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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 7/00; Case 10.337
Session: Hundred and Sixth Regular Session (22 February – 10 March 2000)
Title/Style of Cause: Amparo Tordecilla Trujillo v. Colombia
Doc. Type: Report
Decided by: Chairman: Helio Bicudo;
First Vice-Chairman: Claudio Grossman;
Second Vice-Chairman: Juan E. Mendez;
Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo
Dated: 24 February 2000
Citation: Tordecilla Trujillo v. Colombia, Case 10.337, Inter-Am. C.H.R., Report No. 7/00, OEA/Ser.L/V/II.106, doc. 3, rev. (1999)

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I. SUMMARY

1. On May 11, 1989, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a complaint from Eduardo Umaña Mendoza--later handled by the Corporación Colectivo de Abogados “José Alvear Restrepo” and FEDEFAM (hereinafter “the petitioners”)--regarding the disappearance of Amparo Tordecilla Trujillo (hereinafter “the victim”) in the Republic of Colombia (hereinafter “the State” or “the Colombian State”).

2. The petitioners allege that the victim disappeared after having been detained by State agents. They argue that the State has not carried out its duty to investigate the disappearance and effectively try the persons responsible. They consider these acts to constitute a violation of Articles 4, 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”). The State alleges that domestic remedies aimed at punishing the persons allegedly responsible have yet to be exhausted.

3. After analyzing the elements of fact and law provided by the parties, the Commission declared the case admissible and finally concluded that the Colombian State is responsible for violating Articles 4, 5, 7, 8, 25, and 1(1) of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

4. On May 16, 1989, the Commission proceeded to open the case under number 10.337, and forwarded the pertinent parts of the complaint to the Colombian State, giving it 90 days to submit information. Meanwhile, the Commission continued to receive reports and information on the facts of the case from non-governmental human rights organizations such as Justice et

Paix and Amnesty International. The State submitted its answer on June 16, 1989, and on May 8, 1990, it submitted additional information. The petitioners submitted their observations on August 29, 1990. The State submitted its observations on January 16, February 22, and August 2, 1991, which were duly forwarded to the petitioners. The Commission requested that the petitioners submit their observations on August 23, 1991, and reiterated its request on June 9, 1993, and January 24, 1994. On November 12, 1996, it requested information from the State on progress in the criminal and disciplinary proceedings in relation to this case. On January 10, 1997, the State submitted the information requested. On June 17, 1997, the Commission requested additional information on the status of the proceedings. On August 15, 1997 the State submitted the information requested. On September 22, 1997, the Colectivo de Abogados “José Alvear Restrepo” joined as a co-petitioner in this case.

5. On February 10, 1998, the Commission placed itself at the disposal of the parties to pursue a friendly settlement. On October 5, 1998, during its 100^o session, the Commission reiterated its offer. On January 6, 1999, the State stated that it did not consider it advisable to pursue a friendly settlement in this case, on the grounds that domestic remedies had yet to be exhausted.

III. POSITIONS OF THE PARTIES

A. The petitioners

6. The petitioners allege that State agents detained Amparo Tordecilla the morning of April 25, 1989, at carrera 8 and calle 47, northeast corner, in Bogotá. They argue that agents of the 20th National Army Brigade forced her into a taxi, a 1989 Chevrolet Chevette, license plates SF 32-57, owned by the Colombian Army, and proceeded to an undisclosed location; since then Amparo Tordecilla remains disappeared. They allege that the motive for the kidnapping and later disappearance was the romantic relationship between Amparo and a leader of an armed dissident group known as Ejército Popular de Liberación (EPL).

7. The petitioners allege that Bernardo Echeverry Ossa, Delegate Procurator for Human Rights, told Amparo Tordecilla’s father that she had been apprehended by members of the Army and that she was being held at a military facility. Evidence has also been presented that the Delegate Procurator for the Military Forces had determined that the vehicle in which she was taken by force belonged to the National Intelligence Service, and that it was in the area at the time of the events in question.

8. They allege that the participation of State agents has been confirmed by testimony that appears in the record of the proceedings undertaken in the domestic jurisdiction, in which it is shown that members of the Army decided logistical details such as where to detain Amparo Tordecilla. In addition, it is argued that State agents provoked a cover-up during a disciplinary proceeding conducted by the Office of the Procurator General of the Nation. Concretely, they note that, as revealed in the proceedings, Capt. Mario Rodríguez Reinoso instructed María Nelly Parra to present false testimony according to which it was she, and not Amparo Tordecilla, who had been detained by the members of the Army involved in the case.

9. On this basis, the petitioners allege that the State violated Article 7 of the Convention, which establishes the right to personal liberty and security, given that Amparo Tordecilla was deprived of her liberty with no judicial order. They argue that the right to life enshrined at Article 4 of the Convention has been violated, because Amparo Tordecilla's whereabouts have not been determined since her disappearance in 1989. The petitioners also argue that the State has violated Article 5(1) and (2), given that, according to the statement of one witness, Ms. Tordecilla was forced into the vehicle allegedly used to abduct her.

