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Title/Style of Cause:	Panamanian Victims v. United States
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Decided by:	Chairman: Dr. Oscar Luján Fappiano; First Vice Chairman: Prof. Michael Reisman; Second Vice Chairman: Dr. Alvaro Tirado Mejía; Members: Mr. Oliver H. Jackman; Dr. Leo Valladares Lanza; Dr. Marco Tulio Bruni-Celli; Mr. Patrick L. Robinson
Dated:	13 October 1993
Citation:	Panamanian Victims v. U.S., Case 10.573, Inter-Am. C.H.R., Report No. 31/93, OEA/Ser.L/V.85, doc. 9 rev. (1993)

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BACKGROUND

1. This case concerns claims arising from military action taken by the United States in Panama in December of 1989. Just before midnight on December 19, 1989, the United States initiated a military operation in Panama aimed at removing from power the regime of General Manuel Noriega. The operation involved the mobilization of approximately 24,000 U.S. troops. In an assault backed by helicopters, gunships and tanks, U.S. paratroopers, infantry and marines took control of Panama City on December 20, 1989.

2. In the early morning of December 20, the coalition Government of Guillermo Endara, believed to have won the May, 1989 elections, was sworn in and announced the formation of a new administration. General Noriega, who had taken refuge at the residence of the Papal Nuncio, surrendered to U.S. authorities on January 4, 1990, and was taken to the U.S. for arraignment on drug trafficking and money laundering charges.

3. Isolated elements of the Panamanian Defense Forces continued armed resistance until January 31, 1990. The additional U.S. forces deployed in Panama for the invasion were withdrawn by February 13, 1990.

The Complaint

4. The petitioners submitted sixty petitions on behalf of named victims, and on behalf of all other Panamanians similarly harmed by the invasion, on May 10, 1990. Pursuant to the receipt of certain supplementary information, the petitions were consolidated and this case was opened July 2, 1993. The victims are identified as civilian Panamanians, and in several instances non-citizen residents of Panama, who did not engage in combat, but nonetheless suffered the death of family members, personal injury, and destruction of homes and property as a direct result of indiscriminate military action carried out by U.S.

forces during the December 1989 invasion of Panama. (See attached list naming petitioners and victims in this case.)

5. The complainants dispute the official U.S. count of 202 civilian and 314 military Panamanians killed as a result of the invasion, noting that independent sources have estimated many more civilian deaths. A number of civilians disappeared, and were buried in mass graves with other victims of the invasion.

6. Numerous civilians were wounded, and approximately 18,000 civilians remain homeless due to the destruction of their homes by the invasion. Many of the homeless live in crowded refugee camps such as the Albrook Encampment.

7. "Residential areas of El Chorrillo, in Panama City and in the City of Colon and many other locations were indiscriminately bombed and fired upon."

8. The complainants contend that the U.S. Government violated the fundamental principles of non-intervention of the OAS Charter. Articles 18 and 20 categorically prohibit military action by one member state against another. The intervention as well raises Article 27 which provides that acts of aggression against the sovereignty of one American State will be considered an act of aggression against the other American states.

9. In addition, petitioners claim that the U.S. military forces acted in "an indiscriminate manner with reckless disregard for the safety of Panamanian civilians during the U.S. military operations in Panama" in gross violation of the following Articles of the American Declaration of the Rights and Duties of Man:

Article I..... the right to life, liberty, and security
Article VII..... the right to protection of mothers and children
Article IX..... the right to inviolability of the home
Article XIV..... the right to work
Article XXIII..... the right to property
Article XXVIII.... the right to security for all, and the petitioners' "just demands of the general welfare and advancement of democracy."

As a consequence of this intervention in violation of the prohibition on intervention of the OAS Charter, and in violation of the rights of the individual set forth in the American Declaration, the United States should be held responsible for compensating civilian victims who suffered loss of life, personal injury and destruction of property. The complainants note that the OAS Permanent Council has recognized the gravity of the U.S. intervention in Panama and its consequences.

10. The complaint alleges other violations of international law, including Article 3 of the OAS Charter, Article 2(4) of the United Nations Charter, common Article 3 of the 1949 Geneva Conventions and Articles 51, 52, and 57 of Protocol I to the Geneva Conventions.

11. The complainants contest justifications invoked by the U.S. for its actions. They assert that the circumstances in Panama just prior to the invasion did not rise to the level of a threat of imminent armed attack required to invoke the self-defense exception of Article 51 of the UN Charter, nor did the circumstances interfere with the functioning of the Panama Canal as required to invoke the provisions of the Canal Treaty. Petitioners note that the UN Commission on Human Rights "denounced the U.S. violation of international law and human rights in Panama."

