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Decided by: Chairman: Claudio Grossman;
First Vice-Chairman: Juan E. Mendez;
Second Vice-Chairman: Marta Altolaguirre;
Commissioners: Robert K. Goldman, Helio Bicudo, Peter Laurie, Julio Prado Vallejo.
Dated: 6 April 2001
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I. SUMMARY

1. On December 9, 1996, the law firm of José Alvear Restrepo filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") against the Republic of Colombia (hereinafter "the State", "the Colombian State" or "Colombia"). It was alleged in this petition that on September 23, 1993, members of the Army extrajudicially executed Carlos Manuel Prada González and Evelio Antonio Bolaño Castro[FN1] who were in the city of Blanquicet, Antioquia Department, to negotiate the demobilization of members of the dissident armed group Ejército de Liberación Nacional [National Liberation Army] (ELN), who had joined militants in the political group Corriente de Renovación Socialista [Socialist Renewal Movement] (CRS) in the context of peace negotiations.

[FN1] Carlos Manuel Prada González was also known as "Ricardo González" or "Geniberto Tapias Ahumada", and Evelio Antonio Bolaño Castro as "Enrique Buendía".

2. The petitioners alleged that the State had violated its obligation to respect and ensure the rights to life, personal integrity, and judicial protection enshrined in the American Convention on Human Rights (hereinafter "the American Convention"). The State, for its part, presented information on the prosecution of a number of members of the Army within the military criminal justice framework.

3. After analyzing the points of fact and law presented by the parties, the Commission concluded that the State was responsible for violating Article 4, to the detriment of Evelio Antonio Bolaño Castro, articles 4 and 5, to the detriment of the Carlos Manuel Prada González, and articles 8(1), 25, and 1(1), to the detriment of both victims.

II. PROCEEDINGS ON THE SUBSTANCE AND ATTEMPTS AT A FRIENDLY SETTLEMENT

4. The Commission opened case N° 11.710 on December 17, 1996, and formally declared it admissible on September 25, 1998.[FN2] In its report on admissibility, the Commission placed itself at the disposal of the parties for the purposes of reaching a friendly settlement of the matter.

[FN2] Report N° 84/98, IACHR Annual Report 1998.

5. On January 20, 1999, the petitioners contacted the Commission to indicate that friendly settlement of the matter would have to be based on: (1) recognition of the State's responsibility; (2) referral of the military criminal justice investigation to the regular justice system; (3) the establishment of a committee to ensure reparations for the rights violated, including indemnification of the victims next-of-kin, reparations for social injury, and political reparations to the CRS (the group to which the victims belonged); (4) restoration of the historical memory of the victims; (5) review of the criminal investigation and the design of strategies to prevent similar cases from recurring in the future; and (6) the establishment of protective measures for the next-of-kin and witnesses.

6. On March 2, 1999, a hearing on the instant case was held as part of the 102nd Regular Session of the IACHR. During the course of the hearing, a representative of the Human Rights Unit within the Office of the Prosecutor General of the Nation, as part of the delegation of the State, undertook to study the possibility of raising a conflict of jurisdiction with a view to referring prosecution of the alleged perpetrators in the death of the victims in question from the military to the regular justice system. On April 22, 1999, in Santafé de Bogotá, a delegation of the IACHR held a meeting with the Minister of Defense and Commander General of the Armed Forces, during which reference was made to the content of Report 84/98 and the importance of having the proceedings with respect to the death of the alleged victims examined within the regular justice system as part of an attempt to reach a friendly settlement of case 11.710.

7. On October 1, 1999, as part of the 104th Regular Session of the IACHR, a second hearing was held to continue the efforts to reach a friendly settlement. During the hearing, the State indicated that on September 9, 1999, the National Council of the Judiciary had decided to dismiss the conflict of jurisdiction raised by the Office of the National Prosecutor pursuant to the commitment undertaken at the hearing on March 2, 1999. On October 13, 1999, the State furnished copies of the decision proffered by the National Council of the Judiciary.

8. On December 13, 1999, the State contacted the Commission to provide updated information on progress made in the internal processes for the instant case. The State also

indicated that in view of the procedural circumstances, the question of jurisdiction for the prosecution of the alleged perpetrators was not subject to friendly settlement. Nonetheless, the State expressed its wish to continue seeking a friendly settlement. At the hearing held on March 2, 2000, as part of the 106th Regular Session, the petitioners requested that the effort to reach a friendly settlement in the case be wound up, on the grounds that it would only be appropriate to pursue a solution of this kind if protection of the right to justice were at stake. They also requested a ruling on the substance, and referral of the case to the Inter-American Court of Human Rights.