10. In terms of the judicial investigation over the disappearance of Amparo Tordecilla, the petitioners indicate that on February 2, 1993, the Office of the Prosecutor General for the Public Order Courts (Fiscalía Regional) of Bogotá, Fifth Secretariat for Terrorism, transferred the case to the commander of the 13th Brigade, who is the judge of first instance in the military courts. They consider that the examination of this case by military courts violates the requirements of independence and impartiality of the tribunal enshrined in Article 8 of the American Convention. They argue that the military criminal jurisdiction—which absolved the agents accused of any liability[FN1]—is not the adequate jurisdiction for judging crimes of this nature, as it depends on the executive, and operates pursuant to the principle of military hierarchy.

[FN1] (Ret.) Capt. Mario Rodríguez Reinoso, First Sergeant Guillermo Marín Rojas, and First Corporal Wilson Donneys Barón. In addition, he ordered the proceeding against (ret.) Brig. Gen. Luis Bernardo Urbina Sánchez to cease.

11. They argue that despite the time that has elapsed since Amparo Tordecilla's disappearance, the State has not carried out its duty to investigate her disappearance, clarify her whereabouts, and to try and punish the persons responsible in an effective manner and consistent with the standards of the Convention. Accordingly, they argue that the State has failed in its obligation to guarantee the rights protected by the Convention, with the means available to it, as required by Article 1(1).

12. The petitioners have indicated that the victim's father, Jorge Tordecilla Polo, filed a claim for damages against the State before the Contentious-Administrative Tribunal of Cundinamarca. Nonetheless, his claim was rejected based on the plaintiff's lack of standing, since Amparo Tordecilla's birth record did not include any note recognizing paternity. This rejection was affirmed on March 10, 1995, by the Contentious-Administrative Chamber, Third Section, of the Council of State. The petitioners allege that the State has failed in its obligation to make full reparation for the violations committed against Amparo Tordecilla, which in turn entails a violation of the right to judicial protection set forth in Article 25 of the American Convention.

B. The State's position

13. The State has not called into question the version of the facts presented by the petitioners, nor the alleged violations of the Convention. The information provided by the State refers to the progress in the investigation before the domestic organs.[FN2] In a hearing held October 6,

1998, the State informed the parties and the Commission that the Superior Military Tribunal had transferred the appeal of the judgment absolving the State agents allegedly implicated in the disappearance of Amparo Tordecilla to the civilian courts.

[FN2] Communications of January 15 and 21, 1991; August 2, 1991; January 10, 1997; August 4, 1997; and January 6, 1999.

14. In terms of the claim brought before the contentious-administrative jurisdiction, the State reported that the Administrative Tribunal of Cundinamarca, by judgment of February 10, 1994, denied the plaintiff's claims on the grounds that the plaintiff did not provide a complete copy of the civil record of birth of the alleged victim, despite the Tribunal's order, and that the monetary claims of Mr. Tordecilla Polo were denied due to the fact that he was not able to make a showing of his paternity.

IV. ANALYSIS ON ADMISSIBILITY

A. Jurisdiction

15. The Commission has prima facie jurisdiction to examine the petition in question. The facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the Convention was already in force for the Colombian State.[FN3] The Commission moves on, then, to analyze whether the requirements set forth in Articles 46 and 47 of the Convention have been satisfied.

[FN3] Colombia ratified the American Convention on Human Rights July 31, 1973.

B. Admissibility requirements

1. Exhaustion of domestic remedies and timeliness requirement for submission of the petition

16. The petitioners allege that Mr. Fausto Jorge Tordecilla filed a habeas corpus by way of a public action before the 36th Municipal Criminal Court of Bogotá for the detention-disappearance of Amparo Tordecilla, yet it was not possible to determine her whereabouts. The State has not controverted this information, and indicated, for its part, that in April 1989, the 79th Circuit Court of Criminal Investigation initiated the investigation into the disappearance of the victim, but decided to archive the investigation for lack of merit.

17. In the Case of Caballero Delgado and Santana, the Inter-American Court established that:

in keeping with the object and purpose of the Convention and in accordance with an interpretation of Article 46(1)(a) of the Convention, the proper remedy in the case of the forced

disappearance of persons would ordinarily be habeas corpus, since those cases require urgent action by the authorities. Consequently, " habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty " (Velásquez Rodríguez Case, Judgment of July 29, 1988, supra 63, para. 65; Godínez Cruz Case, Judgment of January 20, 1989, supra 63, para. 68; and, Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, supra 63, para. 90).[FN4]

[FN4] Inter-American Court of Human Rights, Case of Caballero Delgado and Santana, Preliminary Objections, Judgment of January 21, 1994 (Ser. C) N° 17, para. 64.

18. The Commission deems habeas corpus to constitute the adequate domestic remedy for determining the whereabouts of a disappeared person, and finds that its filing in this case, without any effective result,[FN5] satisfies the requirements at Article 46(1)(a) of the American Convention. As established by the Inter-American Court in its judgment on preliminary objections in the Case of Caballero Delgado and Santana "all of the remaining domestic proceedings go to the merits of the case, for they relate to the conduct followed by Colombia in complying with its obligation to protect the rights proclaimed in the Convention." [FN6]

[FN5] The interlocutory order of June 10, 1989, of the 36th Municipal Criminal Court of Bogotá reads: "... To declare that the habeas corpus petition filed by Fausto Jorge Tordecilla on behalf of Amparo Carmen Tordecilla is not upheld, as indicated in the section explaining the reasoning, may the respective authenticate copies be issued to the specialized court, to proceed accordingly" (folio 11 C.O.P.).

