



INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C., 2 0 0 0 6 U. S.

July 8, 2011

Ref.: Case No. 12.416
Santo Domingo Massacre
Colombia

Mr. Secretary:

I am pleased to address you on behalf of the Inter-American Commission on Human Rights in order to file before the jurisdiction of the Honorable Inter-American Court of Human Rights, Case No. 12.416, *Santo Domingo Massacre v. the Republic of Colombia* (hereinafter "the State", "the Colombian State," or "Colombia"), related to a bombing perpetrated on December 13, 1998 by the Colombian Air Force on the hamlet of Santo Domingo, in the municipality of Tame, Arauca department. Specifically, a cluster device was launched that, in accordance with the information available at the time that it issued its merits report, resulted in the death of 17 civilians, among them four boys and two girls. Furthermore, 27 civilians were wounded, including four boys and five girls. After the explosion of the device, the law enforcement agents continued, from the air, to bomb civilians who were trying to assist the wounded and attempting to escape from the hamlet. After the event, the entire population of Santo Domingo was displaced and in January 1999 its residents returned to rebuild their homes. These facts remain in impunity because the State did not undertake a serious and effective investigation to identify the intellectual and other perpetrators responsible and, if need be, to impose the corresponding punishments. In its merits report, the IACHR concluded that, more than twelve years after the facts, only one sentence, from a lower court, has been announced against the crew of the helicopter that launched the device.

Mr.
Pablo Saavedra Alessandri, Secretary
Inter-American Court of Human Rights
Box 6906-1000
San José, Costa Rica

Appendices

The State of Colombia ratified the American Convention on Human Rights (hereinafter "the American Convention", "the Convention," or "the CADH") on July 31, 1973, and accepted the jurisdiction of the Inter-American Court on June 21, 1985.

The Commission has appointed Commissioner María Silvia Guillén and IACHR Executive Secretary Santiago A. Canton as its delegates. Furthermore, Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán, and María José Veramendi will act as legal advisers.

Pursuant to Article 35 of the Rules of Procedure of the Inter-American Court, the Commission attaches a copy of report 61/11 and its appendices, prepared in accordance with Article 50 of the Convention, a copy of the entire file before the Inter-American Commission (Appendix I), as well as the documents used in preparing report 61/11 (Appendixes). This merits report was notified to the Colombian State through a communication dated April 8, 2011, granting the State a two-month period to report on compliance with the recommendations. By a communication dated June 7, 2011 the Colombian State requested an extension for submitting the information. An extension up to June 30, 2011 was granted. To date, the State has not presented the requested information.

Accordingly, the Commission submits the instant case to the jurisdiction of the Inter-American Court because of the need to obtain justice in light of the State's noncompliance with the recommendations. The Inter-American Commission submits to the jurisdiction of the Court all the facts and human rights violations described in Merits Report 61/11. Accordingly, the IACHR asks the Court to conclude and declare that the State of Colombia incurred international responsibility by:

1. Violating the right to life established in Article 4(1) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), Luis Enrique Parada Roper, and Rodolfo Carrillo.
2. Violating the right to life established in Articles 4(1) and 19 of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of the following children: Jaime Castro Bello (aged 4), Luis Carlos Neite Méndez (5), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Egna Margarita Bello (5), and Katherine (or Catherine) Cárdenas Tilano (7).
3. Violating the right to life and the right to humane treatment established in Articles 4(1) and 5(1) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of: Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, Pedro Uriel Duarte Lagos, Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora.

4. Violating the right to life and the right to humane treatment established in Articles 4(1), 5(1), and 19 (Rights of the Child) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of the following minors: Marcos Neite (5), Erinson Olimpo Cárdenas (9), Ricardo Ramírez (11), Hilda Yuraime Barranco (14), Lida Barranca (8), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17), and Neftalí Neite (17).

5. Violating the right to property established in Article 21(1) and (2) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of the victims, who were robbed of their belonging, and the survivors living in the Santo Domingo district, whose homes and belongings were destroyed or taken from them.

6. Violating the right to freedom of movement and residence established in Article 22(1) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of those who moved away from the Santo Domingo district.

7. Violating the rights to a fair trial and to judicial protection established in Articles 8(1) and 25 of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of the victims wounded and the family members of the victims listed in Annex 1 to the Report on the Merits.

8. Violating the right to humane treatment established in Article 5(1) of the American Convention in conjunction with Article 1(1) of the same instrument to the detriment of the family members of the victims listed in Annex 1 to the Report on the Merits.

With regard to the identification of the victims of the violations to the rights to freedom of movement and residence, and to property, because of the very nature of the facts of the case the Commission was unable to obtain accurate information that would enable it to specifically name all the victims of these violations. Given the intrinsic characteristics of the violations established, as well as the displacement and its consequences, the Commission gave special consideration in its merits report to the need to apply a broad understanding of the definition of victims, and to the need for the Colombian State to have a reparation measure that recognizes the community impact of the facts of the case.

In this regard, the Commission informs the Court that in a communication submitted after the issuance of the merits report, the representatives of the victims: i) considered that the victims of the violation to the right enshrined in Article 22 of the American Convention are all of the inhabitants of Santo Domingo who, "on December 13, 1998 were obliged to abandon the town";¹ and ii) specified other people as victims of violations to the rights to property,² to a fair trial, to judicial protection, and to mental and moral integrity.³

¹ See Appendix 1. File with the Commission. Communication from the petitioners of June 3, 2011.

² See Appendix 1. File with the Commission. Communication of the petitioners of June 3, 2011. CD attached. The victims of this violation named by the petitioners after the report on the merits was issued are: Nelcy Moreno Lizarazo, Irma Nelly Carrillo Mora, Nelcy Carrillo Mora, Marleni Carrillo Mora, Ana Mirian Duran

With this clarification, the Commission considers it necessary that, in the instant case, the Inter-American Court order the following reparation measures:

1. Carry out an impartial and exhaustive inquiry, within a reasonable period of time, with a view to trying and punishing the perpetrators and instigators of the human rights violations described in the report on the merits.
2. Investigate the ties between State agents and the mining enterprise operating in the area in which the events occurred and take appropriate steps to avoid a repetition of events such as those described in the report on the merits.
3. Establish, with community participation in its design and implementation, an act of community reparation that acknowledges the impact of the bombing on the civilian population of the Santo Domingo district, in order to redress its grave and lasting consequences for the community as such, and that includes initiatives in areas such as health, housing, and education.
4. Take the necessary steps to avoid a repetition of patterns of violence against the civilian population, in keeping with the obligation to protect and guarantee the fundamental rights recognized in the American Convention. In particular implement, on a permanent basis, human rights and international humanitarian law programs in institutes for training members of the Armed Forces.
5. Make appropriate reparation for the human rights violations described in the report on the merits, with respect to both material and moral prejudice, including establishment and dissemination of the truth of what happened, commemoration of those who died, and the implementation of an appropriate psychological and social program for the surviving family members.
6. Make reparation to the boys and girls affected by the bombing in the Santo Domingo district through measures aimed at safeguarding the best interests of the child and respect for her or his dignity, children's right to participate, and respect for their opinions in the process of crafting and implementing reparation measures.

...continuación

Mora, Rosalbina Duran Mora, Carmen Edilia González Ravelo, Romelia Neite de López, Yaritza Lisbeth Vanegas Tulivila, Norberto Leal, Benilda Pacheco de Leal, Norelis Leal Pacheco, Rubiela Leal Pacheco, Edwin Leal Pacheco, Frady Alexi Leal Pacheco, José Rafael Hernández Mujica, Erika Yusdey Hernández Becerra, José Luis Hernández Becerra, Emerita Hernández Becerra, Lucero Talero Sánchez, Pedro Martínez Carreño, José Vicente Martínez Carreño, Claudia Exelina Martínez Carreño, Ana Fidelina Martínez Carreño, Jorge Eliécer Ávila, Sandy Yomaira Ávila Castillo, Pedro Ávila Castillo, Omar Ávila Castillo, Gladis Cecilia Ávila Castillo, Deyci Damaris Cedano, Ascensión Daza Galindo, Eliud Suárez Daza, Eliécer Suárez Daza, José Alirio Suárez Daza, Wilson Suárez Daza, José del Carmen Lizcano, Abraham Puentes Pérez, Matilde Gutierrez Arciniegas, Albeiro Díaz Herrera, Luis Felipe Duran Mora, Luz Dary Téllez Duran, Yamile Téllez Duran, Luz Dary Abaunza Castillo, Wilmer Téllez Duran, Nelly Guerrero Galvis, and Salomón Neite González.