12. The petitioners request that the Commission:

a. Declare that the United States military intervention in Panama was illegal and violative of the OAS Charter;
b. Declare that the human rights of Panamanian civilian victims were violated under the American Declaration of the Rights and Duties of Man;
c. Declare that the United States violated principles of non-intervention, the inviolability of sovereignty and human rights under the UN Charter, the Geneva Convention, the Geneva Protocols, the Panama Canal Treaty of 1977, and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977, according to its obligation to abide by international law under Article 3 of the OAS Charter;
d. Declare that as a consequence of the United States' violation of international law and the resulting damage to the lives, homes, and property of Panamanian victims, the United States should compensate Panamanians who have suffered damages and other losses;
e. Conduct a full and independent investigation...into the U.S. intervention in Panama to determine the complete damage, injuries, and losses to the Panamanian people;
f. Call for the United States to indemnify all individual Panamanian complainants herein in the total amount of $250 million U.S. dollars for the loss of life, personal injuries, and property damages resulting from the U.S. military operations in Panama;
g. Engage in such actions as will help secure that Panamanian victims of the U.S. military intervention are compensated.
In particular that the Inter-American Commission on Human Rights should:
i. Demand action by the United States to indemnify all Panamanian victims of the U.S. military invasion and operations in Panama;
ii. Report to the OAS all violations of international law and human rights by the United States and to seek that [the] OAS take appropriate action to secure the integrity, sovereignty, and self-determination of Panama; and
iii. Demand action by the OAS to have the United States indemnify all Panamanian victims who suffered from the illegal intervention in Panama.
h. Call for the immediate withdrawal of all U.S. military forces from Panama;
i. Demand that the United States adhere to all the principles of international law, including the OAS Charter, the American Declaration of the Rights and Duties of Man, and all other international laws, treaties and norms as the Inter-American Commission deems appropriate;
j. Conduct hearings on this case before the Inter-American Commission;
k. Take all necessary actions to bring this case before the Inter-American Court;
l. Order such other remedies or actions as the Inter-American Commission sees just and proper.

Additional Information Submitted by Petitioners

13. The claimants provided additional information concerning the exhaustion of domestic remedies in a submission dated June 29, 1990. First, petitioners assert, there is no jurisdiction for claims against the United States in Panamanian courts. Pursuant to Article VIII of the Panama Canal Treaty of 1977, agencies and instrumentalities of the United States are immune from suit in Panamanian courts. The treaty, as domestic law in Panama, precludes the possibility of such a suit, and denies petitioners access to remedies in Panamanian courts.

14. Second, the rule of law was inoperative in the post-invasion conditions. Civil functions were halted and taken over by U.S. forces; the U.S. forces have been restructuring civil functions since December 20, 1989. "It is inconceivable that the petitioners could receive due process in a challenge to the legality of the invasion from the judicial system installed as a result of that invasion."

15. Third, the relevant domestic forum in which they are required to bring claims is that of the

Panamanian judiciary. Nonetheless, petitioners have attempted in numerous cases to have their claims for indemnification resolved through the U.S. army claims program. In each of these cases the claims were denied. Furthermore, this method of resolution is incapable of addressing the petitioners' human rights claims.

16. Fourth, petitioners should not be required to bring suit in the courts of the United States because U.S. courts do not recognize a right to sue the Government or its officials for the type of acts alleged in this case. See, Saltany v. Reagan,886 F.2d 438, 441 (D.C. Cir. 1989)

The Government's Response

17. By a note dated January 4, 1991, the respondent Government filed its response to the petitioners' complaint. The Government denies that it engaged in the human rights violations alleged, and maintains that the Commission should find the complaint inadmissible pursuant to Article 32 of its Regulations. The respondent Government contends: (1) that the Commission does not have competence over the subject matter of the case and (2) that domestic remedies have not been exhausted.

18. With regard to the facts at issue, the U.S. Government points out that it engaged in diplomatic efforts throughout General Noriega's regime to persuade him to step down, particularly following his indictment by a U.S. grand jury. The U.S. Government notes General Noriega's invalidation of elections presumably won by the opposition, and Noriega's execution of the leaders of an unsuccessful coup attempt soon after. "On December 15, 1989, at the instigation of Manuel Noriega, the Noriega-controlled National Assembly declared without provocation that a state of war existed between the Republic of Panama and the United States." Following that announcement, several attacks on U.S. personnel or their dependents were carried out by Panamanian Defense Forces personnel.

19. The U.S. Government asserts that President-elect Endara and his vice-presidents welcomed the intervention when advised of it before the additional deployment of U.S. troops landed in Panama, and that President Endara again welcomed it after his swearing-in. The Government characterizes the actions of its military as "limited to what was necessary and proportionate, and were specifically designed to minimize (to the extent possible) injury and loss to civilians and civilian property."

20. With respect to the issue of the Commission's competence, the U.S. Government is of the view that this petition "seeks to draw the Commission into areas that exceed the scope of its competence as it has been spelled out in Article 111 of the OAS Charter and Articles 1, 18, and 20 of the Commission's Statute."

21. The respondent Government argues that Article 111 of the OAS Charter and Article 1 of the Commission's Statute establish the Commission as a "consultative organ" of the OAS, not a body with the inherent power to adjudicate issues and pronounce remedies that exceed the powers that have been accorded to it. Consequently, in the view of the U.S. Government, the Commission "may only review the instant human rights allegations in reference to the American Declaration, which is an agreed statement of non-binding general human rights principles."

22. The petitioners are asking the Commission to determine two issues clearly beyond its mandate and purpose:

(i) whether the United States was justified under the OAS and UN Charters in using military force in Panama for the purposes stated, and
(ii) whether, in undertaking those actions, the United States properly complied with international legal instruments and customary international law governing the treatment of non-combatants during

times of armed conflict.

23. The Government contends that its actions were consistent with the OAS and UN Charters, and with the 1949 Fourth Geneva Convention. It notes that it is not a party to Convention Protocol I.

24. The U.S. Government considers that the petitioners' claims "are wholly dependent upon proof of alleged violations of the Fourth Geneva Convention of 1949 and other international instruments governing the use of force and the law of armed conflict." The OAS Member States did not expressly or implicitly consent to the competence of the Commission through its Statute to adjudicate matters concerning that complex and discrete body of law. In the view of the respondent Government those legal authorities are "extraneous to and fall outside the scope of the Commission's jurisdiction to interpret or apply."