9. On February 8, 2000, the petitioners presented additional information on the case, which was duly transmitted to the State. On March 10, 2000, the State presented its comments on the matter.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

10. The petitioners allege that members of the Infantry Battalion N° 31 “Voltígeros” of the Colombian National Army extrajudicially executed Mr. Prada González and Mr. Bolaño Castro with impunity on September 23, 1993, in Blanquicet, in the municipio of Urabá, Antioquia Department.

11. The petitioners allege that the presumed victims traveled to Blanquicet on Monday September 20, 1993, accompanied by a representative of the Office of the President, to complete formalities related to the demobilization of an ELN sector that had joined with militants in the political group CRS. On Tuesday, September 21, Mr. Prada González and Mr. Bolaño Castro spoke with a group of Blanquicet residents to inform them that both the civil government and Colombian Army were aware of the presence of CRS militants in the area and that the city had been selected as a coordination point for their transfer to the locality of Flor del Monte.

12. The petitioners allege that military troops entered Blanquicet and then pursued the presumed victims through the surrounding countryside. When they surrendered with their hands up, and as Mr. Prada González waived his white shirt as a sign of truce, attempting to explain their presence in the locality, the petitioners allege, Mr. Bolaño Castro was executed with a gunshot to the head, and his companion was forced to move the lifeless body to the side of the road, where he too was executed. The petitioners allege that these events constitute a grave violation of articles 4(1) and 5 of the American Convention on Human Rights.

13. The petitioners also allege that the exercise of jurisdiction by military criminal justice over the Army members presumably responsible violates Article 8(1) of the American Convention, inasmuch as this internal instance does not meet the requisites of independence and impartiality required under the Convention, in that they do not form part of the judicial branch, are placed under the authority of the Executive Branch, and operate, under express legal mandate, according to the principle of military hierarchy. They allege further that Article 25 of the American Convention had been violated, inasmuch as the victims’ representatives were prevented from obtaining effective judicial recourse to protect their rights.

B. Position of the State

14. The State alleges that the judicial investigation conducted by military criminal justice into the death of the presumed victims had not yet concluded and that it was therefore not prepared to recognize its responsibility in the events alleged by the petitioners. It presented information to this effect on the prosecution of a number of army officers under military criminal and disciplinary jurisdiction.

15. The State recognizes that the Office of the Prosecutor General of the Nation has determined that members of the military forces participated in the events leading up to the death of the presumed victims.[FN3] However, it considers determination of the jurisdiction for judging the perpetrators to be "a strictly juridical matter exclusively subject to the authority of independent judicial bodies in respect of whose decisions the Executive Branch does not and cannot interfere". In that regard, it indicates that the Office of the Prosecutor General of the Nation had requested authority for criminal prosecution of the case at the appropriate time and that the Superior Council of the Judiciary had decided in favor of the military criminal justice system.

[FN3] The Office of Prosecution for the Military Forces requested the separation of Second Corporal Ciro Antonio Duarte Sandoval, First Corporal (r) Juan Arana Rojas, First Corporal (r) Wilder Calambas Peneche, Second Sergeant Luis Eduardo García, Lieutenant José Miguel Velandia, and Captain Mora Nestor Raul Vargas of the Armed Forces, General Division for Special Affairs, Note 2377 of December 13, 1999. Judicial writ from the Office of Prosecution for the Armed Forces August 8, 1994, confirmed on May 18, 1995. The sanction was purportedly executed by resolution of September 25, 1995 and decree of November 7, 1995. Note EE/DH024479 from the General Division of Special Affairs of the Ministry of Foreign Affairs of Colombia, May 14, 1997.

IV. ANALYSIS

A. Analysis of the facts

16. According to the evidence compiled by the judicial and disciplinary authorities, furnished by both parties, Mr. Prada González and Mr. Bolaño Castro traveled to the locality of Blanquicet on September 20, 1993, accompanied by Mr. Ernesto Parada Malavar, a representative of the Office of the President. The presumed victims wore civilian clothing and carried small revolvers for personal protection. Colonel Becerra and Major Clavijo, who at that time commanded the Army base in the municipality of Carepa, subsequently affirmed that Ernesto Parada Malavar had not informed them of the presence of CRS representatives in the area; nor had he explained to them the reason for their journey. However, there is every indication that Mr. Prada González and Mr. Bolaño Castro went to Blanquicet with the conviction that both the civilian government and the Army were aware of the presence of CRS militants in the area, as part of a process to demobilize an ELN sector, and that they had no reason to fear armed confrontation.

17. As confirmed by the statements of witnesses, on Wednesday, September 22, shortly after 5:00 PM, Mr. Prada González and Mr. Bolaño Castro became aware of an attack by Army troops in the area, made an unsuccessful attempt at dialogue, and then tried to escape from their captors. After reaching a distance of approximately 400 meters they decided to stop and make another attempt at dialogue. According to the witnesses' statements, Mr. Prada González took off his white shirt with the intention of waving it as a sign of truce.