See Appendix 1. File with the Commission. Communication of the petitioners of June 3, 2011. CD attached. The victims of this violation named by the petitioners after the report on the merits was issued are: : Oscar Andrey Galvis Mujica, Albeiro Galvis Mujica, Frady Alexi Leal Pacheco, Norberto Arciniegas Calvo, Argemiro Arciniegas Calvo, Erlinda Arciniegas Calvo, and Orlando Arciniegas Calvo.

The Commission also notes that the case involves matters pertaining to Inter-American public order. Specifically, the instant case will enable the Court to develop its jurisprudence on various topics related to the context of internal armed conflict. First: regarding the states' obligations within the framework of military operations in an internal armed conflict, using international humanitarian law as the source for interpreting the relevant standards of the American Convention. In addition to the matter of direct state responsibility, the instant case also raises the matter of attribution of responsibility to the state for actions by private actors who exercise public functions with the authorization of, in coordination with, and in collaboration with law enforcement forces.

Furthermore, the Court will be able to consolidate its jurisprudence regarding the duty to investigate human rights violations, in accordance with special standards that should be taken into account in cases such as the present one, including the responsibility of high-ranking leaders. Finally, the Court will also be able to delve deeper into the topic of forced displacement and state obligations stemming from such situations.

By virtue of the fact that these issues have an important bearing on the Inter-American public order, the Commission takes the liberty to offer the following expert opinions, pursuant to Article 35.1 f) of the Rules of Procedure of the Inter-American Court:

a) Alejandro Valencia Villa, who will refer to the international standards that determine state obligations in the framework of military operations taking place within the context of internal armed conflict, including obligations toward the civilian population. The expert also will refer to the international standards that should be taken into account when facts such as those of the present case are investigated. In a cross cutting manner with regard to these topics, he will analyze the common grounds and complementarity of international human rights law and international humanitarian law.

b) An expert whose name will be reported shortly, who will refer to the phenomenon of forced internal displacement, state obligations stemming from such situations, as well as the application of these standards to the facts of the instant case, taking into account, among other factors, the context in the area.

Together with the annexes to Merits Report 61/11, the Commission will submit the CV of the proposed experts.

Finally, the Commission informs the Inter-American Court of the contact information of the persons who served as petitioners to the IACHR:

- Corporación Colectivo de Abogados "José Alvear Restrepo" (CCAJAR).

[REDACTED]
Bogotá, Colombia.

[REDACTED]

- David M. Stahl and Lisa S. Meyer. Eimer Stahl Klevorn & Solberg

[REDACTED]
Chicago, Illinois 60604



In addition, the IACHR informs the Court that the petitioners have reported that the people who will represent the victims in the proceedings before the Inter-American Court are:

- Corporación Colectivo de Abogados "José Alvear Restrepo" (CCAJAR)
- Humanidad Vigente Corporación Jurídica (HCVJ)
- Fundación de Derechos Humanos "Joel Sierra"
- Asociación para la Protección Social Alternativa "Minga"
- Douglass Cassel⁴

Please accept the renewed assurances of my highest regards.

(Signed in the original)

Elizabeth Abi-Mershed
Deputy Executive Secretary

⁴ After the notification of the report on the merits, the Commission received various powers of attorney for legal representation. The Commission also received internal files. See Appendix 1. File before the Commission. Annexes to the communication from the petitioners dated June 3, 2011.

REPORT No. 31/11⁵
CASE 12.416
MERITS
SANTO DOMINGO MASSACRE
COLOMBIA
March 24, 2011

I. SUMMARY

1. On April 18, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition submitted by the Comisión Interfranciscana de Justicia, Paz y Reverencia con la Creación, the Comité Regional de Derechos Humanos “Joel Sierra”, the Colectivo de Abogados “José Alvear Restrepo”, Humanidad Vigente Corporación Jurídica, and the Center for International Human Rights of Northwestern University School of Law (hereinafter “the petitioners”), which alleged that on December 13, 1998, 17 civilians lost their lives, among them six children, and more than 25, among them nine children, were wounded as the result of the actions of the Colombian Air Force (hereinafter “FAC,” for Fuerza Aérea Colombiana) in the village of Santo Domingo, department of Arauca, Republic of Colombia (hereinafter “the State” or “the Colombian State”).

2. The petitioners argued that the State is responsible for violation of the rights to life, humane treatment, and a fair trial, as well as the rights of the child, the right to property, freedom of movement and residence, and the right to judicial protection recognized in Articles 4, 5, 8, 19, 21, 22, and 25 of the American Convention on Human Rights (hereinafter the “American Convention”) to the detriment of the 17 people who were killed, namely, the children Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Oscar Esneider Vanegas Tulibila (13), Geovani Fernández Becerra (16), Egna Margarita Bello (5), Katherine Cárdenas Tilano (7); and Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Rodolfo Carillo Mora, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo, Arnulfo Arciniegas Velandia, Luis Enrique Parada Roperero and their next of kin; and the 25 individuals who were wounded, namely, the children Marcos Neite (4), Erinson Cárdenas (7), Ricardo Ramírez (11), Neftalí Neite (16), Yeimi Contreras (15), Maryuri Agudelo (15), Rosmira Daza Rojas (15), Lida Barranca (8), Alba García (16); and Fernando Vanegas, Milciades Bonilla, Ludwin Fernando Vanegas, Xiomara García, Mario Galvis, Frey Monoga Villamizar, Mónica Abello, Maribel Daza, Amalio Neite González, Myriam Arévalo, José Agudelo, María Panqueva, Ludo Vanegas, Adela Carrillo, Alcides Bonilla, Fredy Mora, and their next of kin, as a result, not only of the conduct of the agents of the State, but also of the failure of the State to provide an effective response in terms of investigating the attacks and establishing the responsibility of those who orchestrated the acts. The State, for its part, rejected the submissions of the petitioners as regards to the alleged violations of rights protected by the American Convention and argued the supervening lack of competence of the Commission to examine the case because the State has investigated, prosecuted, and convicted those responsible for the acts.

3. Having examined the arguments as to fact and law offered by the parties, the Commission concluded that the State is responsible for violation of Articles 4(1), 5(1), 8(1), 19, 21, and 25 of the American Convention on Human Rights, and, under the principle of *iura novit curia*, Article 22 thereof, as well as for breach of the general obligation to observe and ensure rights

⁵ In accordance with Article 17(2) of the Rules of Procedure of the IACHR, Commissioner Rodrigo Escobar Gil, a Colombian national, did not participate in the discussion or decision in the present case.

recognized in Article 1(1) of the above treaty, to the detriment of the 17 people who were killed, the 27 persons who were wounded, and their next of kin. The Commission also stated that it does not have sufficient evidence to establish a violation of the obligation contained in Article 2 of the Convention.

II. PROCESSING BY THE COMMISSION

4. After it received the initial complaint, the Commission decided to open it as petition 289-02 and begin its processing. On March 6, 2003, after processing the petition for admissibility, the Commission adopted *Report 25/03*,⁶ in which it declared that the petition was admissible with respect to the alleged violations of the rights to life, humane treatment, a fair trial, private property, the rights of the child, and the right to judicial protection recognized in Articles 4, 5, 8, 19, 21, and 25 of the American Convention taken in conjunction with Articles 1(1) and 2 of said treaty. On March 11, 2003, the Commission forwarded the report on admissibility to the parties and gave the petitioners two months in which to submit their arguments on merits. In the same communication, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter, for which purpose it requested them to state their interest in that regard at their earliest convenience.

