

**REPORT N° 73/05**  
PETITION 4534/2003  
ADMISSIBILITY  
OSCAR IVÁN TABARES TORO  
COLOMBIA  
October 13, 2005

**I. SUMMARY**

1. On November 18, 2002, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR"), received a petition from the Interdisciplinary Group for Human Rights (GIDH) (hereinafter "the petitioners"), in which it alleged the forced disappearance of a soldier, Oscar Iván Tabares Toro, on December 28, 1997, while he was camped with the Tigre Company of the General Carlos Julio Gil Colorado Artillery School of No. 1 Mobile Brigade of Army Battalion No.2, in the village of Toledo in the Municipality of San Juanito, Department of Meta, Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia") and the lack of judicial clarification of the circumstances of his disappearance.

2. The petitioners allege that the State is responsible for violation of the right to recognition of juridical personality, and the rights to life, humane treatment, personal liberty, a fair trial, and judicial protection, as enshrined in Articles 3, 4, 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter "the American Convention"), considered together with the general obligation in Article 1(1), to respect and guarantee the rights established in the Convention. As regards the admissibility of this petition, the petitioners allege that it should be exempt from the requirement of prior exhaustion of domestic remedies stipulated in Article 46(1) of the American Convention, by applying the exception contained in its Article 46(2)(c). On the other hand, the Colombian State has requested the Commission to declare the complaint lodged by the petitioners inadmissible, on the grounds of failure to comply with the requirement of prior exhaustion of domestic remedies stipulated in Article 46(1)(a) of the American Convention.

3. After analyzing the positions of the parties, the Commission concluded that it was competent to consider the petition and that the allegations pertaining to Articles 1(1), 4, 5, 7, 8, and 25 were admissible, in accordance with the provisions of Articles 46 and 47 of the American Convention.

**II. PROCEDURES OF THE COMMISSION**

4. The petition was lodged with the Commission on November 18, 2002, in a communication dated November 15, 2002. The Commission registered the petition as Number P4534/2002, and on November 13, 2003, it transmitted to the State a copy of the relevant parts, granting it a period of two months to submit information on the allegations contained in the petition, in accordance with Article 30(2) of the Rules of Procedure of the IACHR. On January 14, 2004, the Colombian State requested the Commission to grant a 30-day extension of the period for submitting its response. On January 21 2004, the Commission granted the requested extension. On October 13, 2004, the Commission sent a letter to the State in which it reiterated its request to submit its observations on the petition lodged by the petitioners, and its noncompliance with the deadline extended to February 21, 2004. In a communication dated February 23, 2005, the State submitted its response, which was forwarded to the petitioners in a communication dated March 7, 2005, granting the petitioners 30 days to submit their observations.

### **III. POSITIONS OF THE PARTIES**

#### **A. Position of the petitioners**

5. The petitioners indicate that Oscar Iván Tabares Toro was serving as a professional soldier in the Colombian Army, assigned to Mobile Brigade No. 1, Battalion 2, of the Tigre Company of the General Carlos Julio Gil Colorado Artillery School. At the time of the events, the Tigre Company of the General Carlos Julio Gil Colorado Artillery School was camped in the village of Toledo in the Municipality of San Juanito, Department of Meta.

6. The petitioners allege that Oscar Tabares Toro visited his family for the last time in October 1997, and during that visit he commented to his mother, María Helena Toro, that he was having problems with Lieutenant Iván Ramiro Rodríguez Piza, commander of the patrol to which he belonged. They further report that in December 1997, he again communicated with his mother to tell her, in a state of distress, that he had to buy a new tent, because his commanding officer, Lieutenant Rodríguez Piza, "had thrown a lit candle on the tent and it had burned," for no reason whatsoever.

7. The petitioners report that, despite the fact that Oscar Tabares Toro communicated regularly with his family, oddly he did not do so on December 31, 1997, or on January 1, 1998. Consequently, Mrs. María Elena Toro attempted to call the mobile phone of her son, but she was not able to establish contact with him, until on January 6, 1998, she managed to reach one of his companions, who told her that she should call the Artillery School to find out where he was. The petitioners allege that during this conversation, Mrs. Toro hear someone say to the person she was talking to: "tell her the truth."

