REPORT No. 159/10
PETITION 1250-06
INADMISSIBILITY
IRIS MARTÍNEZ ET AL.
URUGUAY
November 1st, 2010

I. SUMMARY

1. This report refers to the admissibility of Petition 1250-06, before the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR"), received on November 10, 2006, from Ms. Elizabeth Iturrioz and Ms. Susana Dorado (hereinafter "the petitioners") on behalf of the next-of-kin of the victims who were killed and of 13 persons injured as a result of an airplane accident[1] (hereinafter "the alleged victims"), against the State of Uruguay (hereinafter "the State" or "the Uruguayan State"). The petitioners allege that the State is responsible, in the framework of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), for the alleged lack of access to justice to the detriment of the alleged victims.

2. The petitioners report that on November 14, 1971, the General Command of the Uruguayan Navy performed a display of maneuvers with two helicopters, one of which crashed, resulting in eight deaths (including three children) and more than 40 persons injured, approximately 10 of whom suffered amputations. They allege that the State did not conduct the proper investigation into the facts in the regular justice system, but rather limited the investigation to the military courts, without the victims or their next-of-kin having had any access to justice or proper compensation by the State for what happened, to this day. They allege that even though they requested information from various government offices with respect to the expert examinations and investigations conducted in the military justice system, they had not obtained any response whatsoever, and that it was not until 2005 that they came to learn relevant information, through a television program.

3. The State indicates that it was proper for the military courts to undertake the investigation, since it was an accident that involved military personnel and military aircraft. It adds that even though it was an accident, the State paid compensation to the victims, by means of Law 14,106, passed in March 1973, with which it assumed its responsibility for the facts. The State alleges that the petitioners did not pursue any remedy in the domestic jurisdiction until 2004, when the judicial authorities ruled that the action filed against it had prescribed. In view of the foregoing, the State asked the Commission to find the petition inadmissible.

4. After analyzing the parties' positions, the Commission concluded that it is competent to hear the claim, but that it is inadmissible for failing to meet the requirement provided for at Article 46(1)(b) of the American Convention. The Commission resolved to notify the parties of this report, to make it public, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEDURE BEFORE THE COMMISSION

5. The complaint was presented by the petitioners to the Executive Secretariat of the Commission on November 10, 2006; they submitted additional information on August 3, 2007. The IACHR began processing the petition on August 28, 2007, when it transmitted the pertinent parts to the

[1] The alleged victims as identified by the petitioners are: Elizabeth Iturrioz, daughter of José Iturrioz (killed); Susana Dorado, mother of the child Pablo González Dorado (killed) and wife of Carlos Porta (killed); Audilio Amaral, son of Audilio Amaral (killed); María Amaral, daughter of Audilio Amaral (killed); Gisela San Martín, daughter of Raúl San Martín (killed); Norma Lorenzo (injured); Sergio Leivas, son of Olgarido Leivas; Solis García Pereira (injured); María Martín, wife of José Iturrioz (killed); María Andrea Pelliccia, sister of the child Eduardo Pelliccia (killed); María Cecilia Pelliccia, sister of the child Eduardo Pelliccia (killed); Wismen Núñez (injured); Celestina Iturrioz, daughter of José Iturrioz (killed); Alberto Forteza (injured); Eduardo González, father of the child ablo González Dorado (killed); Iris Nelva Martínez (injured).

State and asked it to submit its response within two months. As the State indicated to the Commission that part of what was forwarded to it was illegible, the petition was forwarded to it again on June 10, 2008. The State submitted its response by means of Note No. 157-08 of September 16, 2008, which was forwarded to the petitioners by communication of October 27, 2008.

6. The petitioners submitted additional information by communications received March 13, September 24, and December 17, 2008, and May 27 and October 23, 2009, which were duly forwarded to the State.

7. The State, for its part, sent additional information by communications of February 17 and 24, 2009, and August 27 and December 14, 2009, all of which were duly forwarded to the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners

8. The petitioners indicate that on November 14, 1971, when the General Command of the Uruguayan Navy was conducting a demonstration of maneuvers with two helicopters one of them crashed, leaving eight dead (three of them children) and more than 40 injured, approximately ten of whom suffered amputations.