25. The respondent Government maintains that the Commission is not an appropriate organ to apply the provisions of the Fourth Geneva Convention to the United States since the U.S. has not given "express authority" to the Commission to do so. The Fourth Geneva Convention "provides a wholly separate series of internal procedures and remedies for its enforcement, including the use of protecting powers, the activities of the International Red Cross and its national counterparts, and the conducting of inquiries. There is no basis in the Commission's mandate to preempt, disregard or attempt to enforce these procedures and remedies."

26. Further, the American Declaration was adopted in 1948, predating the existence of the Fourth Geneva Convention signed in 1949. Thus it cannot be asserted that the Declaration was adopted with the intention to encompass the principles of the Fourth Geneva Convention.

27. The respondent Government claims that the petitioners have failed to exhaust all available local remedies in both Panama and the United States prior to bringing this claim before the Commission.

(a) The respondent Government maintains that "while it may be true that under Article VIII(2) of the Panama Canal Treaty, United States agencies and instrumentalities may not be sued in the courts or other tribunals of Panama, petitioners have not addressed in their pleadings the possibility of pursuing their claims against the Government of Panama through local judicial, administrative or other available procedures in Panama." The U.S. Government asserts that the Endara Government affirmatively endorsed and approved the United States military operation in question. It also notes that the action of the Panamanian Defense Forces contributed to the losses. The respondent Government maintains that "the Panamanian judiciary is independent and functioning."

(b) With regard to the exhausting of local remedies by filing administrative claims, as of January 14, 1991, the United States Government could only verify that twenty of the named petitioners submitted claims to the Army Claims Service. All of these claims have been reviewed and denied according to the U.S. Army South Command claims service in Panama. The respondent Government points out that "the U.S. Army has in fact paid some claims arising from the military operation," which demonstrates the need for all petitioners to file administrative claims.

(c) As to the exhausting of domestic remedies by filing judicial claims, the respondent Government notes that as of January 14, 1991, "there were pending not less than four lawsuits before the courts of the United States brought by Panamanian nationals, both individuals and juridical persons, seeking damage awards against the United States Government arising out of the U.S. military operation in Panama." (See, Cencal, S.A., et al. v. United States of America, Civil Action No. 90-1966 JGP; Panamuebles, S.A. et al. v. United States of America, Civil Action No. 90-2266 SSH; Industria Panificadora, S.A., et al. v. United States of America, Civil Action No. 90-1694 SSH; and Lindo and Madura, S.A. v. United States of America, Civil Action No. 90-2589.)

(d) Respondent Government continues that the litigation position of its Executive Branch is that

because the Government has not waived its sovereign immunity with respect to the claims asserted in those cases, the claims must be dismissed for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted. The courts have not yet decided this jurisdictional issue. Even if, however, the courts dismiss the claims, those plaintiffs will have a full opportunity to appeal any adverse decisions.

28. The Government contends that the petition is inadmissible with regard to the unnamed Panamanian civilians similarly harmed. The Government particularly notes Article 32.a of the Commission's Regulations, which specifies that the name of the complainant should be included in the complaint.

29. The Government contends as well that the individual petitions lack the detail and particularity necessary to support a finding as to how the damage complained of was caused. The Government cites two examples of individual petitions that do not supply sufficient information as to time and causation; and argues that "this lack of specificity falls far short of the kind of `required' information contemplated by Article 32.b and .c."

30. Lastly, the respondent Government points out that "the one billion dollar infusion of U.S. foreign assistance program benefits for the Panamanian economy and people should be taken into account in deciding the issue of exhaustion of remedies."

31. The respondent Government gave Panama $42 million for the "housing of those displaced from the Chorrillo area, for emergency public works and to help businesses affected by the looting." An additional $420 million has been made available for balance of payments support, public investment, and development support to enhance Panama's relations with international financial institutions." The funds are being used for job creation, private sector reactivation, judicial reform and improving police services.

32. The aid package "represents a broad effective program for the Panamanian people as a whole. It is a far more appropriate approach to the needs of the Panamanian people - regardless of the reasons or causes of their injuries - than any piecemeal adjudication of isolated, random individual claims that cannot be determined with any significant degree of accuracy."

Petitioners' Observations

33. In a communication dated February 12, 1991, the petitioners presented their observations to the Government's response. In their communication, the petitioners respond to the U.S. position that domestic remedies have not been exhausted, as follows:

(a) The requirement of "exhaustion of domestic remedies is not an inflexible or rigid rule of law." Case 9102 (Nicaragua), Resolution 29.86, April 16, 1986, p. 64. There exist exceptions to the rule in the interest of avoiding denial of justice. Panamanian petitioners assert the nonavailability of domestic remedies in light of the denial of justice inherent in an illegal invasion under international law that results in human rights abuses;

(b) As domestic law in Panama, the Panama Canal Treaty precludes a suit against the United States in the Panamanian courts;

(c) With respect to the U.S. assertion that it is the Panamanian and not the U.S. Government that should be sued due to the Endara Government's affirmative approval and endorsement of the invasion, petitioners state that "Guillermo Endara was faced with a fait accompli...[t]he United States made its plans to invade well before December 20, 1989...Guillermo Endara was informed of the invasion just `[b]efore the additional US forces had landed'...Guillermo Endara stated unequivocally prior to the invasion that he was not in accord with military intervention by any country."

