REPORT No. 47/10[1]
PETITION 1325-05
ADMISSIBILITY
ESTADERO "EL ARACATAZZO" MASSACRE
COLOMBIA
March 18, 2010

I. SUMMARY

1. On November 21, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition presented by José Luis Viveros Abisambra and María Stella Montoya Montoya in which it was alleged that on August 12, 1995 approximately 15 members of paramilitary groups, with the acquiescence and participation of agents of the Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia"), killed 18 persons including Jorge Luis Julio Cárdenas, Luis Alberto Guisao Ríos, Mélida María Jiménez Borja, Leonardo Minota Mosquera, Francisco Leonardo Panesso Castañeda, Willington de Jesús Tascón Duque, Héctor Alonso Tascón Duque, Libia Úsuga Úsuga, and Jorge Iván Zúñiga Becerra, at the Estadero "El Aracatazzo" in the El Bosque neighborhood, municipality of Chigorodó, department of Antioquia. The petition was submitted on behalf of nine victims and their next-of-kin.[2] It was alleged, moreover, that the State did not respond with the due judicial clarification of these facts.

2. The petitioners alleged that the State was responsible for the violation of the rights to life, judicial guarantees, and judicial protection, established in Articles 4, 8, and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") and Article XVIII of the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"). They allege that the State has not identified and punished the persons responsible, and that the results of the contentious-administrative proceeding are not sufficient to make reparation for the consequences. The State argued that the petitioners' claims were inadmissible considering that notwithstanding the complexity of the matter, investigations were under way and domestic remedies existed that had produced important results, accordingly there is a failure to abide by the requirement of prior exhaustion of domestic remedies, provided for at Article 46(1)(a) of the American Convention. The petitioners invoked the exception to the prior exhaustion requirement set forth at Article 46(2)(c) of the American Convention.

3. After analyzing the parties' positions and compliance with the requirements of Articles 46 and 47 of the American Convention, the Commission decided to declare the case admissible for the purposes of the alleged violation of Articles 4(1), 8(1), 25 and, in application of the principle of *iura novit curia*, Articles 2 and 5 in conjunction with Article 1(1) of the American Convention. In addition, it decided to rule it inadmissible as regards to article XVIII of the American Declaration, notify the parties of the report and order its publication.

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[1] In keeping with Article 17(2) of the Commission's Rules of Procedure, Commissioner Rodrigo Escobar Gil, of Colombian nationality, did not participate in the debate or decision in the instant case.

[2] The petitioners also note 57 next-of-kin as alleged victims in this matter: Ana Rita Amaya Zapata, Jorge Eliécer Julio Gutiérrez, Luis Alfonso Julio Gutiérrez, Ana Paola Julio Amaya, Cástulo Julio Zurique, Federmán Julio Cárdenas, Edilsa Julio González, José Aldemar Guisao David (or Davia), Rosana Ríos Arias, Gilma Rosa Guisao Ríos, Rosalba Guisao Ríos, María Mercedes Guisao Ríos, Rosangela Guisao Ríos, Rosa María Guisao Ríos, Martha Luz Guisao Ríos, Félix Antonio Molina, Erika Yesenia Molina Jiménez, Sebastián Antonio Molina Jiménez, Rosa Margarita Borja de Jiménez, Gloria Elena Jiménez Borja, Hernando Jiménez Borja, Carlos Enrique Jiménez Borja, Edwuard Adulber Jiménez Borja, Elvia Cecilia Moreno Muñoz, Eliana Patricia Cortés Moreno, Yofaide Úsuga Moreno, Ángela María Álvarez Correa, Francisco Leonardo Panesso Álvarez, Juan Guillermo Panesso Álvarez, Camilo Andrés Panesso Álvarez, Luis Alfredo Panesso Hernández, Ana Morelia Castañeda Urrego, María Eugenia Castañeda, Bertha Alicia Palacios Castañeda, Jorge Enrique Cortés Castañeda, Yudis Ester Cortés Castañeda, Ana Morelia Cortés Castañeda, Ana Joaquina Duque, Judith Amparo Duque, María Esther Duque, Luz Stella Rincón Duque, Jorge Edinson Tascón Duque, Efrey Alberto Quintero Úsuga, Arleiber de Jesús Barrientos Úsuga, Jorge Andrés Barrientos Úsuga, Adolfo Enrique Gómez Úsuga, Daniel José Gómez Úsuga, Ana Elisa Úsuga Holguín, Hernando Úsuga Úsuga, Carlos Enrique Úsuga Úsuga, Rosmeri Úsuga Úsuga, Hildorfo Antonio Úsuga Úsuga, Nélida Marlyn Úsuga Úsuga, Omaira Úsuga Holguín, Elvia María Becerra Mosquera, Diana Cecilia Zúñiga Becerra, and Bladimir Córdoba Becerra. Original petition received at the IACHR on November 21, 2005.

II. PROCESSING BEFORE THE COMMISSION

4. The IACHR recorded the petition under number P1325-05 and after a preliminary analysis, on December 19, 2005 it transmitted a copy of the pertinent parts to the State, with a term of two months to submit information, pursuant to Article 30(2) of the Rules of Procedure. In response, the State requested an extension of 30 days to submit its observations, which was granted by the IACHR. On July 10, 2006, the petitioner submitted additional information, which was forwarded to the State. On January 25, 2007, the Commission reiterated its request for information to the State.