18. Evidence provided by both parties—specifically testimony during the disciplinary proceedings—indicates that at least two witnesses were present when Mr. Prada González and Mr. Bolaño Castro were captured.[FN4] According to the testimony, the presumed victims surrendered to the Army troops with their hands up, whereupon a soldier executed Mr. Bolaño Castro with a gunshot to the head. Mr. Prada González was then forced to carry the body of Mr. Bolaño Castro toward the road, following which he too was executed. The witnesses were consistent in indicating that there was no exchange of fire between the presumed victims and the Army.

[FN4] Statement by Vianor Vásquez Cabrera, pages 803 and 804, volume 3, and pages 1305 and 1306, volume 4; statement by Luis Enrique Nisperuza, pages 801 and 802, volume 3; Office of the Prosecutor for the Armed Forces, file 022-145.789, Resolution 439, August 8, 1994, p. 8.

19. On September 23, the bodies were taken to the hospital in Chigorodó by members of the Army. One of the deceased wore no shirt. A white shirt, unstained by blood, was found next to him. The forensic specialists later determined that the two men had died from gunshot wounds that had not been received in combat.[FN5]

[FN5] Report from the Institute of Forensic Medicine, Bogotá Section, Office of the Prosecutor General, Criminology Division, Office of Special Investigations, pages 214 to 249, Volume 4, (Office of the Prosecutor for the Armed Forces, file 022-145.789, Resolution 439, August 8, 1994, p. 9).

20. According to evidence furnished by the parties, on September 23, 1993, Military Investigation Office N° 10, located in Carepa, Antioquia, and assigned to the 17th Brigade of the Colombian Army, launched a preliminary investigation into the death of Mr. Prada González and Mr. Bolaño Castro. On January 3, 1994, Judge 2 of the Military Criminal Justice Chamber assumed responsibility for the preliminary investigation and on January 18, 1994 linked Captain Néstor Vargas Morales with the crime of concealment; and Lieutenant José Miguel Velandia; Sergeant Luis García; Corporals José Herrera, Wilder Calambas Peneche, José Manuel Arana Rojas, Ciro Antonio Duarte Sandoval, and José Joaquín Herrera Suárez; and Privates Albeiro Fernando Jiménez, Edgar Tovar Florez, Carlos Martínez Rojas, Jorge Restrepo Díaz, Ever López Arrieta, Misael Oyola de los Reyes, Santiago Hoyos Sierra, Jaime de Jesús Acevedo Franco,

Carlos Jaramillo Rico, Argemiro Arroyo Varilla, and Manuel Chiquillo Caraballo, with the crime of homicide.

21. On January 19, 1994, the petitioners requested authorization from the Military Criminal Tribunal to join in the proceedings as civil parties. This request was denied on January 28, 1994, and on that same date, the judge for the preliminary military criminal investigation decided not to file charges against the officers concerned or against three of the corporals and 14 of the privates implicated in the matter. On July 15, 1994, the judge invalidated the proceedings prior to that date. Finally, on November 15, 1994, the Tribunal charged Captain Néstor Vargas Morales with the crime of concealment; and Lieutenant José Miguel Velandia; Sergeant Luis García; Corporal José Herrera; and Privates José Jiménez, Edgar Tovar Florez, Carlos Martínez Rojas, and Jorge Restrepo Díaz, with the crime of homicide and ordered the provisional arrest of the accused. However, on June 21, 1995, the Superior Military Tribunal revoked the order of provisional arrest issued by the lower military court and ordered the unconditional and immediate release of the accused.

22. On October 18, 1996, the lower court judge, Division General Iván Ramírez Quintero, closed the proceedings against all of the accused. However, on July 24, 1997, the Superior Military Tribunal partially revoked the lower court order. The Superior Tribunal upheld the decision to close the proceedings against Corporates Wilder Calambas Peneche, José Arana Rojas, Ciro Duarte Sandoval, and José Herrera Suárez, and Privates Ever López Arrieta, Misael Oyola de los Reyes, Santiago Hoyos Sierra, Jaime Acevedo Franco, Carlos Jaramillo Rico, Argemiro Arroyo Varilla, and Manuel Chiquillo Caraballo, but ordered that criminal proceedings continue against Captain Néstor Vargas Morales, Lieutenant José Velandia Mora, and Sergeant Luis García for the crime of concealment, and against Privates Albeiro Fernando Jiménez, Edgar Tovar Florez, Carlos Martínez Rojas, and Jorge Restrepo Díaz, for the crime of homicide beyond self-defense.