(d) Petitioners assert that the Panamanian judicial system is not an independent one. The fact that the United States is involved in restructuring and re-establishing governmental and judicial systems is evidence of the fact that "those systems are still imbued with corruption and injustices."

(e) Citing the Velasquez Rodriguez case, the petitioners argue that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective." In Panama, the petitioners allege, more than a thousand people have been jailed for months without having been charged, so that even if the U.S. were capable of being sued in Panama, the system is incapable of processing the many claims arising from the U.S. invasion and is therefore inaccessible and ineffective as a remedy.

(f) The petitioners argue that the army claims service has been proven an ineffective remedy. Although the Government states that it has paid some claims, petitioners assert that no claims made by Panamanian nationals for the type of damages at issue in the instant case have been paid. In addition, petitioners point out that no legislation has been passed by the U.S. Congress to compensate Panamanians for loss of life, injuries, and other damages resulting from the invasion of Panama.

(g) The petitioners reiterate that forcing Panamanians to file in the United States, a foreign jurisdiction, would not be a "domestic" remedy as required by Article 37 of the Commission's Regulations.

(h) The petitioners note that the Government cites four cases pending before the U.S. District Court for the District of Columbia to suggest that remedies in the instant case are indeed available through the U.S. courts. The four cases, however, are brought on behalf of corporate businesses that seek to recover for economic losses on the theory that the United States had an obligation during and after the invasion to control the looting and other acts by Panamanians that led to their losses. These are fundamentally different claims based on different laws than are those brought by the Panamanian petitioners in this case.

(i) The U.S. denies any legal obligation to compensate victims. An internal U.S. Military Memorandum clearly states that under U.S. law the Foreign Claims Act, 10 U.S.C. Sec. 2734, prohibits compensation for damages incurred during combat, and that no exception should be made to allow for compensation in the case of the Panama invasion. In addition, the Memorandum states that, "a program similar to the USAID program in Grenada would not be in the best interest of the Department of Defense or the United States because of the potentially huge number of such claims."

(j) The U.S. pledge of $1 billion in assistance has not remedied the petitioners' losses. In fact, the President's request for funding was later reduced to $600 million, and the legislation passed by Congress only authorized $420 million. As the U.S. owes Panama at least $450 million in Canal fee payments, and for U.S. military bases on Panamanian soil - the $420 million does not even meet the debt owed to Panama. "Moreover, the $42 to 50 million that was sent to Panama did not go into `housing the displaced from the El Chorrillo area' as promised by President Bush, but instead went to make up for the U.S. debt."

34. The petitioners also take issue with the Government's contention, first, that the Commission is limited to fulfilling the role of a "consultative organ," and, second, that the claims fall primarily in the purview of the 1949 Geneva Convention and thus, the Commission lacks jurisdiction to hear this case. Petitioners cite the admissibility decision in Disabled Peoples' International et al. v. the United States, Case 9213 (United States)(1987) for the argument asserted in the claimant's case that the Commission was competent to hear cases such as the instant case under its OAS Charter, Article 112, mandate to "promote the observation and protection of human rights."

The Government's Observations

35. In a communication dated May 9, 1991, the respondent Government presented its observations to the reply of the petitioners dated January 14, 1991. This communication made the following point regarding the issue of the exhaustion of domestic remedies:

36. The United States District Court for the District of Columbia dismissed a lawsuit (Industria

Panificadora, S.A., et al. v. United States of America, Civ. Action No 90-1694) that had been filed against the United States Government by "Panamanian business firms seeking damages for the looting, burning and destruction of their commercial properties by Panamanian civilians during the breakdown of law and order that occurred when US Armed Forces and the Panamanian Defense Force were militarily engaged." The court also expressly disposed of sixteen related suits brought by other Panamanian plaintiffs seeking to recover money damages. "[I]t has been and remains the position of the United States Government that the United States has not waived its immunity from suit with respect to the claims asserted by the Industria plaintiffs," but that the matter remains in litigation and "is on appeal before the United States Court of Appeals for the District of Columbia Circuit." An affirmation on appeal would indicate a more substantial basis to conclude that effective judicial remedies in the United States are unavailable to petitioners.

37. The Government disputes the petitioners' assertion that the U.S. Congress has not passed legislation to provide compensation for Panamanian citizens' losses. The Government points out the enactment of the "Urgent Assistance for Democracy in Panama Act of 1990" (P.L. 101-401), which authorizes shelter and housing guarantees of $12.5 million for 2500 citizens of the El Chorrillo area.

The Petitioners' Response

38. Petitioners filed an additional reply dated May 9, 1991, which essentially reiterated their earlier arguments on certain issues.

39. With regard to the interim occurrence of the summary dismissal of Industria Panificadora and the related cases, the petitioners assert this as clear proof that U.S. law provides no remedies for these types of claims.

40. The petitioners characterize the Government's emergency assistance as "minimal."

The few shelters that have been constructed in the Chorrillo district are considered among the residents of El Chorrillo and elsewhere to be inhumane and unsafe. These shelters have no windows, are poorly constructed and are dangerously small....No one is receiving any assistance which is comparable to the amount of losses they sustained.

41. On September 19, 1991, a hearing was held before the Commission in which oral presentations were made by the petitioners' and the Government's representatives on the issue of admissibility. At that time the petitioners' representative presented 212 additional individual petitions to be included in this case (see the list of petitioners and victims attached).