5. The State submitted its observations on May 31, 2007, and the annexes to its observations on July 2, 2007, which were transmitted to the petitioners for their observations. In response, the petitioners requested an extension, which was granted by the IACHR. On October 31, 2007 the Commission received the petitioners' observations, which were transmitted to the State for its observations. In response, the State requested a 30-day extension to submit observations, which was granted by the IACHR. On March 31, 2008 the Commission received the response from the State, and on April 11, 2008, it received the annexes corresponding to that response. On August 19, 2008, the petitioners stated their interest in attending a hearing during the 133rd regular period of sessions of the IACHR, which was not granted by the Commission.

6. On April 28, 2009, the Commission, in keeping with Article 30(5) of its Rules of Procedure, asked the State and the petitioners for updated information on the criminal and contentious-administrative proceedings that had unfolded in relation to the petition in question. On May 15, 2009, the petitioners submitted a brief with the information requested. On May 29, 2009, the State asked for an extension, which the Commission granted. On June 11, 2009, the Commission received a brief with the information requested without the attachments indicated, which were requested of the State. On July 30, 2009, the Commission received the annexes corresponding to said communication.

III. THE PARTIES' POSITIONS

A. The petitioners

7. By way of background, the petitioners allege that the municipality of Chigorodó, department of Antioquia, is located in the region known as Urabá[3], where historically various illegal armed groups have sought to control, on occasions with the support of the Armed Forces and National Police, and landowners and businesspersons interested in bringing about the displacement of peasant farmers so as to use their lands for stock-raising, banana plantations, and African palm plantations. They indicate that in the 1990s General Rito Alejo del Río took over as Commander of the 18th Brigade (Brigada XVIII) of the National Army, with jurisdiction in the zone, and that in that capacity that General provided support to various paramilitary groups said to have perpetrated acts of violence against the inhabitants of the zone.[4]

8. The petitioners allege that on August 12, 1995, at 9:45 pm, approximately 15 members of paramilitary groups entered the Estadero "El Aracatazzo" in the El Bosque neighborhood, municipality of Chigorodó, department of Antioquia, and killed 18 persons.[5] They allege that the paramilitaries, who

[3] The region of Urabá is made up, among others, of the municipalities of Chigorodó, Carepa, Apartadó, Turbo, Necoclí, San Juan de Urabá, San Pedro de Urabá, and Arboletes. It is characterized by the quality of its lands and its agroindustrial vocation. Petitioners' brief received at the IACHR on July 10, 2006.

[4] The petitioners mention a series of episodes that involve acts of violence perpetrated over the last decade in the Urabá region, including the massacres at "Honduras" and "La Negra" farms, Pueblo Bello, La Chinita, Estadero "El Aracatazzo", Los Cunas and El Bajo Oso. Petitioners' brief received at the IACHR on July 10, 2006.

[5] The petitioners indicate that the 18 persons include the alleged victims in this petition: Jorge Luis Julio Cárdenas, Luis Alberto Guisao Ríos, Mélida María Jiménez Borja, Leonardo Minota Mosquera, Francisco Leonardo Panesso Castañeda, Willington de Jesús Tascón Duque, Héctor Alonso Tascón Duque, Libia Úsuga Úsuga, and Jorge Iván Zúñiga Becerra. Original petition received at the IACHR on November 21, 2005.

moved on foot and were bearing short- and long-range weapons, had travelled freely along the road that led to the Estadero "El Aracatazzo", with the acquiescence of agents of the Armed Forces who were bivouacked at a checkpoint that the "Voltígeros" Infantry Battalion No. 46 of the National Army had set up along that same road, at a site known as "El Idema," 1,500 meters from "El Aracatazzo."

9. The petitioners allege that the Armed Forces, and specifically two of its agents, had served as accomplices in carrying out the massacre insofar as they apparently failed to take the military measures to react to the shots fired at the Estadero "El Aracatazzo" and provide assistance to the civilian population that was there. They allege that one indication of the omission by the members of the Armed Forces bivouacked at the checkpoint is the resonance test done at "El Aracatazzo" in which "… eleven shots were fired, one by one, with an AK47 rifle at exactly 10:36 pm, subsequently two shots were fired with a Galil 5.56 rifle at 10:40 pm. It [was] noted for the record that at the time of the test … at the site known as Idema one could hear the 11 detonations noted, and the two subsequent ones clearly by the persons who were there."[6] They also allege that the testimony of several witnesses would confirm the presence of the Armed Forces in the area near the Estadero "El Aracatazzo" and that the agents bivouacked at the checkpoint located at "El Idema" would have heard the shots.

10. The petitioners indicate that several years after the facts, the criminal investigations had been ineffective and were still open. As for the establishment of liability of state agents, the petitioners indicate that on September 5, 1995, the 114th Court of Military Criminal Investigation had initiated an investigation which, by order of the Brigade, had been reassigned on September 30, 1995, to the 21st Court of Military Criminal Investigation. On November 9, 1996, the 21st Court refrained from opening a criminal investigation. Subsequently, the Regional Office of Prosecutors (Dirección Regional de Fiscalías) of Medellín forwarded attested copies to the 21st Court to investigate a sergeant and a captain of the 17th Army Brigade; it reopened the investigation, and by resolution of March 19, 1999, the 21st Court once again refrained from initiating an investigation based on the argument that the acts were perpetrated by illegal armed groups.

11. As for the disciplinary investigation, the petitioners argue that on October 23, 2002, the Office of the Procurator General of the Nation (Procuraduría General de la Nación) declared the prescription of the disciplinary action brought against two active-duty members of the National Army due to lapsing of the time periods for concluding the investigation.