23. On August 8, 1997, the case was returned to the lower court judge and Commander of the First Division of the Army. On February 3, 1998, the petitioners again asked to join in the proceedings, this time with success. On February 17, 1998, the civil party requested that the lower court judge be declared incompetent, on the grounds that the decision of the Constitutional Tribunal of August 5, 1997, excluded from military jurisdiction crimes of extreme gravity perpetrated by members of the Armed Forces or National Police. This request was denied. The Tribunal issued the opinion that the deaths of Mr. Prada González and Mr. Bolaño Castro had occurred in combat and were intimately linked with military service, having occurred during a military operation.

24. Court-Martial hearings were held between April 1 and 6, 1998, after which the First National Army Division, headquartered in Santa Marta, acquitted Edgar Fabian Tovar Flórez, Albeiro Fernando Jiménez Jiménez, Carlos Augusto Martínez Rojas, and Jorge Jesús Restrepo Díaz of the crime of homicide. It also acquitted Captain Nestor Raúl Vargas Morales, Lieutenant José Miguel Velandia Mora, and Second Sergeant Luis Eduardo García, of the crime of concealment and ordered a halt to all proceedings against Tobar Flórez, Jiménez Jiménez, Martínez Rojas, and Restrepo Díaz, for the homicide of Carlos Prada González.[FN6] On August 25 1998, after hearing the opinion of the Ministerio Público, the Supreme Military

Tribunal decided to declare the proceedings null and void as from the summoning of the Court Martial.

[FN6] Ibidem, folio 2286, Cuaderno 5.

25. On March 25, 1999, the Prosecution Coordination Office of the National Unit of Human Rights, within the Office of the Prosecutor General of the Nation, informed the First Division of the National Army that it was to continue the criminal investigation against Jiménez Jiménez, Martínez Rojas, Tobar Flórez, and the other soldiers implicated in the death of the presumed victims. It indicated further that in the event that its request should be declined, it would file a motion of positive conflict of jurisdiction before the Superior Council of the Judiciary. On June 4, 1999, the First Division of the Army denied the request of the National Unit of Human Rights and remanded the case to the National Council of the Judiciary to settle the conflict. On September 9, 1999, the Jurisdictional and Disciplinary Chamber of the Superior Council of the Judiciary resolved the conflict of jurisdiction in favor of the military criminal justice system.

26. On August 25, 1999, the Superior Military Tribunal declared all proceedings since the Court-Martial hearings had been convened to be null and void and ordered the examination of additional evidence.[FN7] On December 22, 1999, the Commander of the First Division of the Army convened a Court-Martial without intervention by members of the court.[FN8] The Commission has taken cognizance of the fact that on August 5, 2000, the Court-Martial acquitted the accused and ordered a halt to all proceedings.[FN9]

[FN7] According to the State, Judge 8 for preliminary military criminal investigations requested testimony from several witnesses and a broader purview for the committee of jurists that conducted the proceedings.

[FN8] Resolution convening court martial N° 005, without intervention by members of the court, at the Santa Marta, Magdalena Garrison.

[FN9] Decision of August 5, 2000, Santa Marta, Office of the President of the Court-Martial, First Division of the National Army, Military Forces of Colombia.

B. Analysis of the Law

27. The Commission turns now to an analysis of the factual and legal allegations in respect of the presumed violation of the right to physical integrity, life, and judicial protection of Carlos Manuel Prada González and Evelio Antonio Bolaño Castro.

1. The right to life and personal integrity

28. The petitioners allege that the State is responsible, in the instant case, for the violation of Article 4 of the American Convention. Under this provision, every person has the right to have his life respected, and no one shall be arbitrarily deprived of his life.

29. In this respect, the Commander of the military operation that resulted in the deaths of Mr. Prada González and Mr. Bolaño Castro justified the deaths as casualties of combat. The Superior Council of the Judiciary accepted this hypothesis when it settled the conflict of jurisdiction raised by the Office of the Prosecutor General of the Nation in favor of the military penal justice system.

30. The Commission notes, however, that according to the evidence gathered by the Office of the Prosecutor, the victims were under the effective control of State agents and in a state of defenselessness at the time of their death. Not only were they in a noncombat situation, but also, there is no evidence that they had entered into combat with the Voltígeros Battalion at any time, or that they intended to when the material facts in the instant case arose. On the contrary, there is every indication, given their mission as peace negotiators from the CRS, that they were refraining from any hostile or provocative act.

31. According to the eyewitness testimony, the victims surrendered with their hands up to the Army troops involved, who executed Mr. Bolaño Castro with a gunshot to the head. Mr. Prada González was forced to move the lifeless body of his companion and was then executed as well. As indicated above, the forensic evidence obtained by the Office of the Prosecutor confirms that the victims did not die in combat but were shot from a distance of less than one and one-half meter. According to the prosecutor:

[...] the trajectory of the bullets traced by the doctor who conducted the post-mortem, together with the diagrams presented by the Office of Special Investigations within the Office of the Prosecutor General of the Nation, provide scientific corroboration of the eyewitness testimony that the two victims were executed after they had surrendered to the National Army.[FN10]

[FN10] Superior Council of the Judiciary, Chamber of Disciplinary Jurisdiction, Conflict of Jurisdiction between the National Army, First Division – Military Penal Judge of the First Instance – and the National Directorate of Prosecution, National Human Rights Unit. N° 19990673-A, Decision of September 9, 1999, page 7.