[FN6] Case of Caballero Delgado and Santana, Preliminary Objections, Judgment of January 21, 1994 (Ser. C) N° 17, para. 67.

19. In this case, the requirement established in Article 46(1)(b) for submitting a petition within six months after notification of the final decision by the domestic courts does not apply.

2. Duplication of procedures and res judicata

20. It does not appear from the record that the subject matter of the petition is pending before another international procedure for settlement, or that it reproduces a petition already examined by this or any other international body. Consequently, the requirements established at Articles 46(1)(c) and 47(d) of the Convention are considered to have been satisfied.

3. Characterization of the facts alleged

21. The Commission considers that the allegations made by petitioners regarding the alleged forced disappearance of Amparo Tordecilla by State agents, as well as the inefficacy and lack of independence in the investigation of that crime, could characterize a violation of the rights guaranteed at Articles 4, 5, 7, 8, and 25 of the American Convention. As it was not apparent that

these aspects of the claim were unfounded or inadmissible, the Commission considers them admissible pursuant to the requirements established in Article 47(b) and (c) of the American Convention.

22. In terms of the claim referring to the lack of full reparation before the administrative tribunals as an alleged violation of Article 25 of the Convention, it should be noted that Jorge Tordecilla's claim to damages was rejected by the court with jurisdiction, based on plaintiff's lack of standing. The decision of the Administrative Tribunal of Cundinamarca, Third Section, of February 10, 1994, establishes that:

As this proceeding addresses merely monetary compensation to the person who claims to be the father of the disappeared woman, and finding that, even though this was ordered at the initiative of the court, he did not bring a full and complete copy of the civil record of her birth, but simply a notarial certification mentioning the name of the presumed parents, but without a note of recognition, one should find that the plaintiff lacks standing, which is the basis for denying the monetary claims that derive from the respondent's declaration of principal responsibility.

23. The Commission has the mandate to examine whether the States Parties have met their obligations under the American Convention. Nonetheless, it does not have jurisdiction to review alleged errors of law or fact that may have been committed by the domestic courts acting within the scope of their jurisdiction, as a court of appeal. In this case, it is not evident that the rejection of the administrative claim on grounds of failure to show paternity could constitute a violation of the State's obligations under the American Convention. Accordingly, this particular claim is declared inadmissible.

V. ANALYSIS OF THE MERITS

A. The alleged violation of the rights to life and to personal integrity and liberty

1. Factual considerations

24. The petitioners allege that on April 25, 1989, State agents forced Amparo Tordecilla into a 1989 Chevrolet Chevette taxi, license plates SF 32-57, owned by the Colombian Army, by carrera 8 and calle 47 northeast corner, Bogotá, and has yet to reappear. They argue that State officials admitted that the vehicle in which she was taken belonged to the National Intelligence Service, that the vehicle had been in the area at the time of the facts, that she was in effect apprehended by members of the Army and that she was held at a military facility.[FN7] The State has only said that the investigation into the alleged disappearance of the victim is still under way.

[FN7] In his statement of May 9, 1990, to the Preliminary Inquiry Unit, Mr. Fausto Jorge Tordecilla declared: "they received us at the office of Mr. Echeverry Ossa, who told me, 'Don Fausto, don't worry about the girl, nothing has happened to your daughter and nothing is going to happen to her; but for more information, go to the Procurator for the military forces and Mr. Betancur will give you more information on her.' The next day we went to the Delegate

Procurator for the Military Forces, and spoke with Mr. Betancur, and he said that yes, they had carried out an operation on April 25, 1989, and that the car with those plates had participated and had captured a girl, but that it wasn't my daughter, and so I said why didn't they show the girl who was captured, but he didn't say anything, he said there was some confusion." Resolution 035 of January 24, 1994, Office of the Delegate Procurator for the Military Forces, p. 41.

25. The disciplinary proceedings by the Office of the Procurator General with respect to the facts in this case include depositions by an eyewitness to the abduction and State officials involved in the investigation, and statements by the accused. The eyewitness's statement establishes that:

On Tuesday, April 25, at 11:00 a.m., it was between 11:00 a.m. and 11:05 a.m., I was at the stationery store at carrera 8 and calle 46 at the beginning of the block when I heard the shouts of a woman calling for help, I asked the people who came out to look what was happening, and they told me that a young woman had been forced by two men in civilian dress into a taxi; they had walkie talkies, and they forced her into a yellow taxi, where a third man was waiting at the wheel.[FN8]

[FN8] Id., Declaration of María Teresa Cifuentes Traslaviña, May 2, 1989.

26. In a sworn certification dated September 4, 1990, the Delegate Procurator for the Judicial and Administrative Police affirmed:

On learning of the alleged disappearance of Mrs. Amparo Tordecilla Trujillo I contacted the Procurator Delegate for the Armed Forces at the time ... and the chief of Intelligence of the Army Command [who] informed me that a woman matching the description and circumstances that I described had been captured, but he didn't tell me where she was being held.[FN9]

[FN9] Sworn certification of September 4, 1990, transcribed in Resolution 035 of January 24, 1994, Delegate Procurator for the Military Forces, p. 34.