12. As for the investigation in the contentious-administrative jurisdiction, the petitioners argue that on July 4, 1994, the next-of-kin of the alleged victims filed an action for direct reparation against the Nation – Ministry of Defense – National Army before the Administrative Tribunal of Antioquia. They note that on October 15, 2004, the Chamber for Reduction of Backlog of the Administrative Tribunal of Antioquia handed down a judgment denying the claims of the action. They allege that said Special Chamber "was created subsequent to the occurrence of the facts, the judges who constituted it were designated in haste, with the express order to issue a given number of judgments monthly, which required those officials to systematically deny all claims put before it, due to the physical lack of time to examine each case with the proper legal rigor." They note that on November 25, 2004, a motion of appeal was filed, which was admitted for processing on June 28, 2005.

13. The petitioners indicate that on November 23, 2006, in the context of the contentious-administrative process, a conciliation hearing was held in which it was agreed to pay 100% of the values for moral and material injury in favor of each of the complainants. They allege that on May 8, 2008 a hearing was held for clarification before the Council of State in which it was determined to exclude several plaintiffs[7] from the compensation, based on strictly procedural arguments. They note that on May 21,

[6] The petitioners make reference to the evidence from the resonance test performed on April 17, 1997, by the Office of the Procurator General of the Nation with the assistance of members of the Army, Police, the Office of the Ombudsman of Chigorodó, and the Technical Investigations Corps of the Office of the Attorney General of Colombia. Original petition received at the IACHR on November 21, 2005.

[7] The petitioners note that the alleged victims' next-of-kin who were excluded from the reparation are: Jorge Eliécer Julio Gutiérrez, Luis Alfonso Julio Gutiérrez, Ana Paola Julio Amaya, Jorge Edinson Tascón Duque, Arleiber de J. Barrientos Úsuga, Continued…

2008 the Chamber for Contentious-Administrative Matters approved the act of conciliation and that the Ministry of Defense made payment of the compensation to the plaintiffs, unless they were excluded. They allege that the act of conciliation failed to include reparation for the moral injury suffered by the direct victims and that the alleged victims still have expectations with respect to other forms of non-pecuniary reparation, with respect to which there has apparently been no progress to date.

14. As a correlate, the petitioners make reference to a proposal for conciliation that appears in a confidential document drawn up by the Ministry of Defense in 1999 and that was apparently based on a substantive analysis of the facts and evidence collected in the context of the contentious-administrative proceeding and in which it was concluded that "there is no doubt about the administrative liability of the members of the National Army, Voltígeros Battalion for the events of August 12, 1995 in the … el Aracataz[z]o bar in which 18 humble peasant farmers lost their lives, whether due to their negligence, cowardice, or, in the worst of cases, complicity."[8] They allege that after said conclusion, it is inexplicable that the regular courts did not open criminal investigations into the members of the Armed Forces allegedly involved.

15. In sum, the petitioners allege that the massacre was perpetrated by a group of approximately 15 paramilitaries, with the direct collaboration by act and omission of members of the Armed Forces. They also allege that the regular courts did not carry out investigations into members of the Armed Forces allegedly involved and that 12 years after the events, the criminal investigations against the civilians allegedly involved are still under way.

16. Accordingly, they consider that the State is responsible for the violation of the right to life protected at Article 4 of the American Convention, to the detriment of Jorge Luis Julio Cárdenas, Luis Alberto Guisao Ríos, Mélida María Jiménez Borja, Leonardo Minota Mosquera, Francisco Leonardo Panesso Castañeda, Willington de Jesús Tascón Duque, Héctor Alonso Tascón Duque, Libia Úsuga Úsuga, and Jorge Iván Zúñiga Becerra.

17. The petitioners allege that the failure to judicially clarify the facts that are the subject matter of the claim constitutes a violation of the rights to judicial guarantees and to judicial protection established at Articles 8 and 25 of the American Convention. In addition, they consider that the delay on the part of the domestic courts in deciding on the alleged victims' claims constitutes a violation of the right to justice protected at Article XVIII of the American Declaration.

18. As for compliance with the requirement of prior exhaustion of domestic remedies, provided for at Article 46(1)(a) of the American Convention, the petitioners allege that the exception provided for at Article 46(2)(c) applies, considering that several years after the massacre, the criminal investigation in the regular courts is still pending, and the criminal liability of state agents has not been established.

19. In terms of the State's arguments on the complexity of the matter (see *infra* III.B The State), the petitioners allege that the delay in the investigations is a reflection that the domestic remedies are adequate *in abstracto* but that in the instant matter they have not been effective.

B. The State

20. In its observations, the State sets forth a comprehensive description of the criminal, administrative, and disciplinary proceedings carried out into the events at "El Aracatazzo." As for the criminal investigations in the regular courts into the civilians allegedly involved in the events, the State

…continuation
Jorge Andrés Barrientos Úsuga, Adolfo Enrique Gómez Úsuga, and Daniel Enrique Gómez Úsuga. Petitioners' brief received at the IACHR on May 15, 2009.

[8] The petitioners make reference to the Conciliation Proposal from the Legal Office, Constitutional Contentious Group Medellín office, February 3, 1999. Attachment to the petitioners' brief received at the IACHR on September 26, 2006.

alleges that there were two proceedings, the first before the Regional Justice courts of Medellín under case number 18,522 for the crime of constituting armed private justice groups outside the law; and the second before the Office of the 39th Specialized Prosecutor UP under case no. 861,264 for the crimes of multiple aggravated homicide, illegal bearing of arms, and personal injuries.