9. They also state that 17 months after the accident the last dictatorial period in Uruguay began, during which the alleged victims "made efforts to obtain justice and compensation, without success."

10. They allege that while an inquiry was launched into the facts, it was carried out in the military criminal justice system, and exonerated the crew members of the craft of any liability, without any expert examination or witnesses. In this regard, the petitioners state that the investigation into the facts should not have been conducted by the military justice system, but by the regular justice system, and that no charges were filed or criminal investigation opened to look into the facts.

11. They add that in 2005 they found out that an investigation was carried out by the naval aviation authorities and the Ministry of Defense at the time, and that from the record one can observe that the resolution does not mention: (a) any expert examinations, (b) the inebriated state of the pilot, (c) the co-pilot's lack of experience, (d) human error in failing to activate the emergency pedals, (e) erroneous selection of the area of operations; or (f) lack of fire-fighting equipment.

12. Moreover, they report that in 1973, the General Command of the Navy had granted some of the victims the sums of $2,000 pesos for each death (regardlessof the victim's age) and $3,000 pesos for each person mutilated, as compensation. They also note that only one person received medical care in the United States, paid for by the Uruguayan government.

13. The petitioners indicate that the compensation received was not in line with the amounts received in cases of major accidents and damages such as those suffered by the victims. They indicate that one should not have turned to the parameters of the Banco de Seguros del Estado since these were not occupational accidents, but an accident for which the State was responsible. Moreover, they allege that the list of persons compensated in 1973 names 24 persons injured, whereas there were actually 48.

14. They indicate that in 1978 most of the persons injured filed a complaint in New York against the manufacturer of the aircraft, United Technology Corporation. In this regard, they report that in October 2002, the Supreme Court of the United States rejected the claim in part, due to the running of the limitations period, allowing only the claim of the victims who were under 18 years of age at the time of the accident. They explain that the action filed before the courts in the United States was based on a manufacturing defect in the aircraft; accordingly it did not involve or affect the responsibility of the Uruguayan State.

15. They further note that with the return to democracy, in 1985, they took some steps and presented letters to the Ministry of Defense and various political figures to collect information about the accident; specifically, they requested the files, the expert reports, and the hearings held. They allege that they were repeatedly denied the information on grounds that it was a military matter.

16. With regard to the investigations, they note that there was no judicial investigation whatsoever at the time of the accident other than the military one. The petitioners allege that the State violated the principle of officiality (*principio de oficialidad*) for it should have forwarded the record to the regular justice system, which it did not do either before or after the measures to suspend individual guarantees of the de facto government. They clarify that in December 2004 they brought a criminal action before the First Criminal Court of First Instance (Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno) for it to pursue the inquiry into the accident. In October 2005, the judge had ruled to archive the matter due to prescription of the criminal action. The alleged victims asked that the inquiry be reactivated, which was done on February 1, 2006; nonetheless, they indicate that the result was the same, for the Office of the Prosecutor (Fiscalía), in its second report, reiterated that the action was barred by the tolling of the limitations period. They add that they were therefore unable to continue, and the case was archived.

17. They indicate that on not having a technical or expert investigation into the accident, it was not possible to technically evaluate the responsibilities, so as to bring a civil action aimed at obtaining fair compensation. They describe one case of a person who had filed an action in 1989 in the Court of First Instance against the Ministry of National Defense for damages, which was also dismissed on grounds that it was time-barred, which they say verifies that even having gone before the civilian courts soon after the return of democracy, they had not obtained justice.

18. They argue that the film record of the accident had been sequestered and destroyed by the military authorities, and that it was not until June 17, 2008 that a journalist, on a television program, had shown a copy of the technical investigations of the Air and Naval Force of Uruguay, as well as the report by the manufacturer of the helicopters, which had been entrusted to three active-duty Uruguay military officers in 2000, for the purpose of presenting that expert evidence in the litigation brought in New York by Uruguayans who had been injured in the accident

19. They indicate that there are reports by the State that expressly indicate that the pilots of the aircraft who caused the accident erred, and that the pilot was inebriated.

20. The petitioners allege that the facts described represented a violation, by the Uruguayan State, of the rights to justice, equality before the law, and judicial guarantees, contained in Articles 8, 24, and 25 of the American Convention, to the detriment of the victims of the air accident of November 14, 1971, and their next-of-kin.