27. On April 26, 1989, the inspector of the Office of the Procurator General assigned to the case prepared a report on the commission of the acts, in which he indicates:

I was able to verify the following as regards the public service vehicle in which an offense may have been committed yesterday, the 25th of this month, at calle 47 and carrera 8, in which a woman was intercepted at approximately 11:00 a.m., as reported by the Association of Relatives of the Detained Disappeared: a. It is an "individual" yellow taxi, new, 1988 Chevrolet Chevette, motor # 7JJ19iR51143, series # 5P820L02, license plates # SF 3257, assigned to the Ministry of Defense, Tax Identification Number 99,999,003, whose telephone is # 2669300, extensions 617 and 650. b. At the Transport section of this Ministry, office # 406, I was told that the vehicle in

question belongs to Army Intelligence, office # 305, telephone # 2221712, where Col. Chaustre confirmed the aforementioned, that the car belongs to that Office and that it may have been carrying out some mission.[FN10]

[FN10] Id., p. 2.

28. It should be noted that, according to petitioner's allegations, State agents had tried to obstruct the clarification of the facts, by urging Miss María Nelly Parra to give false testimony. In effect, as arises from the Resolution of the Delegate Procurator, in her statements under seal of May 9, 1989, María Nelly Parra states that it was she--not Amparo Tordecilla--who had been approached and forced into the taxi, on the date and at the time indicated in the facts narrated by the petitioners.[FN11] Agents Wilson Donneys Barón, Héctor Hidalgo Cabrera Peña, and Guillermo Marín Rojas ratified before the Delegate Procurator, in formal testimony, that they were members of the National Army and that they accepted that they had driven a woman in said taxi, but they did not identify her as Amparo Tordecilla.[FN12] Nonetheless, on June 30, 1990, María Nelly Parra appeared before the Office of Special Investigations of the Office of the Procurator General, and in a new statement confessed that, by instructions of Army Capt. Mario Rodríguez Reinoso, she had not told the truth in her testimony. Capt. Rodríguez Reinoso had allegedly accompanied her driving around the city to instruct her on the version of events that she was to present to the Office of the Procurator General, and he even urged her to change her physical appearance.[FN13]

[FN11] Id., p. 13.

[FN12] Id., p. 7.

[FN13] Id., p. 25.

29. In its decision of January 24, 1994, the Delegate Procurator for the Military Forces decided to mete out a sanction in the form of a request for removal of Deputy First Sergeant Guillermo Marín Rojas, first corporal Wilson Donneys Barón, and agent Héctor Hidalgo Cabrera Peña. In addition, she decided to absolve Brig. Gen. Luis Urbina Sánchez and Capt. Mario Rodríguez Reinoso of responsibility. The grounds for that decision include:

The existence of indicia of ability, motive, physical opportunity, and presence in the place of the events, all of which are indicators proven in the second phase of proceedings, with the documents showing the capacity of the persons investigated, their link to the 20th National Army Brigade, their presence carrying out an operation in the area where the apprehension occurred, the ownership and destination of the yellow Chevette vehicle, which is a taxi of the Ministry of National Defense earmarked for the intelligence unit are all consistent, direct and indirect evidence that is credible and that was proven in the second phase of proceedings, and in adding to being introduced in the record once the legal formalities and procedural guarantees were abided by, that make it possible to infer, with a high degree of certainty, as reasonable and based on material evidence, that on April 25, 1989, she was forced into a taxi with license plates SF

3257 occupied by the three operatives under the command of Capt. RODRIGUEZ REINOSO, a vehicle which had literally been driven onto the sidewalk, at 11:00 a.m., to intercept AMPARO DEL CARMEN TORDECILLA TRUJILLO, who had an affective relationship with a leader of the guerrilla movement that called itself Ejército Popular de Liberación E.P.L.--who have reinserted into civilian life as Esperanza, Paz y Libertad, except for a dissident movement—who, according to information received, was to arrive in the city that day, and stay in a hotel near the site where the unjust and anguishing events narrated in the report unfolded.[FN14]

[FN14] Id., p. 135.

30. In consideration of this evidence, collected by the State itself, in the decision adopted in the disciplinary jurisdiction, the Commission concludes that Amparo Tordecilla was illegally deprived of her liberty on April 25, 1989 by State agents, and that her whereabouts have not been established to this day.

2. Considerations of law

31. The Commission considers that the facts of the case fit the concept of “forced disappearance” developed in the case-law of the Commission[FN15] and the Court, and incorporated into the Inter-American Convention on Forced Disappearance of Persons, to which the Colombian State is not yet a party.[FN16]

[FN15] The IACHR has stated: “This procedure is cruel and inhuman. As experience shows, a “disappearance” not only constitutes an arbitrary deprivation of freedom but also a serious danger to personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process....” IACHR, Ten Years of Activities - 1971-1981, OAS 1982, p. 319.

[FN16] Annual Report 1985-1986 of the Inter-American Commission on Human Rights, pp. 40-41; Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 147. Article II of the Convention defines forced disappearance in the following terms: “For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees. Inter-American Convention on Forced Disappearance of Persons, Article II. This Convention entered into force on March 28, 1996, with the deposit of the instrument of ratification by Argentina and Panama on February 28, 1996, before the General Secretariat of the OAS.