8. On January 8, 1998, the family of Oscar Tabares traveled to the city of Bogotá for the purpose of visiting the facilities of the General Carlos Julio Gil Colorado Artillery School, as they were advised to do. They state that they were met there by Captain Kell Soler Linares, who was replacing Colonel Germán Galvis, and who told them that the only information he could give them was that "Soldier Tabares Toro threw a grenade at Lieutenant Rodríguez Piza and that he had run away, but they were looking for him." However, the petitioners allege that Mrs. Toro received information from other soldiers in the battalion indicating that on December 28, 1997, Lieutenant Iván Rodríguez Ramírez Piza had attacked Oscar Iván Tabares Toro and tried to asphyxiate him with his gun, and that after that they heard shots. They further report that following those incidents, various soldiers close to Oscar Iván were discharged from the Army.

9. Despite the explanation provided by the military authorities, the petitioners allege that Iván Tabares Toro had not deserted, but had disappeared while he was still on duty, under the jurisdiction and control of the Tigre Company of the General Carlos Julio Gil Colorado Artillery School on December 28, 1997, in the village of Toledo, Municipality of San Juanito. Consequently, on January 8, 1998, Mrs. María Helena Toro filed a report on the disappearance of her son with the Tisquesusa Police Station in Bogotá, which was registered as No. 018, and on January 18, 1998, another complaint of disappearance was lodged with the Public Prosecutor of the Department of Antioquia.

10. The petitioners allege that "inexplicably," on January 20, 1998, the treasurer of Mobile Brigade No. 1, with the authorization of Colonel Galvis, issued an order to the Manager of the *Banco Cafetero* to deliver the savings in the bank account of Oscar Iván Tabares Toro to Mrs. María Helena Tabares.

11. The petitioners report that on April 16, 1998, Colonel Germán Galvis, Chief of Staff of Mobile Brigade No. 1, submitted a report in which he indicated the following: that on December 28, 1997, Soldier Oscar Iván Tabares Toro launched a grenade that detonated in the tent in which Lieutenant Iván Ramiro Rodríguez Piza and Corporal Ernesto Rodríguez Rojas were sleeping, after which he fled; that the occupants of the tent were wounded; that criminal and disciplinary investigations into the event were opened against Soldier Oscar Iván Tabares; that they had gathered testimony regarding the addiction of Oscar Iván Tabares Toro to narcotic substances and his membership in the Medellín militia, which had murdered him. They add that on August 5, 1999, Mobile Brigade No. 1 notified the mother of the alleged victim of the judgment of "Cacique Sugamuxi" Counter-Guerrilla Battalion Command No. 20, dated October 22, 1998, convicting Oscar Iván Tabares Toro for the crime of aggravated homicide.

12. They allege that, in order to collect more information on the whereabouts of her son, Mrs. Toro went to San Juanito, where she managed to speak with some peasants in the area who told her that they had found the remains of a military tent with what appeared to be blood stains at the site where the Army was camped at the time of the disappearance of her son. The petitioners allege that this evidence was delivered to the *Fiscalía General de la Nación* [National Office of the Public Prosecutor], and that on May 1, 2000, they were informed that the results of the test to determine whether they were blood stains were negative.

13. Based on the above-mentioned facts, the petitioners allege that the State violated the rights to juridical personality, life, humane treatment, and personal liberty enshrined in the American Convention, to the detriment of Oscar Iván Tabares Toro. They further allege that the State violated the rights to a fair trial and to judicial protection, considered in conjunction with the general obligation to respect and guarantee the rights protected by the Convention, to the detriment of the alleged victim and his next of kin, since the authorities have not conducted an effective and a full investigation into the disappearance of Oscar Tabares Toro.

14. As regards the admissibility of the petition, the petitioners allege that the exception to the rule of prior exhaustion of domestic remedies stipulated in Article 46(2)(c) of the Convention applies to this case, in view of the unwarranted delay in resolving the case. They point out that the criminal investigation has been in the preliminary stage since it was opened in January 1998. They believe that this situation amounts to a denial of justice, due to the unwarranted delay, which is a manifestation of the ineffectiveness of the criminal investigation and calls for application of the exception to the rule of prior exhaustion of domestic remedies stipulated in Article 46(2)(c) of the American Convention.