5. On May 9, 2003, the petitioners requested an extension, which was granted by the IACHR. On October 28, 2003, the Commission received the petitioners' comments on merits, which it relayed to the State and gave it two months to present its response. The State requested extensions on January 6, February 13, March 25, and June 4, 2004; these were granted by the IACHR. On January 24, 2005, the petitioners filed a brief containing additional information, which was forwarded to the State for comment together with a reiteration of the request for its response to the petitioners' observations on merits. On February 10, 2005, the State sent a communication in which it requested that the petitioners brief be forwarded in the official language (Spanish). That communication was conveyed to the petitioners for comment.

6. On September 13, 2005, the Commission requested the petitioners and the State for updated information on the matter in reference. On December 27, 2005, the State presented its observations on merits, which were transmitted to the petitioners for comment. On February 22, 2006, the State presented additional information, which was relayed to the petitioners for comment. On April 5 and May 12, 2006, the petitioners requested extensions, which the Commission granted. On August 15, 2006, the petitioners presented their observations which were transmitted to the State for comment. On September 20, 2006, the State requested an extension, which was granted by the IACHR.

7. On December 14, 2006, the State presented its comments. On February 6, 2009, Alejandro Álvarez Pabón, the attorney of the alleged victims and their next of kin in the contentious administrative proceedings at the domestic level, submitted information on the matter in hand, which was relayed to the petitioners and the State. On May 4, 2010, the Commission transmitted to the petitioners for comment a brief received from the State. On June 4, 2010, the petitioners presented their response, which was conveyed to the State for comment. On July 21, 2010, the State requested an extension, which was granted by the Commission. On October 5, 2010, the State presented its comments, which were conveyed to the petitioners for consideration.

⁶ IACHR, Report No. 25/03, Petition 289-02, Admissibility, Santo Domingo, Colombia, March 6, 2003.

III. POSITIONS OF THE PARTIES ON MERITS

A. The Petitioners

8. The petitioners allege that for the past two decades the Department of Arauca has had to endure multiple human rights violations, including destruction of the environment, expulsion of indigenous communities for the purpose of exploiting oil, extrajudicial executions, torture, forced disappearances, and massacres allegedly attributable to the armed forces. The petitioners indicate that at the time of the events alleged in the petition, the village of Santo Domingo was a population center in a rural area of the municipality of Tame, Department of Arauca. Some 200 people lived there in approximately 48 houses situated on the side of the road that links Tame to the department capital. They say that the village of Santo Domingo was a small center of trade as well as an important social hub for the outlying rural communities.

9. The petitioners say that on December 12, 1998, an aircraft with registration number HK-2659, belonging to a company called Saviare, was sighted in the jurisdiction of the Tame municipality, Department of Arauca. The aircraft allegedly belonged to illegal armed groups. They indicate that the aircraft was intercepted by military units and with support from the Colombian Air Force (FAC) armed confrontation arose in the area and lasted for more than four days. They mention that the following morning, fearing for their safety, a number of local residents began to leave the village but had to turn back as the armed forces were bombing the area around Santo Domingo or were barring their way.

10. According to the petitioners, on December 13, 1998, between roughly 9:45 and 10:00 a.m., several FAC aircraft flew over the area surrounding the village of Santo Domingo and a helicopter with registration number 4407 launched a cluster bomb at the civilian population of the village of Santo Domingo, killing 17 civilians, including six children, and wounding 25 others. They say that the helicopter that launched the bomb then continued to shoot, with a machine gun, at the wounded and the people who were assisting them and transporting them in an open pickup truck. The petitioners allege that subsequently the pickup truck that was carrying the wounded to the hospital in Tame was chased by the same helicopter, from which FAC personnel fired on them over a distance of two kilometers.

11. The petitioners say that by the afternoon of December 13, the majority of civilians had abandoned Santo Domingo and that the village was occupied by the National Army from December 16 to 22, 1998. They note that at least seven witnesses stated that they returned to Santo Domingo the day after the Army left the village to find that it had been looted.

12. The petitioners mention that criminal and disciplinary inquiries were launched into the events and that the families of the alleged victims instituted contentious administrative proceedings to obtain direct reparation.

13. As regards criminal proceedings, the petitioners say that a preliminary investigation into the events at Santo Domingo was opened by the 118th FAC Military Preliminary Criminal Investigation Court on May 12, 1999, and that on May 20, 1999, the judge of that court closed the investigation into the FAC personnel on the basis that the crews of the Air Force aircraft involved had not acted in a way that constituted a recognized criminal offense. However, they note that on May 30, 2000, the National Human Rights Unit of the Office of the Prosecutor General overturned the order of the 118th Military Preliminary Criminal Investigation Court and ordered an inquiry into the three FAC personnel who were crewing the helicopter: César Romero Pradilla, Johan Jiménez Valencia, and Héctor Mario Hernández Acosta. It also directed that a copy of the record of the proceedings be sent to the Air Force Office of Special Military Preliminary Inquiries.

14. They allege that on June 14, 2001, the Human Rights Unit of the Office of the Prosecutor General requested the military criminal courts to refer the case to the ordinary jurisdiction since the latter was the appropriate venue to hear the facts that occurred at Santo Domingo. When the military courts refused, the National Human Rights Unit presented a positive conflict of venue with the military jurisdiction on the grounds that the case concerned the prosecution of a crime against humanity. On October 18, 2001, the Disciplinary Jurisdictional Chamber of the Superior Council of the Judicature ruled that the 122nd Court of the Colombian Air Force had jurisdiction over the investigation of the Santo Domingo massacre.

15. The petitioners allege that in an action for a writ of protection, on October 31, 2002, the First Review Chamber of the Constitutional Court reviewed the decision of the Superior Council of the Judicature and concluded that jurisdiction over the investigation belonged to the civil courts. The petitioners state that on February 24, 2003, the Human Rights Unit of the Office of the Prosecutor General took up the investigation, which it registered as case 419. On December 19, 2003, the Office of the Specialized Prosecutor of the National Human Rights Unit brought an indictment against the three FAC servicemen, charging them as co-principals in the crimes of manslaughter and negligent bodily harm. The petitioners say that an appeal was filed against the above indictment, which was decided on August 26, 2004, by the Prosecutorial Unit before the Superior Court of Bogotá, which amended the classification from co-principals to principals in the aforementioned offenses.

16. On September 24, 2004, the National Human Rights Unit referred the record to the Single Circuit Court of Saravena (Department of Arauca), which on October 4, 2004, took up the proceeding as case No. 2004-00452 and set a date for the preparatory hearing. The petitioners indicate that the counsel for the accused requested the Criminal Cassation Chamber of the Supreme Court of Justice to change the trial venue from Arauca to Bogotá owing to the serious public order problem in the region, which was granted by the Chamber on February 17, 2005.

17. They note that on May 18, 2005, the 11th Criminal Court of the Bogotá Circuit took up the case and set a date for the preparatory hearing. They say that the hearing was postponed at the request of the defense and subsequently suspended owing to procedural issues. The petitioners say that the hearing was finally held on October 20, 2005. The petitioners claim that the criminal proceeding was beset with numerous delays as a result of the failure of witnesses to appear, as well as repeated requests from the defense for the accused to be allowed to leave the country, which were allegedly granted by the Security Administration Department (DAS). They say that as of February 2009, the families of the alleged victims had not been notified of a final decision in the criminal trial.

18. As to the disciplinary proceeding, the petitioners say that on October 2, 2002, the Special Disciplinary Commission appointed by the Procurator General of the Nation suspended FAC Captain César Romero and Flight Technician Héctor Mario Hernández from duty. Those suspensions were appealed by the defense counsel. On December 19, 2002, the Disciplinary Chamber of the Office of the Procurator General of the Nation confirmed the contested ruling and penalty imposed on the two FAC servicemen, suspending them from duty for 90 days.