32. The forced disappearance of persons constitutes a multiple and continuing violation of several rights recognized in the Convention that the States Parties are bound to respect and

ensure. As expressed by the Inter-American Court, a forced disappearance begins with the abduction of the person, which entails the arbitrary deprivation of liberty, and violates the right of the detainee to be brought before a judge without delay. In most cases it also entails prolonged isolation and coerced incommunication, which constitutes cruel and inhuman treatment, as well as the execution of detainees in secret and without any indictment, followed by hiding the corpse for the purpose of erasing any material trace of the crime, and seeking to ensure impunity for those who committed it.[FN17] It is, moreover, a continuing or constantly reiterated crime, as it is committed until the person or his or her remains appear, which makes it all the more abominable, to the point of being considered a crime against humanity. This is so established in the Statute of the International Criminal Court adopted by the Rome Conference on July 17, 1998, at Article 7(1)(i).

[FN17] Case of Velásquez Rodríguez, Judgment of July 29, 1988, paras. 145 ff.

33. It should be recalled that as established by the Commission, at the time of the events in this case the agents of the security forces in Colombia resorted to forced disappearances as a systematic practice. As publicly admitted by the then-Delegate Procurator for Human Rights:

Enforced disappearance has been used by State security agencies in Colombia as a method of investigation: individuals are surreptitiously captured; the security agencies conceal the fact of their arrest; they are tortured; information is obtained....[FN18]

[FN18] Public statements by Jaime Córdoba Triviño quoted in IACHR, Second Report on the Situation of Human Rights in Colombia (1993), p. 128.

34. The circumstances and context in which Amparo Tordecilla was taken by force by State agents, and the fact that her whereabouts have yet to be determined, justify considering the case to include violations of Articles 4, 5, and 7 of the Convention.

35. Article 7 of the American Convention sets forth the right to personal liberty. Sections (1), (2), (3), and (5) of Article 7 provide:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
- ...
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings....

36. As has been established, the victim was forced into a vehicle by State agents without any arrest warrant and without being brought before a judge or other competent official. These facts constitute a serious violation of the provisions of Article 7 of the American Convention.

37. Article 5(1) of the American Convention establishes that all persons have the right to have their physical, mental, and moral integrity respected. As the Inter-American Court has indicated, a forced disappearance generally involves prolonged isolation and coerced incommunication, and thus constitutes cruel and inhuman treatment. Accordingly, given the characteristics of the case and the violence of the abduction, one must conclude that there has been a violation of Article 5(1) of the Convention.

38. The American Convention enshrines the right to life in Article 4(1), which establishes that everyone has the right to have his life respected, and that no one shall be arbitrarily deprived of his life. Ten years after the disappearance was perpetrated, the victim's whereabouts are still unknown. Given the time elapsed and the context in which the facts occurred, it is reasonable to infer that the victim is no longer alive. This circumstance constitutes a grave violation of Article 4 of the American Convention.

39. The Commission concludes that State agents perpetrated the victim's disappearance, in violation of her right to life, personal liberty, and humane treatment enshrined in Articles 4, 5, and 7 of the American Convention.

B. The State's duty to investigate, try and punish the persons responsible and the right of victims to judicial protection

40. Petitioners allege that in this case the State has failed in its duty to offer the judicial protection owed to persons under its jurisdiction, in violation of Articles 8 and 25 of the American Convention. The State has merely indicated that the case involving Amparo Tordecilla's disappearance is still pending, as of December 3, 1998, before the civilian justice system.

41. As arises from the information provided by the parties, in April 1989 the 79th Circuit Court of Criminal Investigation initiated the investigation into the victim's disappearance. After considering that there was no merit in opening a formal investigation, the investigation was archived. The Office of the Procurator General began a disciplinary investigation into members of the Charry Solano Battalion with respect to these events.

42. On September 26, 1990, the Special Investigations Office of the Office of the Procurator General considered that there were grounds for opening a disciplinary investigation against members of the Army, and it sent copies of the proceedings to the Bureau of Criminal Investigation (Dirección Seccional de Instrucción Criminal) for Bogotá. Accordingly, the 79th Circuit Court of Criminal Investigation re-opened the criminal investigation on October 22, 1990.

43. On April 17, 1991, the 75th Public Order Court became seized of the investigation. This investigation was transferred to the Office of the Prosecutor for the Public Order Courts (Fiscalía

Regional) of Bogotá, Fifth Secretariat on Terrorism. On February 16, this Office of the Prosecutor transferred the proceedings to the military criminal courts.

44. On August 1, 1997, through a Court Martial, retired Capt. Mario Raúl Rodríguez, First Sergeant Guillermo Marín Rojas, and First Corporal Wilson Donneys Barón were exonerated of any liability in the abduction of Amparo Tordecilla. In addition, the Court Martial decided to terminate the proceedings against Brig. Gen. Luis Bernardo Urbina. On August 19, 1997, the 235th Procurator for Criminal Justice appealed this decision, requesting that the judgment be reversed, and asked that the accused be convicted.

45. On September 29, 1998, the First Chamber of Decision of the Superior Military Tribunal partially affirmed the judgment with respect to Brig. Gen. Urbina, and refrained from hearing the appeal of the judgment of acquittal favorable to the other persons implicated, considering that it was not a matter within the jurisdiction of the military criminal courts. On December 3, 1998, a copy of the case was sent to the National Public Order Court, on the grounds that it did not have jurisdiction over the matter.

