

**REPORT N° 76/01**  
CASE 12.291  
WILSON GUTIÉRREZ SOLER  
COLOMBIA  
October 10, 2001

**I. SUMMARY**

1. On November 5, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition submitted by the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (hereinafter "the petitioners") in which it is alleged that on August 24, 1994, members of the National Anti-Extortion and Kidnapping Unit of the National Police (UNASE) and one private individual tortured Mr. Wilson Gutiérrez Soler after detaining him in the city of Bogotá, Republic of Colombia (hereinafter "the State," "the Colombian State," or "Colombia").

2. The petitioners allege that the State is responsible for violating the rights to humane treatment, a fair trial, and judicial protection, provided for at Articles 5, 8, and 25 of the American Convention on Human Rights (hereinafter "the American Convention") to the detriment of the alleged victim, in conjunction with the general obligation to respect and ensure the rights set forth therein.

3. The State argued that the petitioners' claim is inadmissible since Mr. Soler's case has already been examined by the domestic courts, under Colombia's domestic law. In addition, it argued that the petition had been submitted outside of the legally permissible time frame, as the six-month period provided for at Article 46(1)(b) of the American Convention had expired.

4. Based on the analysis of the parties' positions, the Commission concludes that it is competent to examine petitioners' claim, and that it is admissible under the provisions of Articles 46 and 47 of the American Convention.

**II. PROCESSING BEFORE THE COMMISSION**

5. On June 13, 2000, the Commission assigned the claim the number 12.291, in keeping with the Regulations of the Commission in force until April 30, 2001, and forwarded the pertinent parts of the complaint to the Colombian State, also on June 13, 2001, giving it 90 days to submit information.

6. On September 13, 2000, the State requested an extension, which was duly granted by the Commission. On October 13, 2000, the State submitted its answer, whose pertinent parts were forwarded to the petitioners for observations. On December 1, 2000, the petitioners requested an extension, which was duly granted by the Commission. On January 4, 2001, the petitioners submitted additional information. The pertinent parts of the information were sent to the State, which was given an additional 30 days to submit its observations.

7. On February 9, 2001, the State requested an extension to submit its observations, which was duly granted by the Commission. On February 26, 2001, during its 110th regular session, the Commission held a hearing with the presence of both parties. On July 25, 2001, the Commission asked the State to submit additional information. On August 23, 2001, the State requested an extension to submitting said additional information. The Commission granted the extension requested. On September 17, 2001, the State submitted its observations.

**III. THE PARTIES' POSITIONS**

**A. The petitioners' position**

8. The petitioners allege that on August 24, 1994, members of the National Anti-Extortion and Kidnapping Unit (UNASE: *Unidad Nacional Antiextorsión y Secuestro*) of the National Police detained Mr. Wilson Gutiérrez Soler in the course of an anti-extortion operation in the city of

Bogotá. The operation was carried out in response to a complaint lodged with UNASE according to which Mr. Gutiérrez Soler participated in acts related to the crime of extortion.<sup>1</sup>

9. The petitioners' account indicates that members of the UNASE took the detainee to the UNASE offices. It alleges that once there, the victim was interrogated by then-Commander of the UNASE, Col. Luis Gonzaga Enciso Barón, and by the private individual who lodged the complaint against him, Mr. Ricardo Dalel Barón. The petitioners allege that Mr. Gutiérrez Soler was urged to incriminate himself, accepting that he had engaged in the crime of extortion, and that when he refused to do so, Messrs. Enciso Barón and Dalel Barón stripped him and tortured him by introducing a blunt object into his anus and by inflicting burns on his penis.

10. The petitioners allege that Wilson Gutiérrez Soler signed a self-incriminating statement under duress and without the presence of an attorney, after having been tortured. This declaration was the basis for the special courts in existence at that time known as the Regional Justice jurisdiction to institute a proceeding against him for the crime of extortion and to a detention order that prevented his release. On January 20, 1995, the Delegate Prosecutor before the Superior Court (*Fiscalía Delegada ante el Tribunal Superior*) decided to revoke the detention order and to order Mr. Gutiérrez Soler's release. On May 6, 1999, an indictment was issued against Wilson Gutiérrez Soler, and an arrest warrant was proffered, which was revoked after being appealed by the defense. According to the information provided by the petitioners, Mr. Gutiérrez Soler is now free, but is still under investigation in this proceeding.