19. Finally, the petitioners claim that the families of the alleged victims instituted a contentious administrative proceeding for direct reparations, which finished with a decision that found the State responsible. In that regard, the petitioners say that the amounts granted in compensation have been insufficient

20. The petitioners argue that the State infringed Article 4(1) of the American Convention in connection with Article 19 and 1(1) thereof, by violating its duties to observe and ensure rights, specifically its duties as regards prevention, investigation, and punishment of those

responsible for violation of the right to life of the 17 people, including six children, who died at allegedly as a result of the actions of the FAC.

21. In that connection, the petitioners submit that the alleged launch of a cluster bomb from a FAC helicopter constituted an indiscriminate attack against the civilian population. They say that the above attack took place in a context of an armed conflict in Colombia in which the standards of international humanitarian law and human rights obligations apply, particularly where protection of the civilian population is concerned.

22. The petitioners note that although the IACHR and the Inter-American Court do not have contentious jurisdiction to enforce international treaties that are exogenous to the Inter-American system, under Article 29 of the American Convention, such instruments may be used as a source for interpreting the rights recognized in Convention so as to provide a greater scope of protection for human rights. In that connection, the petitioners cite the Inter-American Court, which has found,

While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case. These provisions were in force for Colombia at the time of the facts, as international treaty agreements to which the State is a party, and as domestic law, and the Constitutional Court of Colombia has declared them to be *jus cogens* provisions, which are part of the Colombian "constitutional block" and are mandatory for the States and for all armed State and non-State actors involved in an armed conflict.⁷

23. Thus, the petitioners note that international humanitarian law, which is based on common law and has been coded in the Geneva Conventions of August 12, 1949, and their Additional Protocols of 1977, contributes to the interpretation of Article 4 of the American Convention.

24. In this context, the petitioners hold that persons who are not party to hostilities are subject to special protection under common Article 3 of the 1949 Geneva Conventions and point out that, while it has been maintained at the domestic level that allegedly there was no deliberate intent on the part of the members of the Air Force to attack the civilian population and that, therefore, they acted with negligence and their actions fell into the category of wanton disregard for human life, that did not release the State from its responsibility for its failure to discharge its international human rights obligations.

25. The petitioners argue that the State violated the right to humane treatment protected in Article 5 of the American Convention, in connection with Articles 19 and 1(1) thereof, to the detriment of the 25 persons, including nine children, who were wounded allegedly as a result of the actions of the FAC, as well as to the detriment of their next of kin and those of the 17 people who were killed in the attack.

26. With respect to Article 19 of the Convention, the petitioners hold that, as the Inter-American Court has ruled,

The content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child, especially its Articles 6, 37, 38 and 39, and of Protocol II to the Geneva

⁷ The petitioners cite I/A Court H.R., *Case of the "Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Series C No. 134, par. 115 (footnotes omitted).

Conventions, as these instruments and the American Convention are part of a very comprehensive international *corpus juris* for protection of children, which the States must respect.⁸

27. The petitioners argue that the arbitrary deprivation of the lives of six children and the wounding of nine others, while some of them were in their homes and others were on the road that passes through the village, constitutes a gross violation of human rights. In that regard, they hold that the military forces omitted to adopt special measures of protection to safeguard the lives and integrity of the victims, given that the cluster bomb was launched at a residential area where there were children visibly present.

28. The petitioners hold that the State is responsible for violation of Articles 8(1) and 25(1) of the Convention in connection with Article 1(1) thereof, due to that the investigations carried out by the military criminal courts and in the ordinary jurisdiction have created a climate of impunity, inasmuch as the State failed its duty to observe due diligence in conducting the investigation and the latter has not resulted in appropriate punishment for those responsible and reparation for the victims.

29. They argue that the fact that the military criminal courts initially took up the investigation of the facts in the instant case constitutes a violation of the rights to a fair trial and judicial protection, since that jurisdiction does not afford the guarantees of a competent, independent and impartial tribunal to investigate cases of human rights violations, as the IACHR and the Inter-American Court have stated on numerous occasions.⁹ The petitioners also argue that the military criminal courts' trial of this case prevented the victims from having access to an adequate remedy in terms of investigation, prosecution, and punishment of those responsible, and that it repeatedly obstructed justice.

30. They also claim that after the investigation was referred to the ordinary jurisdiction the proceeding was carried out without regard to the principle of reasonable time. They argue that only three FAC servicemen were included in the investigation and ultimately convicted as the physical perpetrators of the attack; however, the architects, that is, the high-ranking military officers, both in the Air Force and in the Army, were not included in the proceedings, which has enabled the crimes to go unpunished.

31. The petitioners hold that the State is responsible for violation of the right to property recognized in Article 21 of the Convention owing to the destruction and/or damage of the homes by the cluster bomb and the later looting of the homes of the residents of Santo Domingo. They say that the inhabitants of Santo Domingo were forced to displace themselves after the attack, which constitutes a violation of the right to freedom of movement protected in Article 22 of the American Convention. Finally, they assert that the State has failed to discharge its duty to adopt measures designed to ensure protection for human rights, which constitutes a violation of Article 2 of the American Convention.

⁸ The petitioners cite I/A Court H.R., *Case of the "Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Series C No. 134, par. 153; I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Judgment of September 2, 2004, Series C No. 112, par. 148, and I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004. Series C, No. 110, par. 166.

⁹ The petitioners refer to I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*, Judgment of January 31, 2006, Series C, No. 140, par. 189; I/A Court H.R., *Case of Palamara Iribarne v. Chile*, Judgment of November 22, 2005, Series C No. 135, par. 124; I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*, Judgment of September 15, 2005, Series C No. 134, par. 202; and I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004, Series C No. 119, par. 142; IACHR. Report No. 43/02, Case 12.007, Leydi Dayán Sánchez, Colombia, October 9, 2002, pars. 23-25; IACHR. Third Report on the Situation of Human Rights in Colombia (1999), p. 175, and IACHR. Second Report on the Situation of Human Rights in Colombia (1993), p. 246.

B. The State

32. The State submits that according to the final ruling issued by the Disciplinary Chamber of the Office of the Procurator General of the Nation on December 19, 2002, the persons who were killed by the cluster munition were Jaime Castro Bello, Luis Carlos Neite Méndez, Egna Margarita Bello, Katherine Cárdenas Tilano, Oscar Esneider Vanegas Tulibila, Geovani Hernández Becerra, Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo, Arnulfo Arciniegas Velandia, Luis Enrique Parada Roper, and Leonardo Alfonso Calderón; the persons who were wounded were Marcos Neite, Erinson Castañeda, Lida Barranca, Ricardo Ramírez, Yeimy Contreras, Maryury Agudelo, Rosmira Daza Rojas, Neftalí Neite, Alba García, Fernando Vanegas, Milciades Bonilla, Ludwin Vanegas, Xiomara García, Mario Galvis, Frey Monoga Villamizar, Mónica Bello, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo, and María Panqueva.

33. The State holds that, as regards criminal law, every procedure has been carried out at the domestic level to ensure “the clearest and most thorough investigation of the events of December 13, 1998.” The State says that various inquiries were opened after the events. It says that the investigation begun by the National Army was set aside on December 28, 1998, because no charges were brought against army personnel. Furthermore, the investigation conducted by the FAC concluded with an inhibitory resolution on the basis that the conduct of the servicemen who crewed the aircraft did not constitute a recognized criminal offense.