46. It must be determined whether the judicial activity undertaken by the State--which has stretched out over 10 years, and which in large measure has been before the military courts--meets the standards set forth by the American Convention. Article 8(1) of the American Convention establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, ... for the determination of his rights and obligations of [...] any [...] nature.

At the same time, Article 25 provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy;
- c. to ensure that the competent authorities shall enforce such remedies when granted.

47. These norms establish the obligation to provide access to justice with guarantees of legality, independence, and impartiality within a reasonable time and with the due protections, as well as the general obligation to provide an effective judicial remedy in the face of the violation of fundamental rights, incorporating the principle of the effectiveness of the procedural instruments or mechanisms. As the Court has indicated:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction.[FN19]

[FN19] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, para. 91.

48. The circumstances in which Amparo Tordecilla was deprived of her liberty merit an investigation by the State on its own initiative. The case law of the Commission[FN20] indicates that whenever a crime is committed that can be prosecuted on the initiative of the State, the State has the obligation to promote and give impetus to the criminal proceedings, to their ultimate consequences. In those cases, one cannot demand that the victim or his or her family propel the investigation, since it is up to the State to investigate the facts and punish the persons responsible as part of its obligation to preserve public order. The obligation to investigate, try, and punish the persons responsible for human rights violations is a duty that the State is not in a position to delegate. It is precisely for this reason that in many procedural regimes the State exercises a monopoly over criminal actions, and why in those legal systems that provide for criminal standing for the victim or his or her family members, the exercise of the actions provided for is not compulsory, and does not take the place of state action.[FN21] In this respect, the Inter-American Court has stated that pursuant to the duty to investigate, an investigation "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family ... without an effective search for the truth by the government." [FN22]

[FN20] Report N° 52/97, Case 11.218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paras. 96 and 97. See also Report N° 55/97, para. 392.

[FN21] Id., Report N° 52/97.

[FN22] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 177.

49. The Commission notes that the facts in this case were examined in parallel fashion by the disciplinary jurisdiction, under the Office of the Procurator General, where it was decided to sanction the Subaltern Officer Mario R. Rodríguez Reinoso, Non-Commissioned Officer Guillermo Marín Rojas, First Corporal Wilson Donneys Barón, and Intelligence Agent Héctor Hidalgo Cabrera Peña, for the forced disappearance of Amparo Tordecilla. The Commission considers that a disciplinary pronouncement does not satisfy the obligations established by the American Convention in respect of judicial protection. The disciplinary jurisdiction alone can in no way constitute an effective and sufficient jurisdiction for trying, punishing, and making reparation for the consequences of a forced disappearance by State agents. The grave and multiple violations of fundamental rights suffered by Amparo Tordecilla demand the

substantiation of a civilian criminal proceeding and the imposition of the corresponding sanctions.

50. The forced disappearance of the victim was perpetrated by State agents whose responsibility, at least in some cases, was determined in the disciplinary jurisdiction. Accordingly, ten years after the events, the Commission can only conclude that the State has not shown due diligence in investigating and trying, in the civilian courts, the violations committed by its agents, or in making reparation to the victim's family, as required under Article 25 of the Convention.

51. As regards the examination of a case of this kind by the military criminal courts, it should be noted that in those cases in which the violation of a protected right results in the commission of an act that is criminally sanctioned under domestic law, the victims or their next-of-kin have the right to have a civilian court determine the identity of the persons responsible, to try them, and to impose the corresponding sanctions. There is no doubt but that these cases require the substantiation of a criminal proceeding that includes a criminal investigation and criminal sanctions, as well as the possibility of obtaining reparation.

52. The investigation into this case was transferred to the military criminal courts in 1993. On August 1, 1997, the only judge of first instance of the Military Forces of Colombia acquitted (ret.) Capt. Mario Rodríguez Reinoso, First Sergeant Guillermo Marín Rojas, and First Corporal Wilson Donneys Barón, of any criminal liability for the crime of kidnapping. In that same act he ordered that the proceedings against (ret.) Brig. Gen. Luis Bernardo Urbina Sánchez be halted.

53. The Commission has repeatedly stated that in view of its nature and structure, the military criminal jurisdiction does not meet the requirements of independence and impartiality established in Article 8 of the American Convention. The adequacy of military criminal courts as a forum for examining cases that involve human rights violations has already been the subject of a pronouncement by the Commission:

The military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role in the military justice system.[FN23]

[FN23] IACHR, Third Report on the Human Rights Situation in Colombia (1999), p. 167 (para. 20). See also, Second Report on the Human Rights Situation in Colombia (1993), p. 245, where it states: "The military tribunals do not guarantee that the right to a fair trial will be observed, since they do not have the independence that is a condition sine qua non for that right to be exercised. Moreover, their rulings have frequently been biased and have failed to punish members of the security forces whose involvement in very serious human rights violations has been established."