32. On the basis of this evidence, the Commission can only conclude that the victims were defenseless and under the effective control of the Army at the time of their death, and that there was no justification whatsoever under the applicable provisions of international law for depriving them of their lives. It is salient, in this context, that intentional mistreatment, let alone extrajudicial execution, of persons in the custody of a party to any form of armed conflict is absolutely prohibited under any circumstance in the light of the fundamental considerations of humanity reflected in the common Article 3 of the Geneva Conventions.[FN11] The proven facts in the instant case with respect to the circumstances in which the victims were executed, therefore, constitute an arbitrary deprivation of life under Article 4 of the American Convention.

[FN11] The common Article 3 of the Geneva Conventions of 1949 establishes certain minimum standards to be applied during the course of hostilities with a view to protecting persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat. This provision expressly prohibits, under any circumstance, "violence against the life and person of persons taking no active part in the hostilities".

33. The petitioners have also alleged that the circumstances of the execution involved the violation of Article 5 of the American Convention, which provides:

No one shall be subjected to [...]cruel, inhumane, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

In the instant case, the testimony indicates that after witnessing the execution of Mr. Bolaño Castro, Mr. Prada González was forced to move the lifeless body of his companion with the certain fear that he would also lose his life at the hands of the Army, in a total state of defenselessness, as in fact he did.

34. Although there are no allegations in the case file or evidence indicating that Mr. Prada González had been physically mistreated prior to his execution, it can be inferred from the facts above that he was caused psychological and moral suffering. It should be noted in this regard that both the European Court of Human Rights and the Inter-American Court of Human Rights have held that in certain cases the threat of torture can in itself constitute a violation of the right to humane treatment provided for in Article 3 of the Geneva Conventions and Article 5 of the American Convention.[FN12] In the instant case, the Commission considers that the circumstances preceding the execution of Mr. Prada González constituted a real and imminent indication or threat that he would be arbitrarily deprived of his life, and that these circumstances constituted inhumane treatment under Article 5 of the American Convention, to the detriment of the victim.

[FN12] See Eur. Court H.R. Campbell and Cosans Judgment of 25 February 1982, Series A, N° 48, paragraph 26, cited by the IACHR in the case Villagrán Morales et al, Judgment of November 19, 1999, paragraph 165.

35. Based on the considerations of fact and law set forth above, therefore, the Commission concludes that the State violated Article 4 of the American Convention, to the detriment of Evelio Antonio Bolaño Castro, and Articles 4 and 5 of the American Convention, to the detriment of Carlos Manuel Prada González.

2. Right to a fair trial

36. The petitioner alleges that the State has failed to meet its obligations under articles 8 and 25 of the American Convention. It is thus incumbent upon the Commission to determine whether the judicial activity undertaken by State authorities in the instant case—which has extended over seven years and has been conducted within the military justice system—meets the standards established in the American Convention with respect to a fair trial.

37. Article 8(1) of the American Convention provides 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.

Article 25 of the American Convention provides that:

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; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

These provisions establish the obligation to provide access to justice with guarantees of legality, independence, and impartiality, within a reasonable period of time, as well as the general obligation to provide effective judicial recourse against acts that violate fundamental rights, incorporating the principle of effectiveness in respect of judicial instruments or mechanisms. Under these provisions, as the Inter-American Court has affirmed,

The States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8), 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.[FN13]

[FN13] Inter-American Court of Human Rights, Velásquez Rodríguez, preliminary exceptions, Judgment of July 26, 1987, para. 91.

38. In cases where the violation of a protected right has as a consequence the commission of a criminal offense under domestic law, the victims or their next-of-kin have the right to have an ordinary criminal court determine the identity of the perpetrators, judge them, and apply the appropriate sanctions.[FN14] Without question, these cases require the substantiation of a penal

process that includes an investigation and penal sanctions, as well as the possibility of obtaining reparations.

[FN14] Report N° 52/97, case 11218, Arges Sequeira Mangas, IACHR Annual Report, 1997, para. 96 and 97. See also Report 55/97, paragraph 392.