34. That State holds that on May 30, 2000, based on forensic examinations and expert opinions on the residue found on the corpses, the Human Rights Unit of the Office of the Prosecutor General ordered an investigation that included the crew of the UH1H helicopter. It also decided to vacate the decision of May 20, 1999, by which the military criminal courts abstained from opening an inquiry into the events at Santo Domingo. On August 28, 2000, the military criminal courts ordered the investigation to be reopened and on June 14, 2001, the National Human Rights Unit of the Office of the Prosecutor General requested the military criminal judge to refer the investigation as it considered that it was a matter for the civil courts. The State says that in response to the dispute over jurisdiction, on February 6, 2003, the Superior Council of the Judicature, in keeping with Constitutional Court Judgment T-932/02, stated that the civil justice system was the appropriate jurisdiction for the case to be heard.

35. The State alleges that after the case was referred to the civil courts, on February 24, 2003, the National Human Rights Unit took up the preliminary proceeding and, on September 21, 2007, the 12th Criminal Court of the Bogotá Circuit convicted Air Force servicemen César Romero Pradilla, Johan Jiménez Valencia, and Héctor Mario Hernández Acosta and sentenced them to six years in prison. The State says that subsequently, the Criminal Chamber of the Superior Court of Bogotá vacated the ruling and in its place the 12th Criminal Circuit Court issued a new decision on September 24, 2009, in which it found Captain César Romero Pradilla and Lieutenant Johan Jiménez Valencia guilty of simultaneously committing, with a single act, 17 counts of homicide and 18 counts of bodily harm with wanton disregard for human life, and sentenced them to the principal penalty of 380 months in prison and the ancillary penalty of prohibition from the exercise of public rights and duties for 10 years, and disqualification from occupying any position in the public administration for five years. The court also found Technician Héctor Mario Hernández Acosta guilty of simultaneously committing, with a single act, 17 counts of manslaughter and 18 counts of negligent bodily harm, and sentenced him to the principal penalty of 72 months in prison and the ancillary penalty of prohibition from the exercise of public rights and duties for the same amount of time as the prison term, and disqualification from occupying any position in the public administration for five years.

36. The State holds that the criminal proceeding was carried out in accordance with national and international standards and assured that the rights of the parties and all other fair trial rules and guarantees were observed at all times. It argues that in that regard it met its obligations with respect to investigation and identification of those responsible for the crimes and that on no account was there any intention to obstruct or pervert the course of investigations carried out by justice sector operators or any other agents of the state. It also holds that the proceeding was carried out within a reasonable time and the conflict of venue that arose between the civilian courts and the criminal jurisdiction did not constitute an unwarranted delay in the proceeding, but a guarantee of a fair trial.

37. As regards to the disciplinary jurisdiction, the State holds that on December 19, 2002, the Office of the Procurator General of the Nation ruled on an appeal presented against the decision at first instance of October 2002, and confirmed the penalty imposed on the agents of the state for gross misconduct with wanton disregard for human life, on the basis that they launched the cluster bomb knowing the risk it posed, given the nature and location of the target.

38. As for the contentious administrative proceeding for direct reparation instituted by the families of the alleged victims, the State notes that on May 20, 2004, the Contentious Administrative Tribunal of Arauca found the State responsible for failure in its duty to serve in light of the events of December 13, 1998, in Santo Domingo. It mentions that the complainants appealed against the ruling and following a conciliation hearing in which no agreement was reached, on November 24, 2007, the parties reached an agreement on the amounts in compensation.

39. The State says that by resolution 0979 of March 18, 2009, and resolution 1560 of April 27, 2009, the Nation-Ministry of Defense paid the representative of the alleged victims a total of five thousand fifty-eight million seven hundred fifty-nine thousand nineteen pesos and twenty centavos (\$5,758,759,019.20) in reparation and compensation for the events at Santo Domingo.

40. Finally, the State requested the Commission to declare that at present it lacks jurisdiction to analyze the violations alleged by the petitioners in view of the fact that the State met its international obligations through the remedies under domestic law. The State also considers that the grounds that gave rise to the petition no longer exist and requests the Commission to declare that the State has not violated Articles 1, 2, 4, 5, 8, 21, and 25 of the American Convention.

IV. PROVEN FACTS

A. Context in the Department of Arauca

41. The Department of Arauca is in the Northeast of Colombia, on the border with Venezuela, and is divided into seven municipalities: Arauca, Arauquita, Saravena, Cravo Norte, Fortul, Puerto Rondón, and Tame. The last is where the village of Santo Domingo is located. In 1998, the village of Santo Domingo was a rural community in the municipality of Tame with a population of about 200, who lived in approximately 48 houses situated on the side of the road that runs from Tame to the department capital.¹⁰

42. The Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law has indicated that "[t]he oil industry, livestock, agriculture, services, and trade, in that order, are the five most important economic activities in the department. The

¹⁰ Information provided by the "Joel Sierra" Regional Human Rights Committee in the petitioners' brief of August 15, 2006, received at the IACHR on August 21, 2006, p. 8.

importance of the oil industry is reflected in its contribution to the departmental GDP, which depends to a great extent on that activity.”¹¹ In 1983, the transnational company Occidental Petroleum Corporation (hereinafter “OXY”) discovered the Caño Limón oilfield.¹² Since its discovery, OXY has operated the Caño Limón oilfield, whose oil is transported via the Caño Limón – Coveñas oil pipeline, which is operated by the Colombian company ECOPEPETROL S.A.¹³

43. In that regard, the Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law stated that

[t]he armed conflict in Arauca is closely associated with the money that comes from the oil and the location of the Caño Limón-Coveñas pipeline. In addition to the foregoing there is the geographical location of the department and the fact that Arauca is an obligatory transit zone for merchandise and produce, both legal and illicit, bound for Venezuela. These factors make this region strategically important for military, financial, and economic reasons and have encouraged illegal armed groups to establish a presence in the department for more than 30 years [...]¹⁴

44. According to an Amnesty International report in 1996 the Cravo Norte Association, composed of ECOPEPETROL and OXY,¹⁵ signed a collaboration agreement which committed the Association to provide support to National Army’s XVIII Brigade units operating along the Caño Limón pipeline.¹⁶ The collaboration agreement included some US\$2 million in the form of an annual disbursement to the Colombian security forces.¹⁷

45. By way of context, it should be noted that on April 23, 2003, the residents of Santo Domingo sued OXY and its security contractor, Airscan, Inc. in a federal court in California, USA. The plaintiffs claimed that in a bid to protect the security of the Caño Limón pipeline both OXY and

¹¹ Annex 1. Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law, Indicators on the human rights situation in Arauca Department as of September 2004, available at: <http://www.derechoshumanos.gov.co/Pna/documents/2010/arauca/indicadoresarauca.pdf>.

¹² Information available at: http://www.oxy.com/Our_Businesses/oil_and_gas/Pages/og_la_colombia.aspx.

¹³ Ecopetrol S.A. is a semipublic commercial company organized as a Colombian stock corporation linked to the Ministry of Energy and Mines, in accordance with the provisions of law 1118 of 2006, and is governed by the bylaws fully contained in Public Deed 5314 of December 14, 2007, issued at the Office of the Second Notary of the Notarial Circle of Bogotá. Information available at: <http://www.ecopetrol.com.co/contenido.aspx?catID=30&conID=38178>.

¹⁴ Annex 1. Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law, Indicators on the human rights situation in Arauca Department as of September 2004, available at: <http://www.derechoshumanos.gov.co/Pna/documents/2010/arauca/indicadoresarauca.pdf>.

¹⁵ “The agreement which created the Cravo Norte Association was signed on June 11, 1980, by Ecopetrol and Occidental de Colombia and covered an initial area of 1,003,744 hectares. Oil was discovered on June 18, 1983, and Ecopetrol approved its commercial exploitation on November 15, 1983. The following oil fields have been discovered under the contract: Caño Limón, La Yuca, Caño Yarumal, Matanegra, Redondo, Caño Verde, Redondo Este, La Yuca Este, Tonina, Remana, and Jiba in the Llanos Orientales Basin. Occidental is the operator of the oilfields discovered and Ecopetrol is the operator of the Caño Limón-Coveñas pipeline.” Information available at: http://www.presidencia.gov.co/prensa_new/sne/2004/abril/20/11202004.htm.