21. With respect to the proceeding under case number 18,522, the State indicates that on August 16, 1995, a Regional Prosecutor from Carepa issued a resolution to open an investigation into 13 persons for the crime of forming illegal armed private justice groups and on September 6, 1995, an arrest warrant was issued for them. It indicates that in the course of the investigation 11 defendants had stated their desire to avail themselves of an early termination of the process, accordingly on February 8, 1996, the charges were drawn up for the crime of belonging to belonging to private justice groups aggravated by the premeditated preparation of the punishable act, and acting in complicity with others. It also indicates that on February 12, 1996, charges were drawn up against another defendant who also acknowledges his participation in the facts.

22. The State indicates that on March 12, 1996, the Regional Court of Medellín handed down an early judgment of first instance convicting the accused and sentencing them to 160 months imprisonment, a fine of 66.66 current minimum monthly salaries, and the accessory sanction of disqualification for the exercise of rights and public functions. It notes that the persons convicted filed a motion of appeal and that on August 13, 1996, the National Court (Tribunal Nacional) of Bogotá proffered a judgment on appeal, in which it modified the deprivation of liberty to six years and eight months, and the fine to 33 legal current minimum monthly salaries. It notes that on January 20, 1999, the Third Court of Enforcement of Penalties and Measures of Security of Medellín took cognizance of the enforcement of the penalty. The State indicates that from August 4, 1999 to June 19, 2007, the release of 10 of those convicted was decreed, as follows: five secured conditional release, four obtained definitive release, and one was benefitted by the decree of extinction of the penalty.

23. As for the proceeding under case number 861,264 (before 18,542) the State alleges that on August 13, 1995 the Regional Delegate Prosecutor of Apartadó handed down a resolution ordering that an investigation be opened into the events at “El Aracatazzo.” It notes that on August 25, 1995, the Secretary of the First Division of Support for the Regional Bureau of Prosecutors of Medellín requested the urgent issuance of copies of proceeding 18,522 and on August 29, 1995 the Regional Office of the Attorney General of Medellín Delegated to appear before the Regional Judges issued an order opening the summary investigation and identified as suspects, by means of sworn statements, four persons who were deprived of liberty in connection with investigation 18,522. It indicates that on September 18, 1995, the Regional Office of the Attorney General of Medellín ordered the preventive detention of the four persons identified as suspects in the investigation.

24. The State indicates on August 27, 1996, the preventive detention of two of the accused was ordered. It notes that on October 23, 1996 one of the accused asked the Delegate Prosecutor to avail themselves of an early judgment; this request was granted by order of October 28, 1996. The State argues that on March 7, 1997, it was decreed that the investigation be partially closed with respect to four of the accused, and that on March 20, 1997, the Office of the Attorney General filed charges for the purposes of an early judgment of the accused that was requested; he accepted his liability for the crime of aggravated multiple homicide with terrorist purposes. In view of the foregoing, the matter was referred to the regional judges and the detainee remained at the disposal of those authorities in the Bellavista prison. On April 17, 1997, the Regional Court of Medellín handed down an anticipated judgment of conviction imposing a sentence of 40 years imprisonment against him, and, as an accessory sanction, disqualification from the exercise of rights and public functions for 10 years was imposed, along with the payment of material and moral damages, which was confirmed on appeal on June 23, 1998. It notes that at the time of the judgment, the convict continued to be held in the Bellavista prison, serving the sentence in proceeding 18,552.

25. It indicates that on September 25, 1998, the Fourth Court of Enforcement of Penalties and Security Measures took cognizance of the judgment, and that on February 12, 1999, it decreed the legal joinder[9] of the penalties imposed in the Regional Courts of six years and eight months imprisonment and 40 years of imprisonment, setting a single sanction of 42 years in prison. It notes that on July 29, 2002, the Third Court (Juzgado Tercero) ruled on the request for adjustment and reduction of the penalty imposed on the person sentenced, and set as a new single sanction 316 months of imprisonment, recognizing 13 months and 16 days of the reduction in the sentence for the in-prison activities noted until then. It notes that on June 19, 2007 he was granted conditional release.

26. On September 26, 1997, formal charges were filed against five others accused of the crimes of multiple homicide and aggravated attempted homicide, and one provisional and formal charge against one of them for the crime of illegal bearing of arms. In addition, the persons detained were brought before the regional judges in the prison establishment of Bellavista. The State indicates that on April 26, 2000, a regional court convicted the accused and sentenced them to the 60 years in prison for aggravated homicide with terrorist purposes and to the accessory penalty of disqualification from the exercise of rights and public functions for 10 years, on finding them responsible for committing, concurrently, 18 crimes of homicide and one attempted homicide. On November 19, 1999, the Criminal Chamber for Reduction of Backlog of the Superior Court of the Judicial District of Bogotá ruled on a motion and decided to overturn the decision of first instance against one of those convicted, overturn the imposition of material and moral damages on those on trial, and affirm the other considerations of the ruling appealed.

27. The State indicates that the defense counsel of three of the persons convicted filed a motion for cassation and that on August 25, 2004, the Supreme Court of Justice annulled the entire procedure subsequent to the end of the investigation, as it considered that the fundamental guarantee of a technical defense for the defendants had been affected. It notes that on September 20, 2004 it was ordered that the proceeding be remanded to the Office of the Prosecutor Delegate before the Criminal Courts of the Specialized Circuit of Antioquia and that on October 5, 2004, the accused were granted provisional release; they were released on October 7, 2004.