B. The State's position

21. The State indicates that in effect, on November 14, 1971, the General Command of the Navy was conducting a public display of rescue maneuvers with two Sikorsky military aircraft, acquired from the United States. On that occasion there was an accident involving the two aircraft, which resulted in eight deaths, including three children, 17 persons injured who were released from the hospital the day of the accident, and another 30 persons injured who had to be hospitalized, 10 of whom suffered amputations.

22. It adds that the next day, on November 15, 1971, the Commander in Chief of the Navy requested the presence of a military judge, a request that was attended to urgently, giving way to the proceedings of the Third Investigative Military Court (Juzgado Militar de Instrucción de Tercer Turno). In addition, the Commander of Naval Aviation at the time had ordered that a technical inquest be conducted. The Ministry of National Defense had ordered that the National Aeronautic Authority, represented by the Commander in Chief of the Air Force at the time, issue a statement on the conclusions that emanated

from that technical inquest on the points of agreement or discrepancies with it found by the National Aeronautic Authority.

23. It reports that the ruling by the First Military Prosecutor No. 59172 (Fiscal Militar de Primer Turno No. 59172), of April 17, 1972, held that there was no indication of any violation of the military criminal law provisions in force, and that the investigation should therefore be closed, in keeping with the provisions of the Code of Military Criminal Procedure. On April 25, 1972, the Military Judge ruled along the same lines, and the preliminary inquest conducted by the Third Investigative Military Court was forwarded to the First Investigative Military Court since it was determined to close the procedure on May 5, 1972, and on May 9, 1972 the matter was forwarded to the Supreme Military Tribunal.

24. As for compensation, the State indicates that in May 1972 a Special Committee was established whose mission was to determine the solutions that would be granted for the persons injured in the accident of November 14, 1971. That Commission had recommended introducing legislation to address the matter of compensation. The State adds that as a result, in March 1973 Law 14,106 was adopted. Its Article 102 determined that "The General Command of the Navy shall pay compensation to the victims, persons injured, and successors with claims arising from the helicopter accident that occurred at Pocitos beach on November 14, 1971, to which end an outlay shall be set aside of up to $ 75,000,000 (seventy-five million pesos), which shall be drawn from general revenues." The State adds that this fact itself implied recognition of the State's responsibility in the accident.

25. The State adds that the compensation was made in keeping with the parameters in cases involving similar damages at the time, and notes that this was done administratively, without the interested persons having to come before a court to claim the reparation they considered was owed to them. The compensation was granted voluntarily, without any judicial or other ruling requiring the State to make such payment. This clearly shows the acceptance of the State's responsibility in the facts, even though it was shown that it was an accident caused by an act of God (*caso fortuito*).

26. As for the action filed by the petitioners in 2004 before the criminal courts, the State argues that in introducing it they gave as the reason for not having filed their complaint earlier that in the previous years they had taken administrative initiatives, after the return of democracy; and before that time, because of the state of suspension of guarantees. It adds that the prosecutorial ruling issued on October 21, 2005, held that the limitations period had run in the case, under Article 117 of the Criminal Code. In a subsequent ruling, on April 3, 2006, in the same case, the Prosecutor's Office was of the view that even though it was not proper to include the period of military government for the running of the limitations period, following the prevailing doctrine one would still have to conclude that the criminal action had already prescribed.

27. The State argues that with the return of democracy to Uruguay in 1985, the alleged victims were able to bring actions before the national courts, both criminal and civil, and put forth their case with full guarantees. The victims and/or their next-of-kin should have presented a criminal complaint into the facts, considering that the accident happened in November 1971, two years before the beginning of the period of military rule. In addition, it adds, at the beginning of the democratic period in 1985, they could have filed their civil claim before the national courts, yet they decided to turn to the courts of the United States to sue the company that manufactured the helicopters. They let 35 years go by since the accident, and they let 21 years go by after the entry into force of the American Convention.

28. The State adds that on March 3, 2005, Ms. Elizabeth Iturrioz and Ms. Susana Dorado submitted a note to the then-Minister of National Defense in which they requested access to the archived documentation related to the accident in question, and a series of considerations with respect to an insurance company and the hospital care received by the persons injured. They assert that the authorities of the Ministry of National Defense ordered that what the petitioners requested be done.