39. Based on the facts above, the processes undertaken within the domestic framework to investigate the extrajudicial execution of the victims and judge the members of the Army involved have been substantiated, and continue to be substantiated, within the military penal justice system, despite efforts to bring about referral of the case to the ordinary justice system. Initially, on February 17, 1998, the civil party requested that the lower court judge and Commander of the First Division of the Army, be declared incompetent. This request was denied on the grounds that the deaths of Mr. Prada González and Mr. Bolaño Castro were intimately linked to service, having occurred during a military operation.

40. Once the instant case was declared admissible by the IACHR, a new conflict of jurisdiction, within the domestic framework, was raised by the National Human Rights Unit of the Office of the Prosecutor General of the Nation. The Office of the Prosecutor justified this request as follows:

The officers in command of the Army patrol had the legal and constitutional duty to turn Tapias Ahumada [Mr. Prada González] and Mr. Bolaño Castro over to judicial authorities once they had surrendered, and not to permit the former to be executed upon capture and then force the second of the subversives to move the body of his companion to a roadway where he was subsequently executed [...] the trajectory of the bullets traced by the doctor who conducted the post-mortem, together with the diagrams presented by the Office of Special Investigations within the Office of the Prosecutor General of the Nation, provide scientific corroboration of the eyewitness testimony that the two victims were executed after they had surrendered to the National Army. [...] that being the case, it cannot be accepted that this event somehow or circumstantially occurred in the performance of military duties, because the acts of executing Geniberto Tapias [Mr. Prada González] (sic) following his surrender and then forcing his companion, Evelio Antonio Bolaño (sic), to move the body to a road where he was subsequently executed, attest to a conceptualization and planning of criminal action of such gravity and magnitude that any possible connection with service-related activity is broken.[FN15]

[FN15] Superior Council of the Judiciary, Chamber of Disciplinary Jurisdiction, Conflict of Jurisdiction between the National Army, First Division – Military Penal Judge of the First Instance – and the National Directorate of Prosecution, National Human Rights Unit. N° 19990673-A, Decision of September 9, 1999, page 7.

However, on September 9, 1999, the Chamber of Disciplinary Jurisdiction of the Superior Council of the Judiciary denied the request and confirmed the jurisdiction of the military justice

system on the grounds that the accused were performing functions inherent in their capacity as members of the Army when the events took place and, despite the evidence produced by the Office of the Prosecutor, the victims had fallen in combat.[FN16]

[FN16] "The subjects of the homicide investigation were on an official mission whose purpose was to evacuate a soldier infected with malaria from Filocuchillo to the installations of the Voltígeros Battalion; the confrontation that arose with the subversive group in the area resulted in the deaths of Tapias Ahumada [Mr. Prada González] and Mr. Bolaño Castro." Ibidem, page 10.

41. In this regard, the Commission must once again reiterate that, by its nature and structure, the military penal justice system does not meet the standards of independence and impartiality required by Article 8(1) of the American Convention, which are fully applicable to the instant case. The Commission has already had the occasion to affirm that Colombian military penal courts do not provide a proper forum in which to examine, judge, and punish human rights violations:

The military penal justice system has several singular characteristics that impede access to effective and impartial judicial recourse within that jurisdiction. First, military courts cannot even be considered as a true judicial system. The military justice system does not form part of the Colombian Judicial Branch. This jurisdiction is operated by public security forces and thus falls within the Executive Branch. Those who issue the decisions are not career judges and the Office of the Prosecutor General does not perform its prosecutorial role in the military justice system.[FN17]

[FN17] IACHR Third Report on the Situation of Human Rights in Colombia (1999), pp. 175 to 186. See also Second Report on the Situation of Human Rights in Colombia (1993), p. 237, where it is stated: "Military criminal courts do not guarantee the right to a fair trial, since they lack independence, which is a basic requisite for the existence of this right. Moreover, their judgments have shown a pronounced partiality, frequently failing to impose sanctions on members of the security forces proven to have participated in grave human rights violations".

Moreover, the Inter-American Court has recently affirmed that:

In a Democratic state founded on the rule of law, the scope of the military penal justice system must be restrictive and geared to the protection of special juridical interests related to the functions assigned to the military forces by law. Accordingly, civilians must be excluded from military jurisdiction; military personnel alone must be judged for the commission of crimes or offenses which by their very nature are harmful to the specific juridical interests of the military.[FN18]

[FN18] Inter-American Court of Human Rights, Durand and Ugarte, Judgment of August 16, 2000, para. 117.

42. As the IACHR has already indicated in earlier decisions, the Constitutional Court of Colombia has itself ruled on the jurisdiction of military tribunals in cases pertaining to human rights violations. In that regard, it has indicated the following:

In order for an offense to be subject to the jurisdiction of the military penal justice system, there must be a clear link from the outset between the offense and military service activities. In other words, the punishable act must represent an abuse of power that occurs within the context of an activity directly linked to the proper function of the Armed Forces. The link between the criminal act and the activity related to military service is broken when the crime is extremely grave, as in the case of crimes against humanity. Under those circumstances, the case must be remanded to the civilian justice system.[FN19]

[FN19] Constitutional Court, Decision C-358 of August 5, 1997.