28. It states that on March 30, 2005, the matter was heard by the 16th Specialized Criminal Prosecutor of the Medellín Circuit and that on January 22, 2008, through Resolution 0-0173, the Office of the Attorney General reassigned the investigation to the National Unit on Human Rights and International Humanitarian Law, Sub-Unit UP. It indicates that on February 26, 2008, the Office of the Specialized Prosecutor UP ordered that a variety of evidence be collected. It indicates that on December 16, 2008, the Second Criminal Court of the Specialized Circuit of Antioquia handed down an anticipated judgment against one accused who had previously accepted the charges, sentencing him to 20 years for the crimes of multiple aggravated homicide, to the accessory penalty of disqualification from the exercise of rights and public functions for 10 years, and to the payment of material and moral damages, and it ordered that the corresponding arrest warrant be issued. It notes that on December 19, 2008, the Office of the 91st Specialized Prosecutor UP established the merits of the preliminary proceedings and filed charges with respect to some accused, and preclusion with respect to others.

29. As regards the process pursuant to Law 975 of 2005 (Law on Justice and Peace), the State alleges that on November 25, 2004, Fredy Alonso Miranda González aka “El Vampiro,” Lácides Arnoldo Salas, and Virgilio Conrado Pérez demobilized from the Bloque Bananero, thus on August 16, 2006 they were proposed for the procedure pursuant to the Law on Justice and Peace. It indicates that in April and September 2007 edicts were posted in the Secretariat of the National Unit on Justice and Peace and in the daily newspaper “El Tiempo,” giving notice to the undetermined victims of Virgilio Conrado Pérez, Fredy Alonso Miranda and Lácides Arnoldo Salas.

[9] The State makes reference to Decree 2700, Article 505. Legal Joinder: “The rules that regulate the classification of the penalty, in the case of concurrence of punishable acts, shall also apply when the related crimes were ruled on independently. Likewise when various judgments have been handed down in different proceedings. In these cases, the penalty imposed in the first decision shall be considered as part of the sanction to be imposed.” Brief of observations by the State DDH.GOI No. 14799/0769 of March 28, 2008, footnote 44.

30. The State indicates that on September 20, 2007, Lácides Arnoldo Salas made his spontaneous declaration and did not ratify his interest in availing himself of Law 975 of 2005. It indicates that on November 20, 2007 Virgilio Conrado Pérez made his spontaneous declaration and said that he was responsible for the acts, along with Hoover Silgado Ríos, Walter Goez, Fredy Alonso Miranda González, and José Luis Conrado Pérez. It notes that on November 22, 2007 Fredy Alonso Miranda González gave a spontaneous declaration and said he was responsible for the events, along with alias "Papayón," alias "Walter," alias "el Valle," Hoover Silgado Ríos, Virgilio Conrado Pérez, and alias "Carevieja," who acted on orders of Carlos Castaño. The State reported that Virgilio Conrado Pérez was assassinated on March 26, 2008 at kilometer 2, hamlet of Sadén, municipality of Chigorodó. With respect to Fredy Alonso Miranda González, the State argues that he has yet to conclude his spontaneous declaration, since he himself has said that he has more acts to confess.

31. The State also indicates that Hebert Veloza alias "H.H" confessed his responsibility in the facts of the case in his spontaneous declaration given in the context of the Law on Justice and Peace. It notes that on November 18, 2008, a hearing was held before the Judge of control of guarantees of the Justice and Peace Chamber of the Superior Court of Medellín in which Veloza was accused of the crime of aggravated homicide and attempted homicide. The State argues that Veloza has not yet completed his spontaneous declaration since he himself has said that he has more acts to confess.

32. As for the criminal investigations into the members of the Armed Forces allegedly involved in the facts, the State indicates that as part of the investigation begun before the Office of the Specialized Prosecutor of Medellín, on October 6, 1997 it was ordered that attested copies be issued to investigate the possible infractions that may have been committed by the members of the 17th Brigade of the National Army. It indicates that the Human Rights Unit of the Office of the Attorney General initiated an investigation into the crimes of conspiracy to engage in criminal conduct and "mistreatment of civilians" under case 270 UDH. It notes that on September 23, 2003, the investigation was decreed to be precluded under the argument that the alleged conduct "did not exist."

33. As for the investigations before the military criminal courts, the State indicates that on September 5, 1995, the 114th Court of Military Criminal Investigation initiated a criminal investigation into the facts and that on September 30, 1995, by order of the Brigade Command, the investigation was reassigned to the 21th Court of Military Criminal Investigation. It indicates that on November 9, 1996, the 21st Court issued an order declining to consider the matter, refraining from opening an investigation into the personnel of the 17th Brigade. It notes that on December 1, 1997, the 21th Court resumed the investigation based on the attested copies within proceeding 18,542 and that on March 19, 1999, it decided once again to refrain from opening an investigation, based on considering that the acts were the responsibility of illegal armed groups.

34. As for the disciplinary proceeding, the State indicates that on September 15, 1998, the Commission to Investigate the Violent Acts Committed against Members of the Unión Patriótica[10] of the Office of the Delegate Procurator for the Defense of Human Rights of the Office of the Procurator General of the Nation initiated an investigation into the Commander of the 17th Brigade of the National Army, the Commander of the Voltígeros Battalion, the Commander of the military checkpoint at El Idema under the Voltígeros Battalion, and the Commander of Intelligence Battalion No. 4 based in Villavicencio. It further indicates that on May 5, 1999, the Commission of the Office of the Delegate Procurator began an investigation against a lieutenant of the National Army for dereliction of duty on failing to provide support to the inhabitants of the El Bosque neighborhood of Chigorodó, and the proceedings against various members of the Armed Forces were archived.

[10] The State indicates that the Commission to Investigate the Violent Acts committed against the Members of the Unión Patriótica requested of the Office of the Procurator General that the investigative steps that were initiated because of the events at El Aracatazzo in the Office of the Provincial Procurator General of Apartadó (case 008-005020-96) be provided to it, bearing in mind that according to the testimony of Héctor Feliz Rivera Cruz, the victims of the massacre belonged to the UP. Brief of observations of the State DDH.GOI No. 22995/1113 of May 31, 2007, p. 5.