11. On August 25, 1994, Mr. Gutiérrez Soler denounced to the delegate of the special prosecutorial unit known as the *Fiscalía Regional*, for UNASE (urban area), the torture he had suffered the day before.<sup>2</sup> As a result of the complaint, parallel proceedings were initiated before the military criminal courts and the regular courts. The 51st Judge of Military Criminal Investigation instituted proceedings against Col. Luis Gonzaga Enciso Barón for the offense of injuries (*lesiones*) and the investigation was transferred to the military prosecutorial unit known as *Auditoría Auxiliar de Guerra* N° 60, where it was decided to suspend all proceedings against the accused. This decision was affirmed by the military criminal court on September 30, 1998. For its part, the Office of the Attorney General initiated an investigation into Mr. Ricardo Dalel Barón. On January 15, 1999, the Personal Injuries Unit of the Office of the Attorney General, Prosecutor N° 248, ruled to preclude the investigation into Mr. Ricardo Dalel Barón, and ordered that the case be archived. Later, the victim invoked the special constitutional remedy known as the *acción de tutela* before Criminal Court N° 55 of the Bogotá circuit, which was rejected. On June 8, 1999, the Superior Court of the Judicial District of Bogotá affirmed the decision. In June 1999, the Constitutional Court ruled not to review the decision of the Superior Court, which made it a firm judgment.

12. In addition, according to petitioners' account, a series of disciplinary proceedings were carried out in response to the complaint lodged by Mr. Gutiérrez Soler. Specifically, on February 27, 1995, the Director of the Judicial Police, Brigadier Hugo Rafael Martínez Poveda, exonerated Col. Luis Gonzaga Enciso Barón of all disciplinary liability. Nonetheless, on June 7, 1995, the Office of the Delegate Procurator for Human Rights (*Procuraduría Delegada para la Defensa de los Derechos Humanos*) considered that there were sufficient grounds for drawing up a bill of charges against Col. Luis Gonzaga Enciso Barón. In response, the Office of the Procurator General (*Procuraduría General de la Nación*) decided to terminate the proceeding alleging that the prior absolution of Barón in the proceeding carried out by the Director of the Judicial Police barred the opening of a new proceeding by application of the principle of *non bis in idem*.

13. The petitioners allege that the State, through its agents, participated directly and allowed a private individual to inflict physical torture on Mr. Gutiérrez Soler while he was in the State's custody, in order to extract a confession from him, in violation of the judicial guarantees that

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<sup>1</sup> On August 24, 1994, Mr. Ricardo Dalel Barón allegedly lodged a complaint with the Commander of UNASE, Col. Luis Gonzaga Enciso Barón, against Wilson Gutiérrez Soler, in which he accused Gutiérrez Soler of attempting to extort him. Petition submitted to the Commission on November 5, 1999.

<sup>2</sup> The petition of November 5, 2001, includes as an annex copies of the medical certificate from the National Institute of Forensic Medicine (*Instituto Nacional de Medicina Legal*) of August 24, 1994, which describes the victim's wounds and the degree to which he was incapacitated.

should guide any investigation where there are allegations of criminal conduct. In addition, they allege that the State deprived the victim of access to a remedy adequate to investigate the persons responsible for these violations, since the state agent accused of torture was tried before the military criminal courts rather than the regular courts.

14. In view of these factual allegations, the petitioner considers that the State has violated the victim's right to humane treatment, right to a fair trial, and right to judicial protection, as well as the general obligation to respect and ensure the rights protected by the American Convention, enshrined in Articles 5, 8, 25, and 1(1) of the same treaty. As regards the admissibility of the claim, the petitioners allege that it meets the requirements established in Articles 46 and 47 of the American Convention.

## **B. The State's position**

15. The State alleges that Wilson Gutiérrez Soler's claim alleging he was tortured was examined by the domestic courts, which, in its view, met the obligation of administering justice under Colombian law.<sup>3</sup> In this regard, it considers that the Commission should refrain from reviewing an issue already decided by the domestic courts as though it were a court of last resort, or court of fourth instance, and accordingly that the claim should be considered inadmissible.

16. In the course of the hearing held by the Commission during its 110th regular session, the State indicated that considering that domestic remedies were exhausted by the decision of June 10, 1999, the petitioners failed to meet the requirement of submission within six months of the final decision, provided for at Article 46(1)(b) of the American Convention, and that, accordingly, the petition had not been submitted in timely fashion. In its observations of September 17, 2001, the State alleged that in any event the IACHR should "out of equity to the parties..., forward the complaints in timely fashion, or at least inform them that the complaint was submitted in timely fashion by the petitioners."<sup>4</sup>

## **IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY**

### **A. Competence**

17. The petitioners are authorized by Article 44 of the American Convention to lodge complaints with the Commission. The petition states as the alleged victim an individual with respect to whom Colombia undertook to respect and guarantee 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 it deposited the respective instrument of ratification. Accordingly, the Commission is competent *ratione personae* to examine the petition.