43. The Commission considers that the extrajudicial execution of Carlos Manuel Prada and Evelio Antonio Bolaño Castro by members of the Army cannot be considered a legitimate activity linked to the proper function of the Armed Forces. In this case, the gravity of the violation of the right to life and personal integrity of the victims, executed extrajudicially even though they offered no resistance to capture, makes it inappropriate to judge those responsible within the framework of the military justice system.

44. The American Convention imposes upon states the obligation to prevent, investigate, identify, and punish those who perpetrate and conceal human rights violations. The Inter-American Court has stated:

Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice, and, in particular, to simple and prompt recourse, so that, inter alia, those responsible for the human rights violations may be persecuted and to obtain reparations for the damages suffered. As this Court has ruled, Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention”[FN20]

[FN20] Inter-American Court of Human Rights, Loayza Tamayo, Reparations, November 27, 1998, para. 169.

In this respect, Article 25 is closely related to Article 8(1), which enshrines the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, and confers upon members of the victims’ next-of-kin the

right to have the death of their loved ones effectively investigated by the authorities, judicial proceedings brought against the perpetrators, appropriate sanctions imposed, and reparations provided for the injury suffered.[FN21]

[FN21] Inter-American Court of Human Rights, Durand and Ugarte, Judgment of August 16, 2000, para. 130.

45. In the instant case, the State has not provided the means necessary to fulfill its obligation to investigate the extrajudicial execution of the victims, judge and punish those responsible, and provide reparations to the victims' next-of-kin. The execution of Mr. Prada González and Mr. Bolaño Castro remains unpunished, and as the Court has indicated, "impunity encourages a chronic re-occurrence of the human rights violations and of the complete defenselessness of the victims and their next-of-kin." [FN22]

[FN22] Inter-American Court of Human Rights, Paniagua Morales et al case, March 8, 1998, para. 173.

46. The Commission also considers that the State has failed to fulfill its obligation under Article 1(1) of the American Convention, under which the States Parties undertake to ensure the exercise of the rights and freedoms recognized in the Convention for all persons subject to their jurisdiction. This obligation involves the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights protected in the American Convention.[FN23] The Inter-American Court of Human Rights has held that:

[FN23] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988 para. 166

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, it has failed to comply with its duty to guarantee the free and full exercise of those rights to the persons within its jurisdiction.[FN24]

[FN24] Ibidem, paragraphs 174 and 176.

In the instant case, seven years having already elapsed, the State has not effectively fulfilled its duty to judge and punish those responsible for the extrajudicial execution of the victims and provide reparations to their next-of-kin.

47. Accordingly, based on the points of fact and law set forth above, the Commission concludes that the State has failed to fulfill its obligation to investigate the execution of the victims and judge the perpetrators in accordance with the standards established in articles 8(1) and 25 of the American Convention and its duty to ensure the fulfillment of its obligations under Article 1(1) of that Convention.

V. ACTIONS SUBSEQUENT TO REPORT 77/00 APPROVED IN PURSUANCE OF ARTICLE 50 OF THE AMERICAN CONVENTION

48. On October 4, 2000, the Commission approved Report 77/00 in pursuance of Article 50 of the American Convention. In that Report, the Commission concluded that agents of the state had extrajudicially executed Carlos Manuel Prada González and Evelio Antonio Bolaño Castro and that the State was therefore responsible for the violation of Article 4, to the detriment of Evelio Antonio Bolaño Castro, 4 and 5, to the detriment of Carlos Manuel Prada González, and 8(1), 25, and 1(1) to the detriment of both victims and their next-of-kin. It also recommended that the State: (1) carry out a full, impartial, and effective investigation within the ordinary jurisdiction with a view to judging and punishing those responsible for the extrajudicial execution of Carlos Manuel Prada and Evelio Antonio Bolaño Castro; (2) adopt the measures necessary to ensure that the victims' next-of-kin receive adequate and timely reparations for the violations determined in the Report; (3) adopt measures necessary to fully apply the case law developed by the Colombian Constitutional Court and by this Commission with respect to the investigation and adjudication of similar cases in the ordinary penal justice system. On October 30, 2000, the Commission transmitted this Report to the State, allowing a period of two months in which to carry out the recommendations formulated therein.

49. On December 29, 2000, the State contacted the Commission to request an extension[FN25], which was granted to January 19, 2001. On January 19, 2001, the State contacted the Commission to indicate that

[FN25] Note EE 2965 from the Director General for Special Affairs, Ministry of Foreign Affairs, December 20, 2000.