¹⁶ Annex 2. Amnesty International. Colombia. Laboratory of War - Repression and Violence in Arauca, April 20, 2004, Index number: AMR 23/004/2004. Available at: <http://www.amnesty.org/en/library/asset/AMR23/004/2004/en/23614880-d63d-11dd-ab95-a13b602c0642/amr230042004en.pdf>.

¹⁷ Annex 2. Amnesty International. Colombia. Laboratory of War - Repression and Violence in Arauca, April 20, 2004, Index number: AMR 23/004/2004. Available at: <http://www.amnesty.org/en/library/asset/AMR23/004/2004/en/23614880-d63d-11dd-ab95-a13b602c0642/amr230042004en.pdf>.

Airscan assisted the FAC in carrying out an aerial bombardment of Santo Domingo on December 13, 1998.¹⁸ The lawsuit is still before the courts in that country.

46. The Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law noted that "the dynamics of the armed conflict in Arauca and the significant influence that various outlawed groups in the department have traditionally exercised and continue to exercise, create a situation in which both the civilian population and the civil authorities of the department are directly affected by frequent and gross violations of human rights."¹⁹

47. In its Annual Report for 1998, the Office in Colombia of the United Nations High Commissioner for Human Rights stated that "[i]n their counter-offensives, the armed forces also caused numerous civilian casualties, particularly as a result of aerial gunfire and bombing. The Office was also informed of cases in which the security forces occupied schools or private houses."²⁰

B. Events preceding the bombardment of December 13, 1998

48. On December 12, 1998, a fair was being held in the village of Santo Domingo that included various sporting events.²¹ That day a Cessna light plane, No. HK 2659, registered to the company Saviare Ltda., landed on the road that runs from the village of Santo Domingo to Panamá de Arauca or Pueblo Nuevo.²² The landing and subsequent takeoff was facilitated by around 250 members of Fronts 10 and 45 of the Revolutionary Armed Forces of Colombia (FARC), which were in the area.²³ As a result of the foregoing the 18th National Army Brigade and the 36th Counter-Guerrilla Battalion, in carrying out the military operations codenamed "*Relámpago*" and "*Pantera*" (Panther), respectively, initiated a military engagement that lasted several days.²⁴

49. According to witnesses, at around 4:00 p.m. that day several aircraft flew over the zone, firing at approximately 500 meters from the village of Santo Domingo.²⁵ In the "Pantera" operational orders for December 12, 1998, the Commander of the 36th Counter-Guerrilla Battalion, Maj. Juan Manuel González, determined that its mission would be "to carry out military search and

¹⁸ See *Mujica v. Occidental Petroleum* at http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/OccidentallawsuitreColombia?sorton=effective&batch_size=10&batch_start=3.

¹⁹ Annex 1. Human Rights Observatory of the Presidential Program on Human Rights and International Humanitarian Law, Indicators on the human rights situation in Arauca Department as of September 2004, available at: <http://www.derechoshumanos.gov.co/Pna/documents/2010/arauca/indicadoresarauca.pdf>.

²⁰ Annex 3. Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights on the Office in Colombia, E/CN.4/1999/8, 16 March 1999, para. 119.

²¹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 27. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

²² Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 38. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

²³ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 1. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

²⁴ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 1. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

²⁵ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 27. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

control operations in the sector near the village of Santo Domingo [...] In order to capture the subversive group committing crimes in the sector.”²⁶ In addition, according to fragments of the “Pantera II” operational orders for the same day, the Commander said that it “consist[ed] of conducting an airborne counter-guerrilla offensive as far as the Santo Domingo area,”²⁷ and orders were given to carry out “counter-guerrilla offensives in order to occupy militarily and search the Santo Domingo sector, Tame Municipality, starting at 06:00 on December 13, 1998.”²⁸

50. According to witnesses of the events, the gunfire intensified that night, stopped in the early hours, and resumed at 5:30 a.m. on December 13, 1998.²⁹ According to the video footage shot by the Skymaster plane that took part in military operations and which served as evidence in the criminal proceeding, at 6:53 a.m. on December 13, 1998, the crew of the Skymaster directed their attention to the village of Santo Domingo and reported, “I have a group of persons here, but they are all civilians, I cannot see any [...] all these people appear to be civilians here. They changed, they all changed clothes, that is the problem we have here, these guys have gone into the house and changed clothes.”³⁰

C. The bombardment of the village of Santo Domingo on December 13, 1998, and subsequent events

51. Witnesses agree that from 9:00 a.m. onward on December 13, 1998, several aircraft were observed, which were later identified as follows: i) a UH 60L Black Hawk armed helicopter under the command of Maj. Sergio Garzón (call sign: *Arpía* (“Harpy”)); ii) a UH1H helicopter equipped with cluster bombs, piloted by Lieut. César Romero Pradilla (call sign: *Lechuza* (“Owl”)); iii) a Hughes – 500 armed helicopter under the command of Lieut. Lamilla Santos (call sign: *Cazador* (“Hunter”)); iv) a Skymaster plane crewed by two foreigners and FAC Capt. César Gómez (call sign: *Gavilán* (“Hawk”)); v) a UH 60 helicopter piloted by Capt. Raúl Gutiérrez Gómez (call sign: “*Spock*”); and, vi) an MI 17 helicopter owned by the company Heliandes and piloted by a civilian (call sign: *Pegasso* (“Pegasus”)).³¹

52. The video footage from the Skymaster records the following exchange that took place at 10:00 a.m. between the various aircraft flying over the zone

Lieut. Johan Jiménez Valencia, co-pilot of the UH1H (“Owl”): “*Hunter*, we need to launch the cluster bomb, *Hunter*, *Owl* needs to launch the cluster bomb.”

²⁶ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 38. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

²⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 38. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

²⁸ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 38. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

²⁹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 27. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

³⁰ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 42. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

³¹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 27 and 41. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

Lieut. Lamilla, pilot of the Hughes – 500 (“Hunter”): “*Owl* needs to launch the cluster bomb. Okay. *Hawk* and *Harpy*, hold, because here comes a big gift.”
 Owl: “OK, show me where”
 Hunter: “See the yellow road?”
 Owl: “Where do you want it, *Hunter*? Tell me where you want it!”
 Hunter: “To the right of the village there is a stand of trees. We want it on the whiskey edge of that stand of trees.”
 Owl: “The stand of trees further whiskey or the one nearby?”
 Hunter: “The one nearby.”³²

53. At 10:02 AM, the crew of FAC helicopter UH1H 4407, composed of the pilot, Lieut. César Romero Pradilla; the co-pilot, Lieut. Johan Jiménez Valencia, and the aircraft technician, Héctor Mario Hernández Acosta, launched a cluster munition made up of six fragmentation bombs at the urban part of the village of Santo Domingo,³³ killing 17 people and wounding 27 others, including 15 children.³⁴

54. According to the judgment at first instance issued on September 24, 2009 in the context of the domestic criminal proceeding, the yellow road that is mentioned in the video footage from the Skymaster is joined on in a straight line to the paved road that is the only street in the village of Santo Domingo, and to the north of it is a stand of trees very close to the homes where the cluster bomb was launched.³⁵

55. The AN-M1A2 cluster munition

[...] is composed of six fragmentation bombs or grenades, each weighing 20 pounds, secured by an M1A3 quick-release adapter. The cluster bomb with the fuses installed (nose or head) measures 46.6 inches, weighs 128 pounds, and is fitted with attachment lugs that allow it to be adapted to an aircraft’s launcher. These grenades or fragmentation bombs are designed for air-to-surface launch from an aircraft.³⁶

56. Article 2 of the Convention on Cluster Munitions, which was adopted on May 30, 2008, and entered into force on August 1, 2010, defines a cluster munition as “a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms.”³⁷

³² Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 45. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

³³ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 1. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

³⁴ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 76 and 77. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010, and Annex 5. Special Military Criminal Investigation Unit of June 14, 2001, pp. 36 and 37. Appendix C.4 to the petitioners’ brief received at the IACHR on October 28, 2003.