Petitioners' Supplemental Petition

42. These 212 petitions join to the case additional Panamanian civilian victims who suffered death, personal injury, and destruction of homes and property as a direct result of the U.S. invasion of Panama. (The additional petitioners are included in the list attached.) They bring claims on their own behalf, on behalf of those named, and on behalf of those similarly situated. "No other remedies are available to them to address the illegality of the U.S. invasion and to seek indemnification for their losses resulting from the illegal military intervention." The supplemental cases present further evidence of the "massive destruction and profound victimization" caused by the U.S. actions in violation of the OAS Charter and the American Declaration.

Additional Information Submitted by the Petitioners

43. By a note dated March 12, 1992, the petitioners' representative advised the Commission that the United States Court of Appeals for the District of Columbia had, in its decision of March 6, 1992, affirmed the lower court's denial of access to any remedy through the U.S. courts for damages suffered by Panamanian business enterprises as a result of the invasion. The decision, Industria Panificadora, S.A. et al. v. United States, No. 91-5147 (D.C. Cir. 1992), further verifies that U.S. legislation does not provide any remedy for the claims presented by the petitioners in this case. The decision shields discretionary governmental decisions to engage in military action from tort liability.

44. By a note dated July 1, 1992, the petitioners submitted information they assert shows that U.S. Government economic aid to Panama "has not gone and was never intended to serve the poor who were disproportionately harmed by the 1989 U.S. invasion of Panama." The submission asserts that U.S. economic aid has not significantly affected the economy or underlying political instability; that 70% of the funds aimed at helping the poor and assisting democratic institutions have yet to be disbursed; that too much was spent on the banking sector; that the primary portion of the aid went to pay debt, improve infrastructure and provide business credit.

45. By a note dated July 9, 1992, the petitioners advised the Commission that the Fourth Circuit Court of Appeals had affirmed the lower court ruling in Goldstar (Panama), et al. v. United States of America, No. 91-2229 (4th Cir. 1992) that held that subject matter for claims such as those before the Commission did not exist in U.S. courts. This holding, and the Industria Panificadora holding, the petitioners assert, provide conclusive proof that the remedies requested in this case are not available through the U.S. court system.

46. By a note dated July 31, 1992, the petitioners submitted the text of a U.S. General Accounting Office Report to the Chairman of the Subcommittee on Foreign Operations, entitled "Aid to Panama: Improving the Criminal Justice System." The petitioners assert that this report shows that the Panamanian judiciary is still troubled by serious problems, including a severe backlog of cases; a lack of experienced judges; untrained court personnel; and prolonged detention without trial.

The Government's Observations

47. Pursuant to the Commission's reiteration of its request for information in the case of July 29, 1992, the United States Government filed its observations on September 16, 1992.

48. The Government first addresses the question of U.S. remedies available to the petitioners.

(a) The Government submits that the Federal Tort Claims Act, 28 U.S.C sections 2671-2680, is the only tort claims statute that provides a judicial remedy against the United States Government in the courts of the United States. The Government concedes that this Act does not apply to the petitioners' claims because the claims arose overseas, and because the Act prohibits compensation for claims arising out of combat activities of U.S. armed forces.

(b) The Foreign Claims Act, 10 U.S.C. section 2734, authorizes Department of Defense payment to "foreign inhabitants." The statute prohibits compensation for claims arising from hostile action or directly or indirectly arising from the activities of U.S. forces in combat.

(c) Article 20(8) of the Agreement in Implementation of Article IV of the Panama Canal Treaty, 33 UST307; 1280 UNTS 201, specifies that tort claims against the U.S. Government will be processed through the authority provided in the Foreign Claims Act, whether the claim is accepted, denied, or lack of authority to pay a claim is decided.

49. The Government provides the following figures of claims heard as of September 16, 1992, by the Army Claims Service:

(a) Total Operation Just Cause Claims: 2,884
(b) Total Dollar Amount Claimed: $372,706,376.15
© Chart Breakdown:

TYPE OF CLAIM	NUMBER	AMOUNT CLAIMED	AMOUNT PAID
Personal Injury	111	$21,116,746.38	$6943.19
Wrongful Death	104	$69,295,127.21	$ 00.00
Property Damage	2669	$282,723,310.69	$1,289,158.26
Real Property	772	$33,515,183.82	$98,365.78

Fewer than 100 of the claims were brought by U.S. citizens, the remainder by Panamanians.

50. The Government concedes that, in view of recent U.S. court rulings upholding the argument that the Government had not waived its immunity to suit by the Panamanian plaintiffs and therefore the courts lacked subject matter jurisdiction, the Government "considers it unlikely that the petitioners here would obtain a different result, should they seek a judicial remedy in U.S. courts. (See, Cencal, S.A., et al. v. United States of America, Civil Action No. 90-1966 JGP; Panamuebles, S.A. et al. v. United States of America, Civil Action No. 90-2266 SSH; Industria Panificadora, S.A., et al. v. United States of America, 763 F. Supp. 1154 (D.D.C.), 957 F.2d 886 (D.C. Cir. 1992); and Lindo and Madura, S.A. v. United States of America, Civil Action No. 90-2589; Goldstar (Panama), et al. v. United States of America, No. 91-2229 (4th Cir. 1992) .)

51. The Government reiterates that the petitioners have not exhausted remedies available to them in Panamanian courts for losses attributable to actions of the PDF or the Dignity Battalion. This, the Government contends, shows a failure to exhaust domestic remedies and makes the petition inadmissible.