In its decision of August 5, 1997, the Constitutional Court of Colombia established that:

In order for the military criminal justice system to have jurisdiction over a crime, from the beginning there must be a clear link between the offense and activities properly related to military service. In other words, the punishable act must constitute an excess or an abuse of power that takes place in the context of an activity directly linked to a legitimate function of the armed forces. The nexus between the criminal act and the service-related activity is broken when the offense is extremely grave, as is the case of crimes against humanity. In such circumstances, the case should be forwarded to the civil justice system.[FN24]

[FN24] Constitutional Court, Judgment C-358 of August 5, 1997.

54. The Commission considers that the forced disappearance of a citizen can never be considered part of the legitimate functions of the agents who work with the security forces. Accordingly, the fact that the criminal investigation remained in the military criminal jurisdiction for five years is a violation of Articles 8 and 25 of the Convention.

55. As already indicated, in the hearing held on October 6, 1998, the State reported on the imminent partial transfer of the case from the military criminal justice system to the civilian justice system, which was done on December 3, 1998. The State has alleged that this fact shows that domestic remedies are still being pursued towards a resolution of the case.

56. The Commission considers it necessary to recognize the importance of this fact, since, as established supra, the military justice system is not the adequate forum for investigating, trying, and punishing grave human rights violations. Nonetheless, it notes that the transfer, effectuated almost a decade after the disappearance was perpetrated, has come late and, predictably, it has yet to prove effective in clarifying the facts in determining the whereabouts of the remains, or in trying and punishing the persons responsible.

57. The lack of an effective remedy to address the violation of rights recognized in the Convention is itself a violation of the Convention. Judicial remedies and mechanisms should not only be formally provided for in the legislation, but should also be effective in establishing whether there has been a violation of human rights, and in making reparation for the consequences. The Inter-American Court has established that:

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[FN25]

[FN25] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, July 29, 1988, para. 176.

58. Additionally, the effective substantiation of a civilian criminal proceeding opens the way to a claim for compensation. Therefore, the Commission is of the view that even though the contentious-administrative courts have dismissed the claim for compensation brought against the State, the forum for an ordinary criminal proceeding and to determine compensation exists and the duty to make reparation to the victim's family persists, in this case to the father of Amparo Tordecilla, pursuant to domestic law.

59. Based on the foregoing considerations of fact and law, the Commission concludes that the State has failed in its duty to provide adequate judicial protection as established at Articles 8 and 25 of the American Convention.

C. Obligation to respect and ensure the rights protected by the Convention

60. Article 1(1) establishes the obligation of the States Parties to ensure the rights and freedoms recognized in the Convention. It is an obligation that involves the duty to organize the governmental apparatus and, in general, all structures through which public power is exercised, such that they are capable of legally ensuring the free and full exercise of human rights. It is as a result of this obligation that the States Parties have the legal duty to prevent, investigate, and punish any violation of rights protected in the American Convention.[FN26] Concretely, in cases of forced disappearance of persons, the State has the duty to determine the fate and the situation of the victim, to punish the persons responsible, and to compensate the victim's family. In addition, the Court has noted that:

[FN26] Id., para. 166.

The State has a legal duty [...] to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[FN27]

[FN27] Id., para. 174.

61. In the instant case, the State has not effectively carried out its duty to clarify the forced disappearance of Amparo Tordecilla and the whereabouts of her remains, nor to try and punish the persons responsible and make reparation to the victim's family. The Commission concludes that the Colombian State has failed in its duty to guarantee the right to life, liberty, and humane treatment of Amparo Tordecilla, as well as the right to judicial guarantees for the victim and her family, pursuant to Article 1(1) of the Convention.

VI. PROCEEDINGS SUBSEQUENT TO THE ARTICLE 50 REPORT

62. The Commission examined this case during its 103rd session, and on May 7, 1999, adopted Report N° 76/99, pursuant to Article 50 of the Convention. In its Report, the Commission concluded that the State is responsible for violations of the rights to life, humane treatment, personal liberty, and judicial protection, provided for under Articles 4, 5, 7, 8, and 25 of the American Convention, in conjunction with the obligation to ensure the rights established in Article 1(1), as a result of the forced disappearance of Amparo Tordecilla Trujillo, and its failure to clarify the facts and impose a judicial sanction. In addition, it recommended that the State: "(1) Carry out an impartial and effective investigation in the civilian jurisdiction for the purpose of bringing to trial and punishing the persons responsible. (2) Clarify the circumstances of the disappearance and the whereabouts of her remains, and return them to her family. (3) Adopt the measures needed for the victim's family to receive adequate and timely reparation for the violations established herein." On May 12, 1999, the Commission forwarded the report to the State and asked that it inform the Commission, within two months, on compliance with the recommendations made therein. On July 9, 1999, the State requested an extension and finally on August 10, 1999, it presented its answer to Report N°76/99.

63. In its answer the State made a series of observations on the grounds of the Commission's decision. It calls into question, for example, the declaration of admissibility in this case, based on the determination that the victim's family members were deprived of access to adequate and effective remedies to obtain redress for the violations alleged in the domestic forum. The State considers that its legislation establishes a set of judicial mechanisms that should be considered domestic remedies. Furthermore, it argues that, given the independence of the disciplinary and judicial oversight organs in Colombia, the interpretation of the exhaustion rule in the instant case leaves it "in a relative position of defenselessness." As regards the determination as to the violation of judicial guarantees, it considers that the fact that the habeas corpus action filed yielded no result does not necessarily mean that Article 25 was violated.

