REPORT Nº 25/03
PETITION 289/2002
ADMISSIBILITY
SANTO DOMINGO
COLOMBIA
March 6, 2003

I. SUMMARY

1. On April 18, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition submitted by the *Comisión Interfranciscana de Justicia, Paz y Reverencia con la Creación*, the *Comité Regional de Derechos Humanos "Joel Sierra"*, the *Colectivo de Abogados "José Alvear Restrepo"*, *Humanidad Vigente Corporación Jurídica*, and the Center for International Human Rights of Northwestern University School of Law (hereinafter "the petitioners"), in which it is alleged that on December 13, 1998, 17 civilians lost their lives and more than 25 were wounded (including 15 children) as the result of the action of the Colombian Air Force (hereinafter "FAC," for *Fuerza Aérea Colombiana*) in the hamlet of Santo Domingo, department of Arauca, Republic of Colombia (hereinafter "the State" or "the Colombian State").

2. The petitioners argued that the State was responsible for violating the rights to life, humane treatment, personal liberty, and judicial protection, enshrined in Articles 4, 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") to the detriment of the victims and their next-of-kin, as well as the generic obligations provided for at Articles 1(1) and 2 of the Convention. Subsequently, the petitioners alleged that the State was also responsible for violating the right to property enshrined in Article 21 of the American Convention.

3. As regards admissibility, the petitioners alleged that the exceptions to the requirement of prior exhaustion of domestic remedies pursuant to Article 46(1) of the American Convention apply to the instant case because the investigation into the subject matter of the claim is in the military jurisdiction, which is not impartial or independent, and therefore is not adequate remedy to make reparation for the violations alleged. The State, for its part, alleged that the claim is inadmissible for failure to exhaust domestic remedies. After analyzing the parties' positions, the Commission concluded that it is competent to decide on the claim submitted by petitioners, and that the case is admissible, in light of Articles 46 and 47 of the American Convention.

II. PROCESSING BY THE COMMISSION

4. The petitioners submitted the original version of the petition in English on April 18, 2002. On June 24, 2002, at the request of the IACHR, they submitted a Spanish-language version. On June 26, 2002, the IACHR proceeded to process the petition, identified as number 289/2002, and forwarded the pertinent parts to the State, which it gave two months to submit observations.

5. On August 26, 2002, the State requested a 30-day extension to present its response, which was granted by the IACHR, until September 27, 2002. On September 27, 2002, the State requested a new 30-day extension. In response, the IACHR reminded the Colombian State that Article 30(3) of its Rules of Procedure bar it from granting extensions beyond three months from the transmittal of the original petition, and that, therefore, it could not grant its request. The State submitted its response on November 13, 2002.

6. On February 25, 2003, the parties participated in a hearing convened during the 117th regular session of the IACHR, to present arguments on admissibility.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

7. The petitioners allege that on December 13, 1998, a helicopter of the Colombian Air Force (FAC) dropped a cluster bomb in the hamlet of Santo Domingo, situated in the department of Arauca, and that as a result of the explosion, 17 were killed, including six children, and that 25 others were wounded, including nine children. The deceased were identified as Oscar Esneider Vanegas Tulibila, ten years old; Luis Carlos Neite Méndez, five years old; Egna Margarita Bello, five years old; Geovani Fernández Becerra, 17 years old; Levis Hernando Martínez Carreño; Teresa Mojica Hernández de Galvis; Edilma Leal Pacheco; Salomon Neite; Jaime Castro Bello, four years old; María Yolanda Rangel; Leonardo Alfonso Calderón; Katherine Cárdenas Tilano, seven years old; Pablo Suárez Daza; Carmen Antonio Díaz Cobo; Nancy Avila Castillo; Arnulfo Arciniegas Velandia, and Luis Enrique Parada Ropero. At the hearing held on February 25, 2003, the petitioners presented a list identifying the wounded, which has been included as part of the record of the case, but they requested that the names be not disclosed, in consideration of the risks to their personal safety.