### **Position of the State**

15. The State is of the opinion that the petitioners' complaint is inadmissible due to application of the requirement of prior exhaustion of domestic remedies set forth in Article 46(1) of the American Convention. On this point, it indicates that domestic proceedings to clarify the events that led to the alleged forced disappearance of Mr. Tabares Toro and the possible responsibility of State agents are pending resolution.

16. More specifically, the State points out that the National Human Rights Unit of the *Fiscalía General de la Nación* is conducting a criminal investigation, assigned No. 463, which is in the preliminary investigation stage. The State alleges that to assess the reasonability of the period of time referred to in Article 46(2) of the American Convention, it is necessary to consider various external factors that have influenced this case, such as the complexity of the events, the actors involved,

and the fact that it is impossible for the authorities to have easy and safe access to the areas where they need to go to gather evidence. In this regard, it indicates that the *Fiscalía* has reported that “both the SIJIN, and the National Army and CTI Office in Villavicencio have concurred on how difficult it is to gain access to the area due to the prevailing situation of law and order there, which has prevented any possible measures to exhume a body.”<sup>1</sup>

17. In addition, the State reports that the *Procuraduría Disciplinaria para la Defensa de los Derechos Humanos* initiated a preliminary inquiry in order to determine if there was a breach of discipline related to the events of this case, and if so, to identify and punish the responsible parties. In this regard, it indicates that the *Procuraduría Disciplinaria* closed the preliminary inquiry due to a lack of evidence to support charges against the commanding and deputy officers attacked by Mr. Tabares Toro.

18. In reference to the investigation that was conducted by the 28th Military Criminal Prosecutor’s Office [*Fiscalía*], the State reports that “it is not known whether Mr. Tabares Toro was convicted in lower court for the crime of attempted homicide and whether the judgment was appealed,” in which case the appeal could be the appropriate way to terminate proceedings regarding the alleged violation.<sup>2</sup> On this point, the State maintains that in the event that the criminal judgment is final and *res judicata*, the next of kin of the alleged victim could have recourse to *acción de tutela* [a special constitutional remedy], since in accordance with Colombian constitutional case law, this is a legal recourse against unlawful judicial decisions.

19. In addition, the State alleges that there are two remedies that have not been exhausted by the petitioner: action for direct reparations brought before a jurisdiction that reviews administrative court decisions; and, *acción de tutela*. The State contends that these legal actions are adequate remedies that the petitioners should have made use of in this case. As regards the action for direct reparations, the State maintains that such a remedy is available and could be applied by the petitioners despite the time elapsed since the alleged disappearance of Mr. Tabares Toro, in accordance with Article 7 of Law 789/2000, which establishes that “the statute of limitations of action for direct reparations based on the crime of forced disappearance shall be counted from the date on which the victim appears or, failing that, from the date of the final judgment handed down in the criminal proceedings, notwithstanding the fact that such action could be brought at any time after the events giving rise to the disappearance occurred”.

20. On the basis of these elements, the State argues that it rules out application of any of the exceptions contained in Article 46(2) of the American Convention. In this regard, the State requests that the petition presented by the petitioners regarding its responsibility in the acts related to the alleged forced disappearance of Mr. Tabares Toro and the lack of judicial clarification be declared inadmissible.

### **III. ANALYSIS ON ADMISSIBILITY**

#### **A. Jurisdiction**

21. In principle, the petitioners are authorized by Article 44 of the American Convention to lodge petitions with the Commission. The petition states that the

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1 Ministry of Foreign Affairs, Department of Human Rights and International Humanitarian Law, Communication No. 8755, February 23, 2005.

2 Ministry of Foreign Affairs, Department of Human Rights and International Humanitarian Law, DDH 8755, February 23 2005.

alleged victims are physical persons, in respect of whom the Colombian State undertook the obligation to respect and guarantee the rights established in the American Convention. Colombia has been a State party to the American Convention since July 31, 1973, the date on which it deposited the relevant instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

22. Similarly, the Commission has jurisdiction *ratione loci* to consider the petition, since it alleges violations of rights protected by the American Convention that took place under the jurisdiction of the State. The Commission has jurisdiction *ratione temporis* to examine the petition, since the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State on the date that the events alleged in the petition occurred. Finally, the Commission has jurisdiction *ratione materiae*, because the petition reports possible violations of human rights protected by the American Convention.