35. The State indicates that on December 10, 1999, the Commission of the Office of the Delegate Procurator handed down a bill of charges against two members of the Armed Forces and that on October 23, 2000, it declared the disciplinary action against them to have prescribed due to the complexity of the investigation, "which encompassed the entire national territory, for events that occurred in quite a lengthy period."[11]

36. In terms of the contentious-administrative process, the State indicates that on June 7, 1996, it admitted the action for direct reparation filed by María Griselda Mosquera Ramírez as case 960,909. It indicates that on December 11, 1997, the proceedings were joined under case 961,151, with plaintiffs Ana Rita Amaya Zapata et al., and 962,349, with plaintiffs Yerly María Cortés Hernández *et al*., to the principal case, case 960,909. It notes that on October 26, 2000, case 971,688 of plaintiff Emilce del Carmen Galindo Flórez was also joined to proceeding 960,909. The State indicates that on October 15, 2004, the Administrative Tribunal of Antioquia handed down a judgment of absolution and denied the claims of the action based on the argument that there is no evidence whatsoever of the omission of the Armed Forces in the performance of their obligations.

37. The State indicates that on November 25, 2004, the plaintiffs appealed the decision, and on October 10, 2006, the Procurator General of the Nation filed a request that priority be accorded the ruling with the Council of State, and that on November 23, 2006, a conciliation hearing was held. It notes that on May 8, 2008, a new conciliation hearing was held in order to clarify and correct some pending aspects in the previous process in relation to the following persons: Jorge Eliécer Julio Gutiérrez, Luis Alfonso Julio Gutiérrez, Ana Paola Julio Amaya (next-of-kin of victim Jorge Luis Julio Cárdenas), and Arleiber de Jesús Barrientos Úsuga, Jorge Andrés Barrientos Úsuga, Adolfo Enrique Gómez Úsuga, and Daniel José Gómez Úsuga (next-of-kin of the victim Ana Libia Úsuga Úsuga). It notes that the petitioners, who also represent the alleged victims in the contentious-administrative proceeding domestically, renounced the sums recognized for all particulars in favor of the above-mentioned persons in the hearing of November 23, 2006.

38. The State argues that in relation to Cástulo Julio Zurique, Federman Julio Cárdenas, Edilsa Julio González, and Luz Stella Rincón Duque, the petitioner insisted on the evidence that shows that in effect they are next-of-kin of the direct victim Jorge Luis Julio Cárdenas, but it also said that in the event that the Council of State does not find that said standing has been proven, it would waive the plaintiffs' claims. It argues that on May 21, 2008, the Third Section of the Council of State issued an order approving the conciliatory agreement reached among the parties, in which the next-of-kin of victims Jorge Luis Julio Cárdenas, Luis Alberto Guisao Ríos, Mélida María Jiménez Borja, Leonardo Minota Mosquera, Francisco Leonardo Panesso Castañeda, Willinton de Jesús Tascón Duque, Héctor Alonso Tascón Duque, Libia Úsuga Úsuga, and Jorge Iván Zúñiga Becerra were compensated for material and moral damages. It notes that by resolution 3964 of 2008 payment of the compensation was ordered[12], with which the order that approved the conciliatory agreement was carried out, and on April 22, 2009 the Principal Treasurer of the Ministry of National Defense issued a certification confirming the payment to the petitioner, who served as representative of the plaintiffs in the contentious-administrative proceeding.[13]

39. As for the admissibility of the claim, the State argues failure to meet the requirement of prior exhaustion of domestic remedies and the inapplicability of the exception contained in Article 46(2)(c) regarding the unjustified delay in the decision on the domestic remedies. It argues that according to the

[11] The State makes reference to the Office of the Delegate Procurator for the Defense of Human Rights, Commission to Investigate the Violent Acts Committed against the Members of the Unión Patriótica, case No. 008-00043/97, decision of October 23, 2000. Brief of observations of the State DDH.GOI No. 22995/1113 of May 31, 2007, p. 6.

[12] The State indicates that Resolution number 3964 of 2008 ordered the payment of $3,391,259,290.40 Colombian pesos to the victims' next-of-kin. Brief of observations by the State DDH.GOI No. 31018/1579 of June 10, 2009.

[13] The State indicates that Resolution number 3964 of September 12, 2008 was paid to Mr. José Luis Viveros Abisambra as appears in the vouchers of expenditures numbers 7486 and 7487 of October 14, 2008. Attachments 2 (Resolution 2964 of 2008) and 3 (Certification by the Principal Treasurer of the Ministry of National Defense) to the Brief of observations of the State DDH.GOI No. 31018/1579 of June 10, 2009.

case-law of the Inter-American Court[14], unwarranted delay must be proven for each specific case, and that in the matter under consideration "the delay has resulted from the complexity of the matter, considering the number of persons tried and the defense of the paramount interest of due process…."[15] To that end it alleges that one should take into account first, the successful outcome of the criminal proceeding for the crime of forming illegal armed group (case 18,522); second, the processing of the special motion for cassation in order to safeguard the right to defense of the accused (case 861,264 – earlier 18,542); and third, the new securing of justice and truth through the process provided for in the Law on Justice and Peace.