8. They allege that the victims were non-combatant civilians who were unarmed and that there was no military necessity or legitimate justification for the attack. The petitioners allege that the bombing had been ordered, or at least made known to high-level officers of the FAC, and that after the attack, the Colombian Air Force prevented access to medical care for the wounded, and that members of the Army took advantage of the situation to pillage the hamlet.[1] They argue that these facts constitute violations of Articles 4 and 5 of the American Convention on Human Rights. In the hearing of February 25, 2003, they also made reference to the alleged violation of Article 21 of the American Convention.

9. The petitioners allege that the FAC obstructed the investigation by attributing responsibility to the guerrillas groups, by propagating a false version of the facts with falsified evidence, in order to cover up the responsibility of the members of the Army involved. The petitioners provided copies of official documents and testimonies allegedly refuting the FAC's hypothesis.[2] They also note that Mr. Angel Trifilo Riveros, a survivor of and witness to the massacre, was murdered on January 24, 2002, allegedly by members of paramilitary groups in collaboration with members of the Army.

10. The petitioners also allege that the State failed to comply with its duty to investigate the facts and prosecute those responsible, in accordance with the standards of Articles 8, 25, 1(1), and 2 of the American Convention. They argue that the State has failed to adopt measures to prosecute those responsible before the ordinary jurisdiction nor has taken steps to grant reparation to the victims and their next-of-kin. They argue that no criminal investigation whatsoever has been undertaken in relation to the possible responsibility of high-ranking officers.

11. The submission by the petitioners includes, as an attachment, a copy of the decision handed down on December 8, 2000 by an unofficial Opinion Tribunal that convened in Chicago, in the United States, as a source of information about the facts of the case. This decision includes a list of the persons killed as a result of the events that are the subject matter of this case.

B. Position of the State

12. The State alleges that the petitioners' claim is inadmissible under Article 46(1) of the American Convention, due to the fact that domestic remedies have not been exhausted, since the outcome is still pending in the criminal, disciplinary, and contentious-administrative

[1] Petition dated April 18, 2002.

[2] The petitioners make reference to the December 10, 1999 report of the Ballistic Forensic Laboratory of the National Institute of Forensic Medicine and Forensic Sciences of Colombia, the April 28, 2000 report of the Technical Investigative Corps (CTI) of the Procuraduría General de la Nación; and the May 1, 2000 report by the U.S. Federal Bureau of Investigation.

proceedings instituted to clear up the facts. In its communication of November 13, 2002, it notes that the criminal investigation is before the military jurisdiction by decision of the Superior Council of the Judiciary, and that Court 21 of Military Criminal Investigation issued an arrest warrant against three members of the FAC to be held in pre-trial detention, with the benefit of release on bail. They indicate that this measure was affirmed by the Superior Military Tribunal on April 29, 2002.

13. With respect to the disciplinary proceeding, the State argues that the Human Rights division of the General Attorney's Office (*Procuraduría Delegada para la Defensa de Derechos Humanos*) opened a preliminary inquiry, and that on October 27, 2000, charges were filed against Lt. César Romero Padilla, Second-Lt. Johan Jiménez Valencia and flight technician Héctor Mario Fernández, of the FAC (crew of the helicopter) and against Army Major Juan Manuel González González, as Commander of Counter-guerrilla Battalion No. 36 ("*Comuneros*"). A decision is still pending in this proceeding. In addition, the State reports that the Contentious-Administrative Tribunal of Arauca currently has 22 proceedings pending in relation to these events, awaiting conciliation.

14. The Colombian State alleged in its written communication that the petitioners had not specifically identified the alleged victims of the attack on the hamlet of Santo Domingo, in particular the wounded and requested that the pertinent clarifications be made. During the course of the hearing held February 25, 2003, the respective information was provided.

