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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: 3 October 2000
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I. SUMMARY

1. On February 26, 1997, the Asociación de Familiares Detenidos y Desaparecidos of Colombia (ASFADDES: Association of Relatives of the Disappeared), the Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos (FEDEFAM: Latin American Federation of Relatives of the Disappeared), the Comisión Colombiana de Juristas (CCJ: Colombian Commission of Jurists), and the Center for Justice and International Law (CEJIL) submitted a petition to the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”), against the Republic of Colombia (hereinafter “the State”) in which it alleged that members of the National Police arbitrarily detained Hernando Osorio Correa, and then tortured and executed him on February 16, 1993 in the city of Barranquilla, department of Atlántico.

2. Petitioners allege that the body of Hernando Osorio Correa appeared lifeless and with signs of torture after he was detained by members of the National Police, and that the State is responsible for the violation of the rights to life, humane treatment, personal liberty, and judicial protection set forth at Articles 4, 5, 7, 8(1), and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and that it had failed to perform its obligation to ensure the rights established in the Convention.

3. The State argued that the domestic proceedings to clarify the homicide of Mr. Hernando Osorio Correa are still pending and without resolution. Accordingly, it asked the Commission to declare the case inadmissible for failure to exhaust domestic remedies in light of the requirement in Article 46(1)(a) of the Convention. In response, the petitioners alleged that the case fits within the exceptions to the exhaustion requirement in Article 46(2) of the American Convention, since

the clarification of the facts of the case and the trial of the agents involved, which first took place before the military criminal courts, have been subject to unwarranted delay.

4. Based on the analysis of the parties' positions, the Commission concluded that it is competent to examine the petitioner's claim, and that the case is admissible pursuant to the provisions of Articles 46 and 47 of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

5. On March 3, 1997, the Commission opened the case under number 11.727, and transmitted the pertinent parts of the petition to the State, giving it 90 days to submit information.

6. Once the period had expired, the Commission reiterated its request to the State. The State submitted its response on September 22, 1998; the pertinent parts thereof were transmitted to the petitioners. The petitioners submitted their observations on April 11, 2000, which were duly transmitted to the State, which had 30 days to submit its response. On May 15, 2000, the State requested an extension, which was duly granted by the Commission. On June 16, 2000, the State submitted its response.

III. THE PARTIES' POSITIONS

A. Position of the petitioners

7. The version of the facts submitted by the petitioners indicates that on February 16, 1993, at approximately 3 p.m., several agents of the National Police, Atlántico Division, thwarted an assault at the Banco de Occidente branch in downtown Barranquilla. During the operation, Mr. Hernando Osorio Correa was wounded; petitioners allege that he was traveling through the area. Mr. Osorio Correa was assisted by a passer-by who took him in a pick-up truck to the Clínica Caribe of Barranquilla. Petitioners allege that just as they were about to enter the hospital, Hernando Osorio Correa was stopped by several members of the National Police who placed him in an official vehicle in the presence of several witnesses and several journalists, who took photos of him at the time of his detention.[FN1]

[FN1] In some local newspapers such as El Heraldo and La Libertad, reference was made to the detention of Hernando Osorio Correa, and he was depicted as one of the criminals wounded in the bank robbery.

8. Mrs. Heidi Lucía Pérez, the lifetime companion of the alleged victim, and his sister María Elizabeth Correa, went out in search of Mr. Osorio Correa once they learned he was wounded. The petitioners allege that both women were detained for seven hours by agents of the National Police in civilian dress who questioned them about the activities of an alleged gang called "los nicaragüenses" ("the Nicaraguans"). One of the agents assured María Elizabeth that her brother was wounded but out of danger. The next day, Hernando Osorio Correa was found dead with his hands and feet bound, visible signs of torture, and gunshot wounds.

9. The petitioners allege that state agents tortured and executed the alleged victim while he was in their custody and defenseless; accordingly, they ask that the State be found responsible for violations of Articles 4, 5, and 7 of the American Convention.

10. As regards clarifying the facts in this homicide in the domestic jurisdiction, the petitioners note that on February 18, 1993, Hernando Osorio Correa's mother filed a criminal complaint before the departmental office of the Technical Investigative Corps, Judicial Police Unit No. 1, of Barranquilla. Three months later, in May 1993, the investigation was remitted to Court N° 85 of Military Criminal Investigation.

11. On January 2, 1996, almost three years after the fact, Court 85 of Military Criminal Investigation decided to open formally the criminal investigation, and on March 26, 1997, it made its decision on the involvement of police agent José Vicente Ovalle Fernández, refraining from ordering his detention. On September 5, 1997, the military courts decided to return the investigation to the regular courts. On March 31, 2000, the First Circuit Court of Barranquilla handed down a judgment in the first instance in which it acquitted Willman Jiménez Vásquez, Alvaro José Florián López, and Gonzalo Acevedo Doza for the homicide of Mr. Osorio Correa; this decision was appealed by the prosecutor to the Superior Court, where it is still pending.