52. The Government reiterates its arguments that the petitions are inadmissible with respect to the unnamed victims; and that the petitioners' claims lack the detail and particularity necessary to support a finding of admissibility. The Government also reiterates its argument that U.S. economic assistance to Panama "is a far more appropriate approach to the needs of the Panamanian people...."

Additional Information Submitted by Petitioners

53. The petitioners submitted their arguments as to "The Competence of the Inter-American Commission of Human Rights to Address Claims Arising Out of Combat Situations" by a note of December 30, 1992. The petitioners argue that the Commission must protect human rights in all situations, including armed conflict. The most fundamental of all rights, the right to life, represents a norm of jus cogens. Petitioners note the nonderogability of the right under Article 27 of the American Convention, and the nonderogability of the right as a peremptory norm.

54. The petitioners submit that the Commission's mandate contains no provision restricting its jurisdiction to peacetime. It is observed as well that the Commission is not merely a consultative organ to the OAS, as submitted by the United States Government. Petitioners note the concern for protecting fundamental rights in times of war evidenced by the American States during the period in which the Charter and the American Declaration were promulgated. This concern is reflected in the text of the Declaration in the Defense of Human Rights (1938) and Resolution XL on "International Protection of the Essential Rights of Man." Petitioners contend that the Commission's failure to investigate the merits of the case would contradict the terms of its mandate, and its historical foundation.

55. Petitioners cite the Inter-American Court's advisory opinion concerning "`Other Treaties' Subject

to the Advisory Jurisdiction of the Court" to support the Commission's use of treaties, norms, and customary law in determining matters within its jurisdiction. The Commission has referred to other treaties, including the Geneva Conventions, in its reports on Argentina, Nicaragua, and El Salvador. Other treaties applicable to the present case would include the Geneva Conventions of 1949 and the Additional Protocols.

56. Petitioners maintain that common Article 3 of the Geneva Conventions applies to this case, as the International Court of Justice has set forth in the Corfu Channel case that it provides the minimum standard of protection to be observed in all types of armed conflict. Common Article 2 provides that the Conventions apply to all armed conflicts. The United States is directly bound as a party to the Conventions, and to the extent the Conventions represent customary law, it is indirectly bound as well. Petitioners reiterate that the Court has held that the jurisdiction of the Inter-American system extends "to any provision of human rights set forth in any international treaty applicable in the American States."

57. Although the United States has not ratified the Additional Protocols, the provisions of Protocol I applicable to this case are recognized as customary law. As a signatory to the Protocols the United States is obliged to refrain from acts contravening the purpose of the Protocols. Article 57 of Protocol I requires that precautionary measures be taken to protect civilian populations and civilian objects. The Protocol also codifies certain customary principles such as the prohibition of indiscriminate attacks, and the prohibition of direct attacks against civilians. U.S. combat regulations reflect some of the Protocol's provisions. The United States supported UN General Assembly Resolution 2444 "Respect for Human Rights in Armed Conflict," and has acknowledged that it reflects binding customary law. The resolution states that the means parties may use in warfare are not unlimited, that civilian populations may not be the subject of attack, and it sets forth the principle of distinction.

58. Petitioners recall that the Commission has exercised its competence over situations relating to armed conflict many times. They cite the Commission's work in the Dominican Republic in 1965, in El Salvador and Honduras, and more recently in Haiti following the military coup. They note as well the Commission's decision on admissibility in a case similar to this one, Case 9213.

59. Petitioners reiterate their request that the Commission consider the alleged violations of Article 18 and 20 of the Charter. They assert a direct causal relationship between the violation of the Charter and the violation of human rights in this case. This issue, they maintain, is within the competence of the Commission. Alternatively they request that the Commission submit the question of the legality of the invasion to the Inter-American Court for an advisory opinion.

60. The pertinent parts of the petitioners' December 30, 1992 communication were transmitted to the Government by a note of January 12, 1993.

61. By a note of January 21, 1993, the petitioners submitted additional information, informing the Commission that the United States Supreme Court had denied certiorari in Industria Panificadora, S.A. et al. v. United States, 113 S.Ct. 304 (1992); Goldstar (Panama), S.A. et al. v. United States, 113 S.Ct. 411 (1992). The petitioners set forth that this final decision by the highest court of the United States confirms the petitioners' argument that no remedies are available in the courts of the United States to victims of the 1989 invasion.

62. This information was submitted to the Government in pertinent part by a note of January 29, 1993.

63. By a note of January 29, 1993, the parties were informed that the Commission had requested that they present their arguments concerning this stage of the case at a hearing to be held February 25, 1993.

64. Both parties attended the February 25, 1993 hearing, and both presented written submissions relative to their arguments as to the admissibility of the case. The petitioners submitted a response dated February 26, 1993 to the Government's written submission. This response was transmitted to the Government.

65. By a note of April 16, 1993, the Commission requested the Government to supply information on the substantive aspects of the case. This request was reiterated June 21, 1993.

66. The Government addressed the Commission July 12, 1993 for the purpose of indicating that it intended to present a filing in this case "as soon as possible." To date the Commission has not received this filing.

ANALYSIS

1. The complaint is in compliance with Articles 38 and 39 of the Commission's Regulations. The complaint also meets the procedural requirements set forth in Article 32.a, b and d. Two threshold issues are raised by the respondent Government with respect to the admissibility of this complaint:

(a) Does the Commission have competence over the subject matter dealt with in the petitions?
(b) Have domestic remedies been exhausted or do any of the exceptions set forth in Article 37 of the Commission's Regulations excuse the petitioners from exhausting domestic remedies?