³⁵ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 46. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

³⁶ Annex 6. Office of the Prosecutor General of the Nation, Inspection and study of ballistics and explosives, extended opinion, working group BA-0066/2000, April 28, 2000. Appendix B.2 to the petitioners’ brief received at the IACHR on October 28, 2003.

³⁷ Convention on Cluster Munitions. Available at: <http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument>

57. According to the inspection and study of ballistics and explosives by the Office of the Prosecutor General of the Nation

[H]aving compared a number of the fragments recovered in the course of judicial inspections at Santo Domingo and in the autopsies carried out on some of the victims of the explosions of December 13, 1998, with the component parts of the AN – M1A2 bombs in the cluster munition, there was found to be a consistency and match in their morphology and dimensions, in particular the iron rings that encase bombs of this type lengthwise. By the same token, other aluminum and tin fragments recovered at the scene [...] correspond with the head or nose of the AN – M1- A2 fuze [...]³⁸

58. According to a test carried out by the Technical Investigative Corps (CTI) of the Office of the Prosecutor General, cluster munitions have limited precision but great antipersonnel power, since the bombs burst into countless pieces of shrapnel that spread out in all directions.³⁹

59. The persons who died as a result of the cluster munition were Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Eгна Margarita Bello (5), Katherine (or Catherine) Cárdenas Tilano (7), Oscar Esneider Vanegas Tulibila (12),⁴⁰ Geovani Hernández Becerra (14),⁴¹ Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), Luis Enrique Parada Roperó, and Rodolfo Carrillo.⁴²

60. With regards to Leonardo Alfonso Calderón, who was named as an alleged victim in Report on Admissibility 25/03 of the Inter-American Commission, according to the domestic criminal proceeding, he was a volunteer soldier who was killed "as a result of the action of firearm

³⁸ Annex 6. Office of the Prosecutor General of the Nation, Inspection and study of ballistics and explosives, extended opinion, working group BA-0066/2000, April 28, 2000. Appendix B.2 to the petitioners' brief received at the IACHR on October 28, 2003.

³⁹ Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 64. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010. It transpires from the judgment that on August 12, 2003, the CTI carried out a targeted launch of two cluster munitions, which made it possible to confirm: "i) that the precision of these devices is limited, given that only one of the bombs that comprised them hit the paved road, the predetermined target, while the rest fell on either side of the road, with one even falling many meters away from the rest; and, ii) that they have enormous antipersonnel power, as could be seen by the dense, black cloud of smoke that arose when the bombs hit and fragmented into countless pieces of shrapnel that spread out in all directions, passing right through wooden structures and even metal markers, leaving craters in the ground and oxidized tails similar to those found in the judicial inspection conducted on December 17, 1998, in the village of Santo Domingo."

⁴⁰ Annex 4. According to the Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 76, Oscar Esneider Vanegas was 12 years old when he died. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010. See, also, Annex 7. Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640 (155-45564/2000), December 19, 2002. Appendix to the petitioners' brief received at the IACHR on August 21, 2006.

⁴¹ Annex 4. According to the Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 76, Geovani Hernández Becerra was 14 years old when he died. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010. See, also, Annex 7. Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640 (155-45564/2000), December 19, 2002. Appendix to the petitioners' brief received at the IACHR on August 21, 2006.

⁴² Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 76. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010. See, also, Annex 7 Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640 (155-45564/2000), December 19, 2002. Appendix to the petitioners' brief received at the IACHR on August 21, 2006.

projectiles in events that occurred between December 12 and 14, 1998,"⁴³ but not as a consequence of the cluster bomb explosion. Therefore, he will not be considered a victim in the instant case. Furthermore, it should be mentioned that in the merits stage the petitioners implicitly desisted from the inclusion of Leonardo Alfonso Calderón as a victim in the instant case.

61. In addition, the following were wounded: Marcos Neite (5), Erinson Olimpo Cárdenas (9), Hilda Yuraimé Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17) Neftalí Neite (17), Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, Pedro Uriel Duarte Lagos,⁴⁴ Lida Barranca (8), Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora.⁴⁵

62. It should be noted that in Report on Admissibility 25/03, the Inter-American Commission determined that 25 persons had been wounded, based on information provided by the petitioners, which was based on the count of the wounded contained in the decision as regards legal situation issued by the Special Military Preliminary Criminal Investigation Unit on June 14, 2001. However, on February 24, 2009, during the merits stage of the matter, a judgment at first instance was issued in the criminal trial in which two individuals not on the original list of the wounded in the report on admissibility were included as such; their inclusion among those wounded has not been contested by the State. In view of the foregoing, the Commission will consider as the victims of wounds caused by the cluster munition the 27 individuals listed in the preceding paragraph.

63. In the judgment at first instance in the criminal trial, it was noted that the Skymaster video footage shows that at 10:08 a.m. there were a large number of people, including women and children, abandoning the village, some of them running in the direction of Tame and Betoyes. The judgment also states that "at around 11:00 a.m. the exodus of people dressed in civilian clothes was moving along the paved road over several kilometers, while on the audio there were long periods of silence interspersed by comments from the Skymaster crew speculating that there were guerrillas among those walking."⁴⁶

64. The judgment also says that "at 10:21 a.m. it was observed that from a house [...] the wounded persons were spotted in the back of a white truck [...] so the crew of the Skymaster

⁴³ Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 12. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁴⁴ Annex 4. According to the Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 76 and 77, Marcos Neite González (5), Erinson Olimpo Cárdenas (9), Hilda Yuraimé Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17) Neftalí Neite (17), Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, and Pedro Uriel Duarte Lagos were wounded. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁴⁵ Annex 7. According to the Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640 (155-45564/2000), December 19, 2002, Lida Barranca was wounded. Appendix to the petitioners' brief received at the IACHR on August 21, 2006. According to the decision of the Special Military Preliminary Criminal Investigation Unit of June 14, 2001, pp. 36 and 37, Lida Barranca (8), Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora were wounded. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁴⁶ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 46. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

mentioned several times that there were guerrillas among the civilians who were leaving the village, and for that reason one of them insistently suggested firing rockets in front of the moving vehicle that was carrying the wounded.”⁴⁷

65. In that respect, the versions of several survivors and witnesses concur that they were attacked after the explosion of the cluster bomb, which prevented them from immediately moving the wounded. In that connection, it is worth noting the following statements of persons who were wounded in and/or survived the bombardment:

María Panqueva stated,

[...] I could not help [the wounded] because I was wounded myself, and then suddenly a truck appeared and got us out, just lying in the back. And after that, as we were driving away, they shot at us from either side of the road, and they followed us for about two kilometers. And then they got us out and more dead and wounded people were left.⁴⁸

Nilsan Díaz Herrera stated,

[...] those who were still alive dragged away the wounded to get them out any way they could. I was leaving the village and when they saw me running away with my 12-year-old son they fired at us all along the edge of the embankment that leads to the savannah. I hid among the trees to escape and avoid being killed. I had the idea of taking off my shirt, so that they could not see me and ran to where the jungle begins, and then they stopped following me [...]⁴⁹

For his part, Luis Sel Murillo Villamizar stated, “[...] As we were getting out the dead and wounded, the helicopter continued firing its machine guns and followed us for about two kilometers up the road, while everyone was leaving the village.”⁵⁰ Amalio Neite stated, “[...] I felt that I had been wounded and I told my brother to have a look at me [...] and I was bleeding, and I looked at my other brother and he was limping too. When I saw all this, I went up the road with the women and children, and as I was going there a helicopter came above us and was shooting at us [...]⁵¹ Adán Piñeros stated, “[...] and even after the explosion as we were running up the road the same helicopter carried on blasting away at us [...]⁵²

66. In this regard, the Skymaster video footage narrated in the judgment at first instance shows that between 10:10 and 10:11 a.m. a crew member of that plane, referring to helicopter “Harpy”, shouts, “Tell him to cease fire, damn it! They are civilians. [...] Jesus Christ! He's shooting

⁴⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 46 and 47. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁴⁸ Annex 8. Statement of María Panqueva submitted to the 24th Military Preliminary Criminal Investigation Court on December 21, 1998. Appendix A.1.b to the petitioners' brief received at the IACHR on August 21, 2006.