15. In addition, the State calls into question the validity and relevance of the judgment of the Opinion Tribunal, which is attached by petitioners. It considers that the work of that Tribunal leads to what it defines as the de-institutionalizing of Colombian justice, and that it ignores the investigations being carried out within its jurisdiction.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

16. The petitioners are authorized, in principle, by Article 44 of the American Convention to submit complaints to the IACHR. The alleged victims are individuals in respect of whom the Colombian State undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Colombia has been a State Party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

17. The Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected in the American Convention that are said to have taken place in the territory of a State Party to that treaty. The IACHR is competent*ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention had already entered into force for the State as of the date that the facts alleged in the petition are said to have occurred. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies and time period for lodging a petition

18. The State alleges that the judicial clarification of the facts that are the subject matter of this case is pending, and that therefore the claim is inadmissible for failure to comply with the requirement of prior exhaustion of domestic remedies provided for at Article 46(1) of the American Convention. The petitioner alleges that the investigation is pending before the military criminal courts, and that the military jurisdiction does not offer an independent and impartial remedy for clarifying the violations alleged, excusing petitioner from having to exhaust it before recurring to the inter-American system.

19. Article 46(1)(a) of the American Convention indicates that in order for a petition to be admitted, it will be required to show that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Article 46(2) establishes that this requirement will not apply when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." The Inter-American Court has interpreted that only those remedies that are adequate and effective for redressing the violations allegedly committed by State agents need be exhausted.[3]

20. In the instant case, after the events of December 13, 1998, the National Army, the Colombian Air Force, and the Office of the Attorney General initiated and carried out parallel preliminary investigations. The investigation against National Army members was dismissed on December 28, 1998, on the basis that there were apparently no allegations against members of that branch of the Armed Forces. On May 20, 1999 the Military Criminal Investigation Judge at the Apiay Air Base dismissed the investigation of the FAC members on the basis that the acts of the aircraft crew did not fall under any illegal criminal conduct. Nonetheless, on May 30, 2000, the National Human Rights Unit of the Office of the Attorney General opened a judicial investigation and ordered that the crew of the FAC helicopter UH1H be investigated in light of the examinations and expert opinions of the US Federal Bureau of Investigations (FBI), the Technical Investigative Corps of the Office of the Attorney General (CTI), and the Institute of Legal Medicine and Forensic Sciences. It also decided to refer the investigation to the military jurisdiction. Initially, the military criminal investigative judge at the Apiay Base abstained from complying with the National Human Rights Unit of the Office of the Attorney General's request on the basis that said Unit lacked the competence to make decisions touching military criminal jurisdiction. On August 28, 2000, however, the preliminary investigation was re-opened, and by resolution of June 14, 2001, the Special Military Criminal Investigative Unit summoned the individuals linked to the investigation as allegedly responsible for homicide committed by multiple persons (*concurso de homicidio*) and bodily injury, after which they were released on bail.

21. The National Human Rights Unit raised afterwards questioned the military court's jurisdiction over the case alleging that the matter involved the prosecution of a crime against humanity. On October 18, 2001, the Disciplinary Jurisdictional Chamber of the Superior Council of the Judiciary ruled that the FAC Court of Instance 122 was to exercise jurisdiction upon the investigation of the Santo Domingo massacre.[4] Nonetheless, on October 31, 2002, the First Review Chamber of the Constitutional Court reviewed the Superior Council of the Judiciary's decision and concluded that it violated the principle of the natural judge (*juez natural)*, as an integral element of the fundamental right to due process, and referred the case to the civilian justice system.[5] The IACHR understands that the Superior Council of the Judiciary abided by this decision, and that the case was remanded to the regular jurisdiction on February 6, 2003.

22. The IACHR notes that the jurisdiction responsible for the judicial clarification of the death of numerous civilians, including children, in the hamlet of Santo Domingo in December 1998 has only recently been defined, after more than four years after the facts. The adequacy of the remedies employed to establish the individual responsibility aside, the delay in the judicial investigation suggests that the victims and their next-of-kin have lacked access to an effective remedy in the terms of Article 46(2) of the American Convention. Therefore, the exception to the requirement of prior exhaustion of domestic remedies before resorting to the inter-American system, must apply to their claim.