The Competence of the Commission to Consider Cases Alleging Violations of the Rights Set Forth in the American Declaration

2. The United States Government has contested various aspects of the Commission's competence or jurisdiction over the subject matter of the petitions in arguing that this case is inadmissible. The Commission's jurisdiction over member states not party to the American Convention derives from the relevant provisions of the Charter of the Organization of American States and from the prior practice of the Commission. Article 1 of the Commission's Statute, reflecting Article 111 of the Organization's Charter, sets forth the Commission's mandate to promote the observance and protection of human rights. As to non-ratifying member states, the rights concerned are those delineated in the American Declaration of the Rights and Duties of Man. The Charter and the Declaration are sources of international obligation for members states of the Organization of American States.

3. Article 20 of the Commission's Statute expressly provides that as to non-ratifying member states, the Commission is authorized to examine communications and other information submitted, to request information from the Government concerned, and to make recommendations in relation to the foregoing. Article 20 further obliges the Commission "to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI" of the Declaration. Article 51 of the Commission's Regulations provides that:

The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man, concerning member states of the Organization that are not parties to the American Convention on Human Rights.

Pursuant to Article 52 of the Commission's Regulations, petitions alleging the commission of violations by non-ratifying member states are subject to, among other provisions, the basic requirements listed in Article 32 of the Regulations. Such petitions are also subject to the preliminary screening provided for in Article 35 as to the issue of exhaustion of domestic remedies and questions of admissibility based on the

record.

4. These provisions set forth the competence of the Commission in relation to petitions, such as the one at issue, alleging breaches by member states that have not ratified the Convention. A combined reading of these provisions clearly

indicates the Commission's authority to admit and consider petitions alleging the commission of violations of the rights recognized in the American Declaration.

5. The United States Government has also contested the characterization of the facts on which the petitions are based as alleging violations of human rights. Consistent with Article 41 of the Regulations, the Commission will declare inadmissible petitions which fail to meet the basic requirements of Article 32, which fail to state claims, or which are manifestly groundless. This analysis may be interpreted with reference to Article 47 of the American Convention which provides that petitions which fail to "state facts tending to establish a violation of the rights guaranteed" in the Convention shall be considered inadmissible. It is the Commission's view that the petition sets forth facts from which may be determined the elements constituting a violation of the rights contained in the American Declaration.

6. Where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case.

Exhaustion of Domestic Remedies

7. Article 37.1 of the Commission's Regulations provides that:

For a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law.

The petitioners assert that first, as suit against the United States or its instrumentalities in Panamanian courts is precluded by the terms of the Canal Treaty, which has the status of domestic law in Panama, domestic remedies through the courts there are unavailable. Second, petitioners assert that the army claims program established by the United States to handle claims arising from the invasion has proven to be essentially nonavailable or ineffectual due to its pattern of denial of the type of claims involved here; and furthermore, that it is not competent to offer the remedies sought by the petitioners. Third, the petitioners argue that they should not be required to file suit in the courts of the United States as that forum is not the applicable domestic forum, and moreover, such suit is precluded by the law of the United States.

8. Pursuant to Article 37.3, when the petitioner asserts an inability to prove exhaustion, the Government bears the burden of showing that domestic remedies remain to be exhausted. The Government has conceded that it "considers it unlikely that the petitioners here" would prevail in the domestic fora of the United States, as its courts had determined that domestic law barred all such suits on the basis of sovereign immunity. (Government's Submission of September 16, 1992, p. 4.) Moreover, the Government has recognized "that under Article VIII(2) of the Panama Canal Treaty, United States agencies and instrumentalities may not be sued in the courts or other tribunals of Panama." (Government's submission of January 4, 1991, p. 10.) The Commission therefore concludes that the domestic courts of Panama and the United States are fora unavailable to the petitioners to invoke their claims. The Government continues to maintain its view that the army claims program is the applicable forum to which

the petitioners are required to bring their claims, and that because only twenty of the individual petitioners have filed such claims and been denied, the case is inadmissible for failure to exhaust this remedial mechanism.

9. Procedurally, the American Convention in Article 46, and the Commission's Regulations in Article 37, require that domestic remedies be "pursued and exhausted in accordance with generally recognized principles of international law." The recognized principles of international law dictate that exhaustion is required only where adequate and effective remedies are available.

Adequate domestic remedies are those which are suitable to address an infringement of a legal right....not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted....A remedy must also be effective -- that is, capable of producing the result for which it was designed. [FN1]

[FN1] Velasquez Rodriguez Case, Judgment of July 29, 1988, para. 64, 66.

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10. With respect to the issue of exhaustion of domestic remedies, then, by the terms of the Government's own argument this case would be admissible at least as to the twenty individual petitioners in this case known to have brought claims before the U.S. army claims program which were denied. With regard to the other individual petitioners, the issue is whether the remedy provided by the army claims program was indeed an available and effective remedy such that their failure to exhaust that remedy renders their claims inadmissible.

11. The scope of this domestic remedy that the United States asserts is the applicable remedial channel may be determined first by examining the legislation authorizing the claims service to make payments. The terms set forth in the Foreign Claims Act, 10 U.S.C. section 2734, include compensation for loss of or damage to real property, personal property, personal injury or loss of life, "if the damage, loss, personal injury, or death occurs outside the United States...and is caused by, or is otherwise incident to noncombatant activities of, the armed forces...." A claim under these terms will be allowed "only if...it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat...."