Once the appropriate agencies have been consulted, the Colombian government has the honor to present [...] the proposal it will put forward with a view to satisfying, as the case may be, the requirements of justice, truth, and reparations in each case, in accordance with national legislation.[FN26]

[FN26] Note EE 0110 from the Director General for Multilateral Organizations, Ministry of Foreign Affairs, January 19, 2001.

The proposal mentioned indicates that the State considered it appropriate to request that the Ombudsman (Defensor del Pueblo) prepare a special report by August 21, 2001, "inclined toward fulfillment of the recommendations contained [...] within the framework of the legal and constitutional authority established in our country".[FN27] As indicated in the aforementioned proposal, the Ombudsman was to prepare his report taking into account the opinions of the parties to the proceedings before the IACHR, the next-of-kin or their beneficiaries, the judicial and administrative authorities that had taken cognizance of the proceedings concerned, the IACHR, and persons and institutions whose opinion he considered relevant. The proposal indicated that the Ombudsman would specify time limits and modalities for fulfillment of the conclusions and recommendations in his own final report, which would also be submitted to an intersectoral committee on human rights for consideration. The proposal indicates that the State "undertakes to address the conclusions and recommendations in the Ombudsman's final report".

[FN27] "Proposal by the Colombian State with respect to a number of cases before the Inter-American Commission on Human Rights in respect of which reports have been proffered in accordance with Article 50 of the American Convention on Human Rights", attached to Note EE 0110 from the Director General for Multilateral Organizations, Ministry of Foreign Relations, January 19, 2001.

50. The Commission takes note of the contents of the proposal presented by the State in response to Report 77/00, approved in the pursuance of Article 50 of the American Convention, in the instant case. The Commission also appreciates the willingness to "address the recommendations of the Commission" by way of the evaluation the Ombudsman was to conduct of the conclusions contained in Report 77/00. However, the States response does not reflect the adoption of specific measures or the assumption of certain express commitments with regard to fulfillment of the Commission's recommendations. Accordingly, the Commission must proceed in processing the case in accordance with Article 51 of the American Convention.

VI. CONCLUSIONS

51. In view of the facts and points of law analyzed above, the Commission reiterates its conclusions that agents of the State extrajudicially executed Carlos Manuel Prada González and Evelio Antonio Bolaño Castro and that the State is therefore responsible for the violation of Article 4, to the detriment of Evelio Antonio Bolaño Castro, 4 and 5, to the detriment of Carlos Manuel Prada González, and 8(1), 25, and 1(1) to the detriment of both victims and their next-of-kin.

VII. RECOMMENDATIONS

52. In view of the foregoing considerations,

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

1. Carry out a full, impartial, and effective investigation within the ordinary jurisdiction with a view to judging and punishing those responsible for the extrajudicial execution of Carlos Manuel Prada and Evelio Antonio Bolaño Castro.
2. Adopt the measures necessary to ensure that the victims' next-of-kin receive adequate and timely reparations for the violations determined in the Report.
3. Adopt measures necessary to fully apply the case law developed by the Colombian Constitutional Court and by this Commission with respect to the investigation and adjudication of similar cases in the ordinary penal justice system.

VIII. PUBLICATION

53. On February 28, 2001 the Commission transmitted this Report to the Colombian State pursuant to Article 51 of the American Convention and granted a period of one month as from that date to present information on compliance with the above recommendations. On that same date, the Commission transmitted the Report to the petitioners. On January 28, 2001 the State requested additional time to respond and the Commission granted a seven-day extension.

54. The State presented its response on April 3, 2001 and once more referred to the mechanism of compliance proposed in its previous response to the report adopted pursuant to Article 50 of the American Convention (see supra paras. 49 and 50). The State expressed that "it shall follow up on compliance with the recommendations by continuing with the investigations and other pending procedures in each case and shall submit a study on adequate compensation to the instances contemplated in Act N° 288 (1996)."[FN28]

[FN28] Note EE 0705 General Director of Special Affairs(in charge), Ministry of Foreign Affairs, April 3, 2001.

55. Accordingly, pursuant to Articles 51(3) of the American Convention and 48 of its Regulations, the Commission decides to reiterate its conclusions and recommendations included in chapters VI and VII supra; to publish this report and to include it in the Commission's Annual Report to the General Assembly of the OAS. Pursuant to the provisions contained in the instruments governing its mandate, the IACHR will continue to evaluate the measures taken by the Colombian State with respect to those recommendations until the State has complied with them.

Done and signed in Santiago de Chile in the sixth day of the month of April of the year 2001. (Signed:) Claudio Grossman, Chairman; Juan E. Mendez, First Vice-Chairman; Marta Altolaguirre, Second Vice-Chair; Robert K. Goldman, Helio Bicudo, Peter Laurie, Julio Prado Vallejo, Commissioners.