29. With respect to the technical reports by the Air Force, the details of the accident, conclusions on the causes and responsibilities in it, in which they evaluate the factors that led to the

accident, the State reports that the conclusion was that the Force that organized the event made a series of mistakes of command, planning, and supervision.

30. As additional information, the State indicated that by Decree No. 32,572 of July 17, 2008, the Departmental Board (Junta Departamental) of Montevideo resolved to approve the installation of a monolith with a commemorative plaque in the space delimited by Rambla República del Perú to the coast of the River Plate across from the esplanade of the former Kibón, which would include the inscription "Memorial de un tragedia ocurrida en este lugar el 14 de noviembre de 1971 que es parte de los sentimientos y el recuerdo de los uruguayos. Junta Departamental de Montevideo, 14 de noviembre de 2008" ("Memorial of a tragedy that occurred in this place on November 14, 1971, which is part of the sentiments and memory of Uruguayans. Departmental Board of Montevideo, November 14, 2008").

31. In response to the petitioners' observations, the State indicates that the military justice system was investigated the incident because it involved an accident in which members of the military were the key players and that it was done in keeping with the laws in force at the time. Nonetheless, it clarifies that the ruling by the military justice system that there was no violation of the military provisions does not imply the absence of responsibility on the part of the State. It indicates that this was considered at the time that compensation was paid to the victims, whereby the State assumed its responsibility.

32. Accordingly, the State asked the Commission to declare the petition inadmissible for failing to exhaust domestic remedies as they were required to do, and because the facts do not tend to establish violations of any right enshrined in the American Convention.

IV. ADMISSIBILITY ANALYSIS

A. Competence of the Commission *ratione personae, ratione materiae, ratione temporis* and *ratione loci*

33. The Commission is competent to examine the petition in question. According to Article 44 of the American Convention, the petitioners have standing to file a complaint with the Commission. Uruguay has been a member state of the Organization of American States since 1955, when it ratified the Charter of the OAS, and, therefore, is subject to the Commission's jurisdiction with respect to individual complaints, as that competence was established by the Statute in 1965 in relation to the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration"). The State of Uruguay has been subject to the jurisdiction of the Commission in the terms of the American Convention since April 19, 1985, the date on which it deposited the respective instrument of ratification. Accordingly, the Commission is competent *ratione personae* to examine the complaint presented.

34. Since the petition alleges violations of rights stipulated, first, in the American Declaration, and subsequently in the American Convention, the Commission is competent *ratione materiae* to examine it.

35. While the accident that affected the alleged victims occurred in 1971, the American Declaration of the Rights and Duties of Man establishes the criteria applicable for the Commission to examine a matter. With respect to any member state that has not yet ratified the American Convention, the fundamental rights that the State undertakes to preserve as party to the Charter of the OAS are those stipulated in the American Declaration, which is a source of international obligations.[2] The Commission's Statute and Rules of Procedure establish additional provisions regarding the exercise of its competence. That competence was in force as of the date of the accident, and the Declaration, like the Convention, provides for access to justice (Articles XVII and XVIII). Once it was ratified by Uruguay, the American Convention became the principal source of legal obligations[3] and the rights and obligations expressly mentioned by the petitioners became applicable. Accordingly, the Commission is competent *ratione temporis* in relation to the allegations made by the petitioners.

36. Finally, given the fact that the petition adduces violations of rights protected under the American Declaration and the American Convention said to have taken place in the territory of a member state of the OAS, the Commission concludes that it is competent *ratione loci* to hear the matter.

B. Other admissibility requirements

1. Exhaustion of domestic remedies and time for filing a petition

37. Article 46(1)(a) of the American Convention provides that in order for a complaint submitted to the Inter-American Commission to be admissible, under Article 44 of the Convention, one must first have pursued and exhausted domestic remedies, in keeping with generally recognized principles of international law. This requirement is aimed at guaranteeing the state in question the possibility of resolving disputes within their own legal framework. Moreover, under Article 46(1)(b) of the Convention, in order for a petition to be admitted it must be filed within the stipulated time, i.e. six months from the date on which the person whose rights were allegedly violated has been notified of the final decision handed down in the domestic courts.

