for members of the Military Forces, since the right to due process, access to justice and equality, was not ensured by discretionally discharging Mr. Páez Monsalve; particularly by disrespecting his permanence in the military institution; and for the special rules and regime of the Military Forces which do not allow its members to use the right to defense. He adds that there was a further disregard to the jurisprudence of the Constitutional Court which holds that the motivation is a presumption of the right to defense and the discretionary power is not absolute. Lastly, petitioner claims that the action for protection is an exceptional mechanism, and it only applies upon absence of any other judicial defense; for which reason it would be unfit in this situation, since the alleged victim had the possibility of contesting via some other path.

7. As additional information, the petitioner holds –without mentioning a direct link with the discretionary discharge of Mr. Páez Monsalve from the army– that he suffered an accident in combat which caused him to lose 12.5% of his work capacity certified by the Medical Work Team No. 3108 of 2001, and that afterward at the Discharging Medical Work Team in February 2007, he was determined a loss of work capacity of 28%, assigning him a partial work disability. He claims that as a consequence the reincorporation of Mr. Páez Monsalve into the labor world has been complex, almost impossible; and that his family has been directly

affected because they depended entirely on his income. He highlights that he also was affected in terms of pension and housing. Concerning pension because he contributed for over twelve years to the pension fund of the army, a special regime which only requires having served for a specific time; however, he did not get to reach said time, and had not contributed into the ordinary regime of pensions which demands to meet the requirements of time and age. In regard to housing, since he lost the housing subsidy offered by the army to which he would have had the right after fourteen years of service.

8. The State claims that the petition is inadmissible in considering: i) that the filing of charges is manifestly unfounded; ii) the lack and undue exhaustion of domestic remedies; and iii) the configuration of a “fourth international instance”. In regard to the first point, it holds that no evidence was provided to sustain *prima facie* the breach of article 24 of the American Convention. Regarding the second point, it holds that since the core matter of the petition is the lack of motivation of an administrative act which provided the retirement of Mr. Páez Monsalve, the first remedy that the alleged victim should have exhausted was the action for protection, which is the suitable and effective remedy to protect the claimed rights. This should have been exhausted prior to the filing of the annulment remedy and restoration of right, since said action is only fit and effective when the administrative act has its due motivation. Also, it holds that the Constitutional Court in its sentences C-590 of 2005 and SU-053 of 2015 has established that the action for protection is the suitable mechanism to correct mistakes concerning lack of motivation. Likewise, it claims that judicial decisions were not contested via the action for protection since if any fundamental right had been breached during the process, it would have been modified. Also, the right to contest said decisions by means of the action for protection is domestically foreseen, as an expression of due legal process. Therefore, it concludes that the requirement set forth in article 46.1.a) of the Convention is not met and the exceptions foreseen in article 46.2.c) of the Convention do not apply.

9. In regard to its claim concerning a “fourth international instance” the State holds that the annulment remedy and restoration of right was decided by three different judges, as a consequence of a first instance decision, an appeal and a review remedy. It points out that the first instance judge addressed the problem raised in the petition, concerning the power to retire a person from the National Army with no due motivation, holding that the procedure does not disregard the right to defense since it is not a disciplinary sanction, but a path to meeting the goals and functions of the institution, for which reason it should be regarded as adjusted to the law. Thus, in the resolution of the appeal, the judge reiterated the arguments exposed and added the concept of good service to retire a person from the National Army, since it does not limit to the work performed, but it includes elements of convenience and opportunity. Finally, it stresses that the State Council held that there was no connection whatsoever between the criminal investigation initiated and the decision to discharge him from duty.

10. Therefore, it concludes that the sentences address in a reasonable and motivated manner the arguments raised in the petition, in particular because the express lack of motivation cannot be understood as a synonym of arbitrariness and does not lead to a disregard of the right to defense, since the discharge does not hold a punitive character.

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

11. The petition is centered in the breach of the rights to equality, fair trial and judicial protection by Colombia, for discretionally discharging Sr. Páez Monsalve from the National Army.

12. The petitioner holds that the alleged victim filed a remedy of annulment and restoration of right which was dismissed on April 15, 2006 by the Second Administrative Court of Ibagué. This decision was appealed, and confirmed on November 10, 2009 by the Administrative Court of Tolima; and as a last resort he filed a remedy of review which was rejected by the State Council, and whose decision was notified on August 2, 2013. Thus, he holds that domestic remedies were exhausted, and that therefore, the petition met the requirement set forth in article 46.1.a) of the American Convention and with the time for filing of six months set forth in its article 46.1.b). On its part, the State holds that domestic remedies have not been exhausted since the alleged victim filed no action for protection in neither of the two occasions which he had: before the remedy

of annulment and restoration, and as a mechanism to contest judicial remedies. Therefore, it concludes that the requirement set forth in article 46.1.a) of the Convention is not met.