## **B. Requirements for admissibility of the petition**

### **1. Exhaustion of domestic remedies**

23. The State alleges that the petitioners' complaint should be declared inadmissible, due to failure to meet the requirement of prior exhaustion of domestic remedies stipulated in Article 46(1) of the American Convention, and to failure to make use of all adequate domestic means to remedy the alleged violations. The petitioners, on the other hand, allege that the exception to the requirement of prior exhaustion of domestic remedies stipulated in Article 46(2) of the American Convention is applicable, by virtue of the delay and ineffectiveness of the criminal investigation.

24. In view of the allegations of the parties, first it is necessary to clarify the domestic remedies that must be exhausted in a case such as the present one, in the light of the jurisprudence of the inter-American system. The Commission's case law establishes that whenever a crime liable to prosecution by the State is committed, the State has the obligation to promote and expedite criminal proceedings until their final consequences,<sup>3</sup> And that, in such cases, this is the best way to clarify the facts, judge the perpetrators, and establish the corresponding criminal punishment, in addition to providing for other monetary reparations. The Commission considers that the events described by the petitioners involve the alleged violation of fundamental rights, such as the right to life, to humane treatment, and to personal liberty, which are regarded under domestic legislation as crimes liable to prosecution by the State, which is also expected to promote the corresponding investigation and prosecution.

25. In this regard the Inter-American Court has held that only adequate remedies to rectify the alleged violations are expected to be exhausted. "Adequate" remedies means that the function of those remedies in the context of the domestic legal system is suitable for protecting the violated legal situation. In all domestic legal systems, there are many remedies, but not all are applicable in all circumstances. If in a specific case, the remedy is not adequate or appropriate, it is evident that it does not have to be exhausted. This is consistent with the principle that rules or laws are designed to produce an effect, and cannot be interpreted in the sense that they do not produce an effect or that their result would be clearly absurd or unreasonable.<sup>4</sup>

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<sup>3</sup> Inter-American Commission, Report N° 52/97, Case 11,218, Arges Sequeira Mangas, 1997 *Annual Report of the IACHR*, paragraphs 96 and 97. See also *Report N° 55/97*, paragraph 392.

<sup>4</sup> Inter-American Court, Case of Velásquez Rodríguez, Judgment of July 29, 1988, paragraph 63

26. In the case in point, the State alleges that the petitioners should have availed themselves of remedies linked to the jurisdiction that reviews final administrative court decisions, such as *acción de tutela*, before taking their case to the Commission. However in cases involving allegations of presumed human rights violations, such as those reported in this case, the IACHR has established that the decisions of administrative review courts are exclusively mechanisms for supervision of the administrative operations of the State designed to obtain compensation for damages caused by abuse of authority.<sup>5</sup> In general, this type of procedure, like the *recurso de tutela*, does not constitute an adequate mechanism in and of itself to compensate for human rights violations such as the ones reported, or to satisfy the duty of judicial clarification of crimes. Therefore, it is not necessary for this type of remedy to be exhausted in a case such as the present one. In addition, it is appropriate to clarify whether the *acción de tutela* referred to by the State has to do with a proceeding against Soldier Tabares Toro that is not related to the acts reported by the petitioners pertaining to the forced disappearance of the soldier in question.

27. As for application of the exception to compliance with the requirement of exhaustion of domestic remedies invoked by the petitioners, Article 46(2) of the Convention establishes that this requirement is not applicable 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.

In their petition, the petitioners invoke application of the exception related to unwarranted delay in the administration of justice, based on the duration of the preliminary investigation stage in the proceedings opened in the present case, which has extended over a period of more than four years. The State, for its part, alleges that the prolonged time of the preliminary stage is reasonable, in view of the complexity of the investigation and the impossibility of gaining access to the area where the events occurred in order to complete the taking of evidence.

28. The Commission notes that, in accordance with the information provided by the parties, over six years have elapsed since the beginning of the preliminary investigation, and that the investigation has not even yet resulted in the first stage of a criminal trial. On the basis of the elements of proof produced in the past six years, the whereabouts of Iván Tabares Toro has not been determined and the persons presumably responsible for his forced disappearance have not been identified.