64. The Commission should note that it would be improper to re-examine its pronouncement on admissibility at this stage in the proceedings; this would only be allowed in exceptional circumstances, when substantial material errors or elements of fact are present which, had they been taken into account, would have substantially modified the decision on admissibility. The IACHR can only reiterate that the principles and standards in force in international law provide that the States that have assumed obligations by ratifying a treaty cannot invoke their domestic law as an excuse for noncompliance. The Commission has a mandate to determine whether the norms of the American Convention are duly respected and ensured by the States Parties. This determination is subject to admissibility requirements such as prior exhaustion of domestic remedies. The Commission, however, should not neglect its obligation to determine whether there have been violations of the fundamental rights enshrined in the American Convention, once it has been shown that the remedies offered by the domestic jurisdiction adequate to redress the violation have not worked or are not working according to the standards established in the Convention regarding access to justice. The Commission has stated clearly, in its analysis of the merits, the grounds that led it to conclude that the investigation of the facts and the judgment of the persons responsible by the military tribunals deprived the victim's family members of access to justice pursuant to the standards set forth in the American Convention.

65. As for compliance with the Commission's recommendations, the State has argued that "despite the time elapsed and the transfers between the civilian jurisdiction and the military criminal jurisdiction, there may still be a decision on the merits." It trusts that soon "it will be viable for the Human Rights Unit of the Office of the Prosecutor General of the Nation to complete an impartial and effective investigation ... for the purpose of judging and punishing the persons responsible and to clear up the circumstances of the disappearance and the whereabouts of the victim's remains and returning them to the family members, as appropriate." Along the same lines, "it would be in agreement with the need to adopt the measures needed for the victim's family members to receive adequate and timely reparation for the violations established herein, in the event that its occurrence and State responsibility are found." [FN28]

[FN28] Note EE 1442 of August 10, 1999. Dirección General de Asuntos Especiales, Ministry of Foreign Relations, Republic of Colombia.

66. The Commission takes note of what the State has said regarding examination of the case by the civilian justice system, specifically the National Human Rights Unit, and hopes that an impartial and effective judicial investigation will be concluded soon that will clarify the facts and lead to justice in this case. The Commission further notes that the State has conditioned reparation of the harm caused in this case to a possible determination of the facts and of its responsibility by the domestic courts. The Commission has already verified the facts, the grave and multiple violations of the American Convention that occurred as a result of the victim's forced disappearance, and the State's responsibility for those violations. Therefore, as ten years have already lapsed since the victim's disappearance, and as State responsibility has been determined, not only for the violation of the right to liberty, humane treatment, and life, but also for failing to guarantee access to a suitable and effective remedy to investigate, try and punish the persons responsible effectively and in accordance with the guarantees provided for in the Convention, it should proceed immediately to make reparation for the damage caused the victim's family members and comply with the Commission's recommendations.

VII. CONCLUSIONS

67. Based on the foregoing considerations of fact and law, and considering that the State has yet to carry out the recommendations made in Report 76/99, the Commission ratifies its conclusions that the State is responsible for violating the rights to life (Article 4), humane treatment (Article 5), personal liberty (Article 7), and judicial protection (Articles 8 and 25), in conjunction with the obligation to guarantee the rights protected in the Convention, as provided in Article 1(1), all to the detriment of Amparo Tordecilla Trujillo.

VIII. RECOMMENDATIONS

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE COLOMBIAN STATE:

1. Complete an impartial and effective investigation in the civilian jurisdiction to try and punish the persons responsible.
2. Clarify the circumstances of the disappearance as well as the whereabouts of the victim's remains, and return them to her family.
3. Adopt the measures needed for the victim's family members to receive adequate and timely reparation for the violations established herein.

IX. PUBLICATION

68. On September 29, 1999, the Commission decided to transmit Report 115/99, adopted pursuant to Article 51 of the American Convention, to the parties. The Report was effectively transmitted on October 18, 1999, and the State was given one month to submit information on compliance with the Commission's recommendations. By note of November 17, 1999, the State requested a 30-day extension, which was duly granted.

69. In its answer of January 4, 2000, the State indicated that the Office of the Vice-President was working in coordination with the Human Rights Unit to give impetus to the investigations. In terms of the reparation due to the victim's family members, the State reported that it would soon convoke the Committee of Ministers provided for in Article 2 of Law 288/96, which establishes that there may be "settlement agreements or proceedings for payment of damages in the case of those human rights violations in respect of which ... there is a prior, written, and express decision of ... the Inter-American Commission on Human Rights in which it is concluded, with respect to a specific case, that the Colombian State has committed a human rights violation, and must pay compensation for the resulting harm." The State undertook to report to the Commission on the course of the investigations, as well as the result of the efforts to seek compensation.

70. In view of the foregoing considerations, and pursuant to Articles 51(3) of the American Convention and 48 of its Regulations, the Commission decides to reiterate the conclusions of paragraph 67 and its recommendations; and to make public this Report and include it in its Annual Report to the OAS General Assembly. The Commission, consistent with its mandate, shall continue evaluating the measures taken by the Colombian State in relation to the recommendations mentioned.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 24 day of the month of February, 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan E. Méndez, Second Vice-Chairman; Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo Commissioners.