40. Finally, the State asks the IACHR to find the claim inadmissible considering that the domestic remedies have not been exhausted, since in view of the complexity of the matter several of the investigations are still under way, that access to domestic remedies was and is available, and that for the most part the remedies have yielded important results.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

41. The petitioners are authorized, in principle, by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates, as the alleged victims, individual persons with respect to whom the Colombian State undertook to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Colombia has been a state party to the American Convention since July 31, 1973, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

42. In addition, the Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of rights protected in the American Convention in the territory of Colombia, a state party to that treaty. The Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention had already come into force for the State on the date on which the facts alleged in the petition are said to have occurred. Finally, the Commission is competent *ratione materiae*, because the petition alleges possible violations of human rights protected by the American Convention.

43. As for the alleged violation of a provision of the American Declaration, one should note that from the moment of the entry into force of the American Convention for Colombia, the Convention and not the Declaration became the applicable source of law[16], so long as the petition refers to the alleged violation of rights that are substantially identical in both instruments. In this case, the right allegedly violated by the Colombian State under the Declaration is protected under the Convention, and the facts that gave rise to the petitioners' claim are said to have occurred in 1995, i.e., after the American Convention came into force for Colombia. The petitioners did not offer foundation for invoking this article. Therefore, the Commission will refer only to the alleged violations of Convention and not the Declaration.

B. Admissibility requirements

1. Exhaustion of domestic remedies

[14] The State makes reference to I/A Court H.R., Case of Acosta Calderón. Judgment June 24, 2005, Series C No. 129, para. 105 and Case of the Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125, para. 65.

[15] Brief of observations of the State DDH.GOI No. 14799/0769 of March 28, 2008, para. 157.

[16] On ruling on the legal value of the American Declaration, the Court confirmed that in principle for the states parties to the Convention, the specific source of obligations in relation to the protection of human rights is the Convention itself. I/A Court H.R. *Advisory Opinion OC-10/89 (Interpretation of the American Declaration on Human Rights) of July 14, 1989*, para. 46. The Inter-American Commission has ruled along the same lines; see Report 38/99, Argentina, *Annual Report of the IACHR 1998*, para. 13 and Report 112/99, Colombia, Álvaro Lobo Pacheco *et al.* (19 Merchants), September 27, 1999, para. 17.

44. Article 46(1)(a) of the American Convention demands the prior exhaustion of the remedies available in the domestic jurisdiction in keeping with generally applicable principles of international law, as a requirement for the admission of claims on the alleged violation of the American Convention.

45. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply 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.

As the Inter-American Court has established, whenever a state alleges failure to exhaust domestic remedies by the petitioner, it has the burden of showing that the remedies that have not been exhausted are "adequate" for curing the alleged violation, i.e. that the function of these remedies within the domestic legal system is suitable for protecting the legal situation infringed.[17]

46. In the instant case the State alleges that the petition does not meet the requirement of prior exhaustion of domestic remedies, provided for in Article 46(1)(a) of the American Convention, given that there are criminal proceedings pending on the facts that are the subject matter of the claim. The petitioners allege that the exceptions to the prior exhaustion requirement set out at Article 46(2)(c) apply to the case, considering that more than 12 years after the facts, there has been delay in the criminal investigations pursued nationally.

47. In view of the parties' allegations, one must first clarify which domestic remedies must be exhausted in a case such as this in light of the case-law of the inter-American system. The precedents established by the Commission indicate that whenever a crime is committed that is subject to prosecution at the initiative of the prosecutorial authorities, the State is under an obligation to promote and give impetus to the criminal proceeding[18], and that in these cases this is the suitable means for clarifying the facts, prosecuting the persons responsible, and establishing the corresponding criminal sanctions, in addition to making possible other pecuniary forms of reparation. The Commission considers that the facts stated by the petitioners include the alleged violation of a fundamental right, as is the right to life, which translates, in the domestic legislation, into a crime whose investigation and prosecution must be promoted by the State itself.

48. In this respect, the Commission observes that as a general rule, a criminal investigation should be conducted promptly to protect the interests of the victims, preserving the evidence, and even safeguarding the rights of every person who, in the context of the investigation, is considered a suspect. As the Inter-American Court has pointed out, while every criminal investigation must meet a series of legal requirements, the rule of prior exhaustion of domestic remedies should not render international action to assist the victims to come to a halt or to be delayed to the point of being useless.[19]

49. The Commission notes that as more than 14 years have transpired since the facts that are the subject matter of the claim, the criminal liability of 10 civilians for forming illegal armed groups and

[17] Article 31(3) of the Commission's Rules of Procedure. See also I/A Court H.R., *Case of Velásquez Rodríguez,* Judgment of July 29, 1988, para. 64.

[18] IACHR, Report No. 52/97, Case 11,218, Arges Sequeira Mangas, *Annual Report of the IACHR 1997*, paras. 96 and 97. See also Report No. 55/97, Case 11,137, Abella *et al.*, para. 392.

[19] I/A Court H.R., *Velásquez Rodríguez v. Honduras Case. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 93.

of one for the crime of multiple homicides with terrorist purposes had been established. In the investigation being carried out in the Human Rights Unit of the Office of the Attorney General, several indictments have been handed down against other members of paramilitary groups, without liability having been definitively established.

50. As for the three persons who demobilized who are involved in criminal proceedings in the National Unit for Justice and Peace of the Office of the Attorney General, the IACHR understands that Virgilio Arturo Conrado Pérez was assassinated on March 26, 2008, and that the circumstances of his death are the subject of a criminal investigation, and that while Hebert Veloza, alias H.H, and Fredy Alfonso Miranda González had given spontaneous declarations in the context of the application of the Law on Justice and Peace, the first had been extradited to the United States on March 5, 2009, and the second had recently been arrested in Medellín by agents of the Technical Investigations Corps. The Commission observes that these prosecutorial measures are still in their initial stages.