23. In terms of the other remedies to which the State refers in its allegations, the Commission has held earlier that decisions issued in the disciplinary and contentious-administrative jurisdictions fail to meet the requirements established in the Convention. The disciplinary

[3] I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 64.

[4] The Superior Council of the Judiciary considered that the circumstances in which the action of the members of the Colombian Armed Forces acted had to do with "acts of service," which had to be sanctioned by the military jurisdiction, and "service-related acts," which by exception are under the purview of the military courts, for by their nature they have to do with the purposes and missions that the Constitution establishes in Article 217 for the Military Forces.

[5] First Review Chamber of the Constitutional Court, T-932 Janeth García Guevara v. Consejo Superior de la Judicatura, Disciplinary Jurisdictional Chamber, October 31, 2002.

jurisdiction does not provide adequate means to prosecute and punish human rights violations of the nature alleged in this case nor redress their consequences. The contentious-administrative jurisdiction, moreover, is a mechanism destined to supervise the State's administrative activity, and which allows only for compensation for damages caused by abuse of authority. Accordingly, in a case such as this, it is not necessary to exhaust these remedies prior to recurring to the Inter-American system.

24. Nor is it required in a case such as this to comply with the six-month period provided for in Article 46(1)(b) of the Convention, as the petition was submitted within the reasonable period of time referred to in Article 32(2) of the Commission's Rules of Procedure, for those cases in which no final judgment has been issued prior to submission of the petition.

25. Finally, the Commission must indicate that the application of the exceptions to the prior exhaustion rule, provided for at Article 46(2) of the Convention is closely linked to the determination of the alleged violations of substantive rights set forth in the Convention, such as the guarantees of access to justice. Nonetheless Article 46(2), by its nature and purpose, is autonomous from the substantive provisions of the Convention. Accordingly, the determination as to whether the exceptions to the prior exhaustion of remedies rule apply to the case in question must precede the analysis of the merits, for it rests upon a separate standard of appreciation from that employed to determine whether Articles 8 and 25 of the Convention have been violated. It should be clarified that the causes and the effects that prevented the exhaustion of domestic remedies in this case will be analyzed in due course in the Report on the merits where the IACHR shall determine whether they actually constitute violations of the American Convention.

2. Duplication of proceedings and *res judicata*

26. It does not appear from the record that the subject matter of the petition is pending before another international procedure, or that it reproduces a petition already examined by this or any other international body. Accordingly, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

3. Characterization of the facts alleged

27. The Commission considers that the petitioners' allegations regarding the alleged violation of the rights to life, humane treatment, personal liberty, and the judicial protection of the victims and their family members, if true, tend to establish a violation of the rights guaranteed at Articles 4, 5, 8, 21, and 25, in relation to Articles 1(1) and 2 of the American Convention. The IACHR notes that the petitioners have failed to sustain with arguments of fact and of law their claim regarding the alleged violation of Article 7 and therefore it cannot be admitted at this time.

28. Moreover, in view of the allegations that 15 of the victims were children, the Commission will consider, in the merits phase, whether it must also examine the international obligations of the State in light of possible violations of Article 19 of the American Convention.

V. CONCLUSIONS

29. The Commission concludes that the case is admissible and that it is competent to examine the claim submitted by the petitioners on the alleged violation of Articles 4, 5, 8, 21, and 25, in conjunction with Articles 1(1) and 2 of the American Convention, in keeping with the requirements established at Articles 46 and 47 thereof.

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
DECIDES:

1. To declare the claim admissible in relation to Articles 1(1), 2, 4, 5, 8, 21, and 25 of the American Convention.

2. To notify the decision to the State and petitioners.

3. To initiate the proceedings on the merits.

4. To publish this decision and include it in the Annual Report to be submitted to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., March 6, 2003. (Signed:); José Zalaquett, President; Clare Kamau Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners: Marta Altolaguirre, Robert K. Goldman, Juan Méndez, and Julio Prado Vallejo.