29. In this regard the IACHR has repeatedly maintained that criminal investigations must be conducted promptly, in order to protect the interests of the victims, preserve the evidence, and even to safeguard the rights of any persons considered as suspects in the context of the investigation. According to the Inter-American Court, although any criminal investigation must comply with a series of legal requirements, the rule of prior exhaustion of domestic remedies should not lead

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<sup>5</sup> IACHR, Report N° 15/95, 1995 Annual Report of the IACHR, paragraph 71; Report N° 61/99, 1999 Annual Report of the IACHR, paragraph 51.

to a situation in which international proceedings for assistance to the victims are detained or delayed to the point of futility.<sup>6</sup>

30. In conclusion, given the characteristics and context of this petition, the Commission considers that the exception stipulated in Article 46(2)(c) of the American Convention is applicable, in view of the meager prospects that available remedies would be effective. Consequently, the requirements pertaining to exhaustion of domestic remedies stipulated in the American Convention are not applicable.

31. Finally, application of the exceptions to the rule of exhaustion of domestic remedies stipulated in Article 46(2) of the Convention is closely linked to determination of possible violations of certain rights enshrined in it, such as guarantees of access to justice. However Article 46(2), by its nature and purpose, is a rule whose content is independent of the substantive provisions of the Convention. Therefore, a determination as to whether the exceptions to the rule of exhaustion of domestic remedies stipulated in that Article are applicable to the case in point should be made prior to and independently of an examination of the merits of the case, since it relies on a different standard of evaluation than the one used to determine whether or not there was a violation of Articles 8 and 25 of the Convention. It should be noted that the causes and effects that prevented exhaustion of domestic remedies in this case will be analyzed in the report adopted by the Commission on the merits of the case, with a view to determining whether they in fact represent violations of the American Convention.

## **2. Time for submitting the petition**

32. The IACHR has established *supra* that in the present case, the requirement stipulated in Article 46(1)(b) of the American Convention is not applicable. However, the conventional requirements of exhaustion of domestic remedies and presentation within the period of six months of the decision indicating such exhaustion are independent. Therefore, the Commission must determine whether the petition under consideration was presented within a reasonable period of time of the date on which the actual events comprising the present case occurred. In this regard, it is important to note that the events alleged by the petitioner related the right to life, to human treatment, and to liberty of Oscar Tabares Toro took place on December 28, 1997, and the original petition was received on November 18, 2002. Consequently, the Commission considers that the period elapsed was reasonable in view of the circumstances of this petition.

## **3. Duplication of proceedings and *res judicata***

33. The case files of the petition do not contain any information that could lead one to conclude that this matter is pending settlement in another international proceeding or that it has been previously decided by the Inter-American Commission on Human Rights. Therefore, the IACHR concludes that the requirement stipulated in Article 46(1)(c) of the American Convention has been met.

## **4. Characterization of the alleged facts**

34. The Commission is of the opinion that the allegations of the petitioners regarding the presumed violation of the right to life, to humane treatment, and to

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<sup>6</sup> Inter-American Court, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987 paragraph 93.

personal liberty, and the guarantees of due process and judicial protection, could characterize a violation of the rights guaranteed in Articles 3, 4, 5, 7, 8, and 25, considered together with Article 1(1), of the American Convention. Since these aspects of the petition are not manifestly without a basis or grounds, the Commission considers that the requirements established in Articles 47(b) and (c) of the American Convention have been satisfied.

35. The Commission concludes that it is competent to consider the complaints filed by the petitioners regarding the alleged violation of Articles 3, 4, 5, 7, 8, and 25, considered together with Article 1(1) of the American Convention, to the detriment of Oscar Iván Tabares Toro and his family, and that they are admissible, in accordance with the requirements established in Articles 46 and 47 of the American Convention.

## **V. CONCLUSION**

36. The Commission concludes that it is competent to consider this matter and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention. On the basis of the factual and legal arguments set forth in this report, and without prejudging the merits of the matter,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

#### **DECIDES:**

1. To declare the present case admissible, as it pertains to possible violations of Articles 1(1), 3, 4, 5, 7, 8, and 25 of the American Convention on Human Rights.
2. To notify the parties of this decision.
3. To continue with an analysis of the merits of the case.
4. To publish this decision and 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 Washington, D.C., on the 13th day of October, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez, Commissioners.