18. The Commission is competent *ratione loci* to hear the petition insofar as it alleges violations of rights protected in the American Convention in the territory of a state party to that treaty. The IACHR is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the Convention had already entered into force for the State on the date on which the facts stated in the petition are alleged to have occurred. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

### **B. Admissibility Requirements**

#### **1. Exhaustion of domestic remedies**

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<sup>3</sup> Note EE 2303 from General Office for Special Matters of the Ministry of Foreign Affairs of the Republic of Colombia, October 13, 2000.

<sup>4</sup> Note EE 34106 of the General Office for Special Matters of the Ministry of Foreign Affairs of the Republic of Colombia, September 17, 2001.

19. Article 46(1)(a) of the Convention establishes as a requirement for a petition to be admitted "... that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." In this case, the State expressly recognized, in the hearing held in the 110th regular session, that the domestic remedies had been exhausted by the victim. In view of this declaration, the Commission considers the requirement set forth in Article 46(1)(a) of the American Convention to have been met.

## **2. Time period for submitting the petition**

20. In the course of the hearing held by the Commission at its 110th regular session, the State alleged that the petitioners had failed to satisfy the six-month time period for submission of petitions, as required by Article 46(1)(b) of the American Convention. The State also made reference to this allegation in its communication of September 17, 2001. This provision establishes that for a petition to be admitted by the IACHR, it must be submitted within six months from the date on which the person allegedly injured has been notified of the final decision of the domestic courts in relation to his or her claim.

21. As appears from the information in the record, on June 10, 1999, after an *acción de tutela* brought by the victim was rejected, the ruling of the Superior Court of the Judicial District of Bogotá that decided to archive the case over personal injuries<sup>5</sup> brought at the initiative of the alleged victim became a firm judgment. The Commission notes that the petition was received by the Executive Secretariat of the IACHR on November 5, 1999, and that additional information was requested of the petitioners that was sent in by June 1, 2000. On June 13, 2000, after analyzing the documents provided by the petitioners, the Commission decided to begin the procedure and transmit to the State the pertinent parts of both the initial claim and of the additional information received at a later date. In view of the procedural activity and the dates indicated above, the Commission concludes that the petition was submitted within the six-month period required by Article 46(1)(b) of the Convention.

## **3. Duplication of procedures and *res judicata***

22. 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 body. Accordingly, the requirements established at Articles 46(1)(c) and 47(d) of the Convention are considered to have been met.

## **4. Characterization of the facts alleged**

23. The State has alleged that the decision of the domestic courts that dismissed the claim by Mr. Gutiérrez Soler based on the provisions of Colombia's domestic law show that in this case, it has met its obligations under the American Convention. Accordingly, it challenges the competence of the Commission to undertake what it considers a review of the decisions adopted in the domestic courts, as a fourth instance, or court of last resort.

24. In this respect, the Commission considers that it is competent to examine the claim submitted by the petitioners, including its allegations with respect to access to the judicial protection to which he has a right, insofar as they refer to rights protected by the American Convention. In effect, the elements that appear in the file indicate that, if shown to be true, the petitioners' allegations regarding the acts of torture allegedly perpetrated against Wilson Gutiérrez Soler, his prosecution based on a self-incriminating statement allegedly made under duress, and the use of the military jurisdiction to investigate and prosecute the persons responsible, tend to establish violations of the rights to humane treatment, a fair trial, and judicial protection, guaranteed in Articles 5, 8, and 25, in relation to Article 1(1) of the American Convention. Accordingly, the claim satisfies the requirements set forth in Articles 47(b) and (c) thereof.

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<sup>5</sup> Order of June 8, 1999, of the Superior Court of the Judicial District of Bogotá, Criminal Chamber (Act 50/99).

## **V. CONCLUSIONS**

25. The Commission concludes that it is competent to examine the claim submitted by the petitioners over the alleged violation of Articles 5, 8, and 25, in accordance with Article 1(1) of the Convention, and that the case is admissible pursuant to the requirements established in Articles 46 and 47 of the American Convention.

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

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:**

1. To declare the instant case admissible as regards the alleged violation of Articles 5, 8, 25, and 1(1) of the American Convention.
2. To report this decision to the Colombian State and the petitioners.
3. To move on to the merits phase.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 10th day of October, 2001. (Signed): Claudio Grossman, President; Juan E. Méndez, First Vice-President; Marta Altolaguirre, Second Vice-President; Commission members Robert K. Goldman, Peter Laurie, Julio Prado Vallejo and Hélio Bicudo.