12. The petitioners consider that the State has failed to carry out its duty to investigate, prosecute, and punish the persons responsible for the detention, torture, and execution of Mr. Hernando Osorio Correa, pursuant to the standards of the American Convention. They indicate that the investigation of the crime, committed more than seven years ago, lasted beyond what is reasonable, without having clarified the circumstances of the torture and execution of the victim and without a firm judgment against the perpetrators. They also argue that during the investigative stage before the military criminal courts the State denied the victim and his family members the right to an impartial and independent trial pursuant to Articles 8(1) and 25 of the Convention.

13. With respect to the State's arguments (see *infra*) on failure to meet the admissibility requirement of prior exhaustion of domestic remedies set forth in the American Convention, the petitioners consider that this case fits within the exceptions provided for at Article 46(2)(c) thereof. They contend that clarifying the facts of the case and prosecuting the agents involved, which were initially under the military criminal courts, have been subject to an unwarranted delay of over seven years, four of which under a jurisdiction that does not meet the requirements of independence and impartiality demanded by the Convention. In this regard, they noted that

at the time the complaint was submitted to the Commission (February 26, 1997), the victim's family members did not have a suitable and effective remedy to protect them in the face of the human rights violations to which Hernando Osorio Correa was subjected. At that time the investigation was under the military jurisdiction, which in addition to being called into question for the reasons set forth above, proved ineffective for protecting them in this particular case.[FN2]

[FN2] Communication from petitioners, April 11, 2000, p.3.

The petitioners argue that even though in their initial petition they invoked the exceptions to the requirement that domestic remedies be exhausted, the State failed to respond thereto in a timely fashion, and merely reiterated that the remedies were being pursued consistent with domestic legislation.

B. The State's position

14. The State argued that the judicial investigation into the death of the alleged victim is pending resolution, and that therefore the petitioners had not satisfied the requirement of prior exhaustion of domestic remedies provided for in Article 46(1)(a) of the American Convention.[FN3]

[FN3] Note EE/DH 049082 of the General Bureau for Special Matters of the Ministry of Foreign Affairs, September 22, 1998. Note EE 1205 of the General Bureau for Special Matters of the Ministry of Foreign Affairs, June 16, 2000.

15. In its communication of June 6, 2000, the State expressed that "major decisions in determining the persons responsible" had been taken in the criminal proceedings under way in the domestic jurisdiction. Concretely, it indicated that the prosecutor handling the case, acting as a party to the proceedings during the trial stage, asked the First Criminal Court for the Barranquilla Circuit to find the accused guilty. It also indicated that the accused were acquitted and that in response the Office of the Public Prosecutor filed an appeal in which a decision is still pending.

16. With respect to the fact that the case was initially investigated by the military criminal courts, the State noted that one should

attribute positive value to the removal of the criminal investigation to the regular courts at the initiative of the military criminal courts. This undoubtedly shows the will of the State to investigate and punish human rights violations.[FN4]

[FN4] Note EE 1205 of the General Bureau for Special Matters of the Ministry of Foreign Affairs of June 16, 2000.

17. As regards the alleged delay in justice, the State was of the view that under the case-law of the Inter-American Court, the conduct of the victim's representatives is a fundamental element to be considered when determining the reasonableness of the time it takes to complete an internal investigation. In this respect, it alleged that the victim's family members had not filed an

appearance as a civil party, and had not collaborated in the proceedings “through the valuable powers granted them by law.”

18. The State also reported that disciplinary investigation N 015-145983 had begun against several agents of the National Police. This investigation culminated with the declaration that such action had prescribed on March 25, 1998. Case 140-0065-96, which was continuing against other persons alleged to be implicated in the homicide of Mr. Hernando Osorio Correa, was also archived by order of April 8, 1999 due to prescription of the disciplinary action.

19. The State refrained from making observations on the facts alleged by the petitioners in relation to the merits. In this regard, it stated that this abstention, based on the lack of a firm judgment in the domestic jurisdiction, was not equivalent to acceptance of the version of the facts set forth in the petition.[FN5]

[FN5] Id.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission

20. The Commission is competent *prima facie* to examine the claim submitted by petitioner. The facts alleged affected a natural person who was under the jurisdiction of the State at the time of the facts, which took place when the obligation to respect and guarantee the rights established in the Convention was already in force for it.[FN6] The Commission shall now analyze whether this case meets the requirements established at Articles 46 and 47 of the American Convention.

[FN6] Colombia ratified the American Convention on Human Rights on July 31, 1973.

B. Admissibility Requirements

1. Exhaustion of domestic remedies and time for submitting the petition

21. The State has asked the Commission to declare this case inadmissible on the grounds that domestic remedies are pending. The petitioners, for their part, have alleged that the investigation undertaken to clarify the death of Hernando Osorio Correa is still pending, and that it has been drawn out unreasonably. Accordingly, they have asked that the case be declared admissible pursuant to the exceptions established in Article 46(2) of the American Convention.

22. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

23. As the Inter-American Court has established, whenever a State alleges the failure by the petitioner to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are “adequate” to cure the violation alleged, i.e. that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right.[FN7] The Commission has repeatedly stated its views that the military jurisdiction does not constitute an appropriate forum and therefore does not offer an adequate remedy to investigate, prosecute, and punish violations of the human rights set forth in the American Convention allegedly committed by state agents or with their collaboration or acquiescence.[FN8] In addition, the Inter-American Court has recently confirmed that the military justice system is an adequate forum only for trying members of the military for committing greater or lesser offenses which, by their nature, violate legally protected interests particular to the military order.[FN9] The Commission observes that in this matter, the case was before the military jurisdiction for four years, and therefore the victim’s family members were deprived during that time of an adequate remedy for the investigation, prosecution, and punishment of the conduct alleged in this case.

[FN7] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 63.

[FN8] IACHR, Third Report on the Human Rights Situation in Colombia (1999), p. 175; Second Report on the Situation of Human Rights in Colombia (1993), p. 246; Report on the Situation of Human Rights in Brazil (1997), pp. 40-42.

[FN9] Inter-American Court of Human Rights, Case of Durand y Ugarte, Judgment of August 16, 2000, para. 117.

24. With respect to the justification for the delay based on the alleged lack of procedural activity by the victim’s family members, the Commission should note that whenever there is an investigation of a crime that can be prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate consequences. In these cases, one cannot demand that the victim or his or her family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and punish the persons responsible as part of its obligation to maintain public order. With respect to the procedural activity of the State organs, the Commission notes that the formal initiation of the investigation before the military courts occurred more than three years after the facts, and that on September 5, 1997, it was decided to remove the investigation to the regular justice system, where a final decision is still awaited.

25. As a general rule, a criminal investigation should be carried out promptly to protect the interests of the victims, preserve the evidence, and even safeguard the rights of all persons

considered suspects in the context of the investigation. As the Inter-American Court has noted, while every criminal investigation must meet a series of legal requirements, the rule of prior exhaustion of domestic remedies should not lead international action on behalf of the victims to come to a halt or to be delayed to the point of being rendered ineffective.[FN10] Therefore, given the characteristics of this case, the Commission considers that the exception provided for in Article 46(2)(c) of the American Convention applies in relation to the alleged violation of the right to life and personal liberty of Hernando Osorio Correa, thus the requirements set forth in the American Convention regarding exhaustion of domestic remedies, and, accordingly, the six-month time requirement for submitting the petition, do not apply.

[FN10] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Preliminary Objections, Judgment of June 26, 1987, para. 93.

26. With respect to the alleged violations of the right to personal liberty of Heidi Lucía Pérez and María Elizabeth Correa, petitioners did not submit information on the exhaustion of domestic remedies, thus the Commission declares these claims inadmissible under Articles 46(1)(a) and 47(a) of the Convention.

27. Invoking the exceptions to the rule on the exhaustion of domestic remedies provided for at Article 46(2) of the Convention is closely linked to the determination of possible violations to certain rights set forth therein, such as guarantees of access to justice. Nonetheless, Article 46(2), by its nature and purpose, is a provision that has content of its own, independent of the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule of exhaustion of domestic remedies provided for in sub-sections (a), (b), and (c) of Article 46(2) are applicable to the case in question should be made first and separate from the analysis of the merits, since it depends on a standard of appreciation different from that used to determine violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that impeded the exhaustion of domestic remedies will be analyzed, where pertinent, in the Report adopted by the IACHR on the merits in order to determine whether there have been violations of the American Convention.

2. Duplication of procedures and res judicata

28. It does not appear from the record that the subject matter of the petition is pending before any other international procedure for settlement, nor that it reproduces a petition already examined by this or any other international organ. Therefore, the requirements set forth at Articles 46(1)(c) and 47(d) of the Convention have been met.

3. Characterization of the facts alleged

29. The Commission considers that the petitioners' allegations regarding the alleged violations of the rights to life, humane treatment, and personal liberty of Mr. Osorio Correa, as well as the delay in the investigation and the failure to effectively prosecute or punish the persons responsible, state facts that tend to establish a violation of the rights guaranteed at

Articles 4, 5, 7, 8, and 25, in conjunction with Article 1(1), of the American Convention. The Commission considers that the requirements established at Articles 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

30. The Commission considers that it is competent to examine the claim submitted by the petitioners and that the case is admissible, in keeping with the requirements established in Articles 46 and 47 of the American Convention.

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to the alleged violation of Articles 4, 5, 7, 8(1), 25, and 1(1) of the American Convention, to the detriment of Hernando Osorio Correa.
2. To declare inadmissible the claim with respect to the alleged violation of Article 7 of the American Convention, to the detriment of Heidi Lucía Pérez and María Elizabeth Correa.
3. To give notice of this decision to the Colombian State and the petitioner.
4. To continue to analyze the merits.
5. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., October 3, 2000. (Signed:) Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan E. Méndez, Second Vice-Chairman; Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Commissioners.