51. Therefore, given the circumstances of the instant case and the time that has transpired since the facts that are the subject matter of the petition, the Commission considered that the exception to the prior exhaustion rule provided for at Article 46(2)(c) of the American Convention, regarding unwarranted delay in the development of the domestic judicial proceedings, applies here.

52. Invoking the exceptions to the rule on exhaustion of domestic remedies provided for at Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), given its nature and purpose, is a provision whose content is autonomous vis-à-vis the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question should be made prior to and separate from the analysis of the merits, since it depends on a standard of appreciation different from that used to determine the possible violation 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 in the report adopted by the Commission on the merits, so as to determine whether there are violations of the American Convention.

53. As for the proceedings before the disciplinary jurisdiction and the contentious-administrative jurisdiction, the Commission has held repeatedly[20] that those jurisdictions do not provide suitable remedies for the purposes of analyzing the admissibility of a claim of the nature of the present one before the Commission. The disciplinary jurisdiction does not constitute a sufficient means for the prosecution, punishment, and reparation of the consequences of human rights violations. And the contentious-administrative jurisdiction is a mechanism that seeks the supervision of the administrative activity of the State, and which only makes it possible to obtain compensation for damages caused by the acts and omissions of state agents. Accordingly, it is not a suitable remedy for the purposes of analyzing the admissibility of this case. As for the military criminal justice system, the Commission has ruled repeatedly that the military jurisdiction does not constitute an appropriate forum and therefore does not provide an adequate remedy for investigating, prosecuting, and punishing violations of human rights enshrined in the American Convention allegedly committed by members of the Armed Forces.[21]

2. Deadline for submitting the petition

54. The American Convention establishes that for a petition to be admissible by the Commission, it will have to be submitted within six months of the date on which the alleged injured party

[20] IACHR, Report No. 74/07 (Admissibility). José Antonio Romero Cruz *et al*. v. Colombia. October 15, 2007, para. 34.

[21] IACHR, Report No. 47/08, Petition 864-05, *Luis Gonzalo "Richard" Vélez Restrepo and family*, July 24, 2008, para. 74; see also 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. See also I/A Court H.R., *Durand and Ugarte v. Peru Case.* Judgment of August 16, 2000. Series C No. 68, para. 117.

has been notified of the final judgment. The IACHR has established that the exceptions to the prior exhaustion requirement set out at Article 46(2)(c) of the American Convention apply to the claim under consideration. In this respect, Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the prior exhaustion rule apply, the petition should be submitted within a time that is reasonable, in the Commission's view. In this connection, the Commission must consider the date on which the alleged violation of rights is said to have occurred, and the circumstances of each case.

55. In the instant case, the petition was received on November 21, 2005; the facts that are the subject matter of the claim occurred on August 12, 1995; and its alleged effects, in terms of the alleged failure to administer justice, extend to the present day. Therefore, in view of the context and characteristics of the instant case, as well as the fact that an investigation is still pending, the Commission considers that the petition was presented within a reasonable time and that the requirement of admissibility with respect to time for submission should be considered to have been satisfied.

3. Duplication of procedures and international res judicata

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

4. Characterization of the facts alleged

57. In view of the elements of fact and law submitted by the parties and the nature of the matter put before it, the IACHR considers that the petitioners' arguments on the scope of the alleged state responsibility for the facts that are the subject matter of the claim tend to establish possible violations of the rights to life, judicial guarantees, and judicial protection protected at Articles 4(1), 8(1) and 25 in keeping with Article 1(1) of the American Convention. In the merits stage the Commission shall also consider *iura novit curia* the possible violation of Article 5 of the American Convention to the detriment of the alleged victims' next of kin.

58. The Commission shall also consider *iura novit curia* in the merits stage the possible breach of the obligations established in Article 2 of the American Convention in relation to the decision on extradition to the jurisdiction of a third state[22] of one of the possible perpetrators of the "El Aracatazzo" massacre[23], who was at the disposal of the judicial authorities linked to the application of what is known as the Law on Justice and Peace.[24]

V. CONCLUSIONS

59. The Commission concludes that it is competent to examine the claims presented by the petitioner on the alleged violation of Articles 2, 4(1), 5, 8(1), and 25 in conjunction with Article 1(1) of the American Convention and that they are admissible, in keeping with the requirements established at Articles 46 and 47 of the American Convention. It also concludes that the claim must be ruled inadmissible as regards the alleged violation of Article XVIII of the American Declaration.

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[22] See IACHR Annual Report 2008, Chapter IV, Colombia, at http://www.cidh.oas.org/annualrep/2008eng/Chap4eng.htm.

[23] Resolution 295 of the Ministry of Interior and Justice of August 21, 2008, ordered the extradition of Hebert Veloza, alias H.H, which occurred on March 5, 2009.

[24] On June 22, 2005, the Congress of the Republic of Colombia approved Law 975 of 2005, known as the "Law on Justice and Peace," which came into force after presidential sanction on July 22, 2005. See IACHR, Report No. 70/09, Petition 1514-05, Admissibility, José Rusbell Lara, Colombia, August 5, 2009.

60. Based on the foregoing arguments of fact and law and without this representing any prejudgment on the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible in relation to Articles 2, 4(1), 5, 8(1), and 25, in conjunction with Article 1(1) the American Convention.

2. To notify the Colombian State and the petitioner of this decision.

3. To continue with the analysis on the merits.

4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 18th day of the month of March 2010. (Signed: Felipe González, President; Paulo Sérgio Pinheiro, First Vice-president; Dinah Shelton, Second Vice-president; María Silvia Guillén, and José de Jesús Orozco Henríquez, members of the Commission).