12. The scope of this remedy may also be determined by examining how the claims service interprets its authority in practice. A memorandum [submitted by petitioners, referred to in the first part of this report at para. 33(i)] identified by subject as "Operation Just Cause Claims - Lessons Learned" authored by a chief in the Special Claims Branch, supports a literal reading of the prohibition on combat-related claims set forth in the Foreign Claims Act. The memorandum notes the Act's "prohibition against payment of combat related claims;" notes that one focus of the claims service's efforts was "ensuring that DA staff and the Department of State were aware that the Army was prohibited from paying combat related claims;" and notes that another focus was on obtaining a consensus within the army staff that an exception to the prohibition, as was made with the USAID program in Grenada, would not be in the best interests of the United States "because of the potentially huge number of such claims." It may be noted that the memorandum reflects that the identification and adjudication of claims resulting from the loss of goods in transit to or from Panama, and resulting from the appropriation of personal property for use by the army formed a very significant part of the claims service's work.

13. The Commission also notes the letter dated March 25, 1990, from the Command Claims Service to Jose Isabel Salas. Mr. Salas, one of the individual petitioners in this case, had reported the death of his wife, injury to three other family members and extensive property damage due to military gunfire to the

claims program and requested compensation. The letter from the Claims Service acknowledges receipt of the "report of your wife's death resulting from combat operations during Operation `Just Cause'" but concludes "there is no legal authority to compensate you for your loss."

14. The twenty petitioners that United States records show filed claims and were denied suffered damage attributable to combat-related activities, as reflected by the substance of their individual petitions in this case. The denial of each of these claims is evidence of a pattern of practice of the claims program. This denial is entirely consistent with the text and indicated purpose of the authorizing legislation by which payment is limited to non-combat related claims.

15. The claims program, by the terms of its authorizing legislation and as reflected in its practice, is limited to the payment of non-combat related claims. The substance of the individual petitioners' claims are, however, combat related. The petitioners seek measures to remedy damage suffered as a result of the combat actions of United States armed forces which constituted the invasion.

16. The claims program does not provide the petitioners with the possibility of redress appropriate to the remedies they request. "Adequate domestic remedies are those which are suitable to address an infringement of a legal right....not all are applicable in every circumstance." The claims program does not provide a forum for resolution of the type of violations which form the gravamen of the petitioners' complaint. "If a remedy is not adequate in a specific case, it obviously need not be exhausted." [FN2]

[FN2] Id.

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17. In conclusion, as to the threshold issues raised, the Commission is authorized by means of its established competence to receive and consider petitions alleging the violation by a non-ratifying member state of rights recognized in the American Declaration of the Rights and Duties of Man. The facts upon which the instant petitions are grounded provide a basis from which may be determined a violation of the Declaration's provisions. Given the lack of adequate and effective remedies capable of repairing the violations alleged, the requirement that domestic remedies be exhausted is inapplicable.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
RESOLVES:

1. To declare admissible the petitions presented by the petitioners in this Case 10.573.

2. To transmit this report to the Government of the United States and to the petitioners. [FN3]

[FN3] Pursuant to receiving Report 31/93, on February 1, 1994 the Government of the United States submitted its views contesting the Commission's finding of admissibility in Case 10.573, and asserting that the case should be dismissed on procedural and substantive grounds. The Government argues that the petitioners have failed to exhaust domestic remedies available to them in Panama. The petitioners, the Government insists, should have requested "ex gratia payments for losses arising from the actions of Panamanian military units" engaged with United States forces. The Government also contends that the petitioners should have sought redress from the Government of Panama through application to the domestic judicial system. Thus, the Government asserts that the Commission's decision is procedurally flawed and must be corrected.
The Government also reiterated the substantive grounds it has previously asserted as barring admissibility: United States military action in Panama (continued) (Continuation) "was entirely justified

under, and consistent with, international law;" the military action was supported by the terms of the Panama Canal Treaty; and the military operations were conducted in compliance with the applicable law of armed conflict and provisions of humanitarian law. Because the Commission, the Government contends, lacks the authority to interpret or apply general international law, the law of armed conflict, or humanitarian law, there is no substantive basis upon which the Commission could decide this case.

THE COMMISSION OBSERVES: The obligation to exhaust domestic remedies contained in Article 46 of the American Convention requires that the remedies shown to exist within the legal system of the responsible state must be utilized and exhausted. Remedies which do not offer the possibility of redressing the alleged injury cannot be regarded as effective, and therefore need not be exhausted. The obligation to exhaust domestic remedies does not require petitioners to exhaust remedies available in a state against whom a petition has not been lodged. The texts of Article 46 of the American Convention, Article 20 of the Commission's Statute, and Article 37 of the Commission's Regulations clearly indicate that the remedies to be exhausted are those of the legal system of the state against whom a violation is alleged. In this case the respondent state is the United States, and the obligation to exhaust domestic remedies refers only to remedies available through the legal system of the United States.

As to the Government's substantive arguments, at this stage of the case, the Commission need only restate that pursuant to the terms of its mandate and procedures it is clearly authorized to admit and consider petitions alleging the commission of violations of rights recognized in the American Declaration.

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3. To proceed to consider the merits of the case.

4. To order publication of this report.

(*) Commission member Prof. Michael Reisman abstained from participating in the consideration and voting on this report.