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[2] I/A Court H.R., Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," Ser. A No. 10, paras. 43-46.

[3] I/A Court H.R., Advisory Opinion OC-10/89, July 14 1989, "Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," Ser. A No. 10, para. 46.

38. In the instant case, the petitioners adduce that the State was under an obligation to initiate the investigation into the facts in the regular courts on its own initiative. The State, for its part, alleges that it satisfied its duty to investigate in the military justice system.

39. The Commission's analysis must begin with a determination of the adequate remedy that had to be exhausted based on the facts of each case, i.e. the means suitable for resolving the legal situation infringed.

40. With respect to the investigation into the facts, the Commission observes that the day after the accident an investigation was begun in the military jurisdiction in which, in April 1972, it was determined that there was no violation whatsoever of the military criminal provisions and, therefore, it ruled to archive the case.

41. As the Inter-American Court of Human Rights has indicated repeatedly, although the military criminal justice system is not itself violative of the American Convention, its jurisdiction should be exceptional and refer solely to offenses against legal interests military in nature. For the purposes of the admissibility analysis, this principle suggests the military jurisdiction may not be suitable for upholding the guarantees of impartiality and independence necessary to determine the existence of responsibility in an incident in which persons outside of the military were injured. In cases such as this, in which civilians lost their lives at the hands of state agents, even if an accident, in principle the regular criminal justice authorities would be the appropriate ones to carry out the investigation. The investigation into the facts and causes of the accident of November 14, 1971, in which the alleged victims were affected, should have been carried out in the regular criminal jurisdiction.

42. With respect to the allegations related more specifically to the compensation determined by Law 14,106 of March 1973, the Commission does not have information that indicates that the alleged victims pursued any remedy before the domestic jurisdiction to seek compliance with that law or to challenge the arrangement and/or the amounts established by means of that law.

43. As regards the exhaustion issue, the Commission observes that the alleged shortcomings of the military jurisdiction, including the alleged lack of access to the relevant information, could have kept the alleged victims or their next-of-kin from pursuing other remedies, due to the failure of clarify the facts and lack of evidence alleged.

44. Without prejudice to those difficulties in exhausting possible domestic remedies, the Commission observes that the petitioners have turned to the system of individual petitions 35 years after the accident. According to the Rules of Procedure of the IACHR, in cases in which it has not been possible to exhaust domestic remedies, the petitioners must file their petitions in a time which, in light of the circumstances, is reasonable. Moreover, it should also be noted that 34 years have elapsed since the resolution of the military investigation, 33 years since the adoption of Law 14,106, which decreed the compensation challenged here, and 21 years since the re-establishment of democracy in Uruguay. The petitioners have not presented the Commission any arguments that explain or justify the lapse between these relevant events and the submission of the petition under study.

45. In view of the foregoing considerations, the Commission concludes in the instant case that the requirement stipulated at Article 46(1)(b) of the American Convention, regarding timely submission of the petition, was not met.

46. The Commission refrains, having concluded that the matter is not properly before it, from examining the other admissibility requirements provided for in the American Convention.[4]

[4] IACHR, Report No. 5/10, Petition 12.118, Peru, Alicia Álvarez Trinidad; Report No. 135/09, Petition 291-05, Peru, Jaime Salinas Sedó, November 12, 2009; Report No. 42/09, Petition 443-03, Peru, David José Ríos Martínez, March 27, 2009; Report No. 87/05, Petition 4580/02, Peru, October 24, 2005; Report No. 73/99, Case 11,701, Mexico, May 4, 1999; Report No. 24/99, Case 11,812, Mexico, March 9, 1999; and Report No. 82/98, Case 11,703, Venezuela, September 28, 1998, among others.

V. CONCLUSIONS

47. In light of the arguments of fact and law set forth above, the Commission considers that the petition is inadmissible under Article 46(1)(b) of the American Convention, and, accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this petition inadmissible under Article 46(1)(b) of the American Convention.

2. To notify the parties of this decision.

3. To make the instant report public and publish it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on November 1st, 2010. (Signed): Felipe González, President; Dinah Shelton, Second Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, José de Jesús Orozco Henríquez, and Rodrigo Escobar Gil, members of the Commission.