13. On this point, the Commission has established that the requisite of having exhausted domestic remedies does not mean that the alleged victims have necessarily the obligation to exhaust all domestic remedies<sup>4</sup>. In the instant case, in spite of not having filed the action for protection, the petitioner exhausted the remedy of annulment and restoration of right before the contentious-administrative jurisdiction, thereby activating one of the available and suitable remedies in the domestic legal system to expose his claim, which in return constitutes the subject matter of the present petition. Therefore, the petition meets the requirement of exhaustion of domestic remedies set forth in article 46.1.a) of the Convention.

14. In regard to the timeliness of the filing, the Commission observes that the last remedy was notified to the petitioner on August 2, 2013 and the petition was filed on January 31, 2014, therefore, it meets the requirement of six months set forth in article 46.1.b) of the American Convention.

## VII. ANALYSIS OF COLORABLE CLAIM

15. For purposes of admissibility, the Commission is to decide whether the alleged facts may characterize a violation of rights, pursuant to the set forth in article 47.b) of the American Convention, or whether the petition is "manifestly unfounded" or it is "evidently inadmissible", according to subsection c) of said article. The criterion of assessment of those requirements differs from the one used to decide on the merits of a petition; the Commission is to conduct a prima facie assessment to determine whether the petition establishes the foundation of the possible or potential violation, of a right safeguarded by the Convention, yet not no establish the existence of a violation of rights. This determination constitutes a primary analysis, which does not imply prejudging on the merits of the matter.

16. In this sense, and considering the facts and the information provided in the case as a whole, and always from a preliminary perspective, the Commission observes that neither memorandum No. 23 of May 4, 2006, nor memorandum No. 5 of May 8, 2006, specified or mentioned the reasons due to which the alleged victim was being discretionally discharged from the army. This means, even within a scenario of discretion, there was not even a succinct information toward the alleged victim. On the other hand, the alleged victim was certified in 2001 with a 12.5% loss of his work capacity, for disability; however, he was able to continue to work for the army, being promoted to Captain. Likewise, there is no controversy between the parties that by the time when Mr. Pérez Monsalve was discharged, it was confirmed (in 2007) that his loss of work capacity had reached 28%, a partially permanent disability. Finally, it is not argued either that the alleged victim was discharged a couple of years before qualifying for certain benefits such as a housing subsidy and other pension rights.

17. In view of these considerations, and after examining the factual and legal elements set forth by the parties, the IACHR considers that the petitioner's claims are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, may characterize violations of rights established in articles 8 (fair trial), 24 (equality before the law), 25 (judicial protection) and 26 (progressive development) of the American Convention, in connection to its articles 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects), to the detriment of Mr. José Joaquín Páez Monsalve. The present conclusion is congruent with the decision established in the recent Report on Admissibility No. 179/19 concerning a Colombia, in which a non-commissioned officer of the National Army was removed, in a discretionary and allegedly discriminatory manner due to his disability<sup>5</sup>.

18. As for the allegations concerning violations to article 6 of the Protocol of San Salvador, the IACHR notes that the competence foreseen in the terms of article 19.6 of said treaty to establish violations in

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<sup>4</sup> IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, párr.12.

<sup>5</sup> IACHR, Report No. 179/19. Petition 507-09. Admissibility. Omar Darfo Clavijo Gutiérrez. Colombia. December 5, 2019.

the context of an individual case is limited to articles 8 and 13. In regard to the other articles, in accordance with article 29 of the American Convention, the Commission may take them into account in order to interpret them and apply the American Convention and other applicable instruments.

19. Finally, concerning the claim of the State of fourth instance, the Commission observes that by admitting this petition it does not intend to supersede the competence of domestic judicial authorities, but that it shall analyze at the merits stage of the present petition, whether the domestic procedures met the guarantees of due process and judicial protection, and offered the alleged victim due guarantees of access to justice in the terms of the American Convention.

#### **VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 8, 24, 23 and 26 of the American Convention in connection to its 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 26<sup>th</sup> day of the month of October, 2021. (Signed): Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice-President; Flavia Piovesan, Second Vice-President; Margarette May Macaulay; Esmeralda E. Arosemena Bernal de Troitiño; Joel Hernández García and Edgar Stuardo Ralón Orellana, Members of the Commission.