⁴⁹ Annex 9. Statement of Nilsan Díaz Herrera submitted to the Municipal Ombudsman of Tame on December 16, 1998. Appendix A.2.a to the petitioners' brief received at the IACHR on August 21, 2006.

⁵⁰ Annex 10. Statement of Luis Sel Murillo Villamizar submitted to the 24th Military Preliminary Criminal Investigation Court on December 22, 1998. Appendix A.3.c to the petitioners' brief received at the IACHR on August 21, 2006.

⁵¹ Annex 11. Statement of Amalio Neite submitted to the Municipal Ombudsman of Tame on December 16, 1998. Appendix A.5.a to the petitioners' brief received at the IACHR on August 21, 2006.

⁵² Annex 12. Statement of Adán Piñeros submitted to the Municipal Ombudsman of Tame on December 16, 1998. Appendix A.13 to the petitioners' brief received at the IACHR on August 21, 2006.

at civilians [...] Tell him to cease fire, damn it!"⁵³ In light of the foregoing, the court at first instance concluded that there was no doubt that there was an attack by "Harpy" against the civilian population 10 minutes after the cluster bomb was launched.⁵⁴

67. The record in the case notes the existence of videos that record the aftermath of the bombing in the village of Santo Domingo, which include

[...] the video cassette [...] which shows the corpses of two adults in civilian clothes and four small children, which display wounds and are covered in blood; later on, after a brief interruption, in the village itself one can see a shattered beam, an abundance of blood and clothes scattered over the ground, as well as a close-up of the car and, in front of the right wheel, a dark object which days later was identified as the tail of a cluster bomb. It also shows parts of a corrugated zinc roof from a building that was hit from the top down, with blood on the grass next to them. [...] [The] images [...] are the first that were taken in the village after the tragic events and were shot in the presence of officials from the Office of the Ombudsman."⁵⁵

68. After visiting the area on December 17 and 18, 1998, the Office in Colombia of the United Nations High Commissioner for Human Rights issued a press release in which it said that

[...] According to the complaints received and the evidence collected from observations in the field, it is reasonable to suppose that these acts were caused by a military action on the part of the Armed Forces of Colombia, as a consequence of the impact and explosion of rockets fired at the population of Santo Domingo, in contravention of the obligations of international humanitarian law, in particular its Second Protocol.⁵⁶

69. The first judicial commission arrived four days after the events and noted that all of the inhabitants had been obliged to abandon the village. The record also shows the existence of a video from December 28, 1998, which shows that "a tour was made of several homes to register the alleged ravages caused by the soldiers who arrived in Santo Domingo while it was uninhabited."⁵⁷ Furthermore, at an open town meeting held in the municipality of Tame on December 17, 1998, the inhabitants of Santo Domingo publicly denounced the crimes and said that owing to the continuous bombardment on December 13 and 14, 1998, the inhabitants of the village moved to the district of Betoyes in the Municipality of Tame, and to the cities of Tame and

⁵³ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 47. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁵⁴ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 47. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁵⁵ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 21. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁵⁶ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 23. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁵⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 50. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

Saravena.⁵⁸ According to information in the public domain, the inhabitants returned to the village in January 1999, whereupon they started its reconstruction.⁵⁹

70. On December 17, 1998, the 124th Military Preliminary Criminal Investigation Court traveled to Santo Domingo to carry out a judicial inspection in which it was noted for the record that the village was without any inhabitants.⁶⁰ In the judicial inspection carried out by the Commission of Prosecutors, recorded in a minute dated December 28, 1998, a record was made of the damage caused to some of the homes as well as the theft of property from inside them, including those of Plinio Granados, Milciades Bonilla, Emilia Calderón, Mario Galvis, Olimpo Cárdenas, and María Panqueva, among others. The inspection was suspended due to the lack of electricity; however, it was officially noted that irregularities were found in more than 70% of the dwellings.⁶¹ In the judicial inspection conducted on December 29, 1998, by the Municipal Ombudsman of Saravena, waste material was found that was "apparently material used by the armed forces."⁶² Furthermore, in the proceedings instituted at the domestic level it was claimed that damages were caused to the property of Víctor Julio Palomino, Margarita Tilano Yáñez, Hugo Ferney Pastrana Vargas, and María Antonia Rojas.⁶³

D. The versions of events

71. It emerges from the criminal proceeding that two military versions were offered: those that deny the use of the cluster munition and those that acknowledge its use fall into inconsistencies over the origin of the order to launch the munition and the place where the launch occurred.⁶⁴

72. According to the communications sent by the Commander of the 18th Brigade of the National Army, Brigadier General Luis Hernando Barbosa Hernández, to the International Committee of the Red Cross, the initial versions from the military indicate that the FARC used "[...] the civilian population as a shield after forcing them at gunpoint to evacuate their homes, they then proceeded to fire at the military units, placing the population between their weapons and their objectives [...]"⁶⁵ The Brigadier General also reported that the FARC later ordered "[...] some of their criminal

⁵⁸ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, p. 38. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁵⁹ Annex 13. Equipo Nizkor, Support Group for Displaced People Organizations, Report on Forced Displacement in Colombia, 1999, March 2000. Available at: http://www.derechos.org/nizkor/colombia/doc/gad1e.html#N_26.

⁶⁰ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, p. 164. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁶¹ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, pp. 165-166. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁶² Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, p. 167. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁶³ Annex 14. Section Three, Council of State, Mario Galvis Gelves et al., Case No. 07001-23-31-000-2000-0348-01, December 13, 2007. Appendix to the communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

⁶⁴ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 29. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁶⁵ Annex 15. National Army, Second Division, 18th Brigade, Communication 0373/DIV2-BR18-B6-DH-725, December 13, 1998. Appendix D.3 to the petitioners' brief received at the IACHR on October 28, 2003. See, also, Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 30. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

accomplices (using radio communication) to denounce the joint action of the troops and the Air Force as "indiscriminate bombing" to human rights organizations, including the International Committee of the Red Cross, and broadcast and print mass media."⁶⁶

73. In testimony presented on January 5, 2009, Brig. Gen. Barbosa Hernández stated that the fighting with the guerrillas took place six kilometers from the urban areas of Santo Domingo. Furthermore, Maj. Juan González and Capt. Jaime Rodolfo Núñez from the same brigade said that they heard that a bomb that the guerrillas had placed in a vehicle exploded in Santo Domingo and that the fighting took place three kilometers from the village.⁶⁷

74. In addition, a document signed by the Inspector General of the Air Force said that the FAC is not responsible for what happened and that "there is no evidence of bombing or machine-gunning" and "there are no traces of blood either inside or outside the homes, except in two places." It also mentioned that "the Air Force aircraft did not use bombs. The use of this weapon requires special authorization from the Commander of the Air Force, which was not given."⁶⁸

75. General Héctor Fabio Velasco, who was Commander of the Air Force at the time, stated in a news program on August 13, 2001, that bombs were not used.⁶⁹ However, in a later statement, the general said that he had heard about the use of the cluster bomb

[...] some days afterward because [...] authorization for the use of such weapons was only given by the Commander-in-Chief of the Armed Forces through the Air Force Command, and since that had not initially occurred, when the account emerged that the deaths were caused by bombing I denied it, saying that it surely referred to the firing of a 40 mm shell.⁷⁰

76. As regards the second version of events, there are different accounts from the military personnel who took part in the operations of December 13, 1998, which variously state that the cluster bomb was launched five kilometers, four kilometers, two kilometers, one kilometer, 600 meters, and 500 meters north of the village of Santo Domingo.⁷¹ In this regard, the judgment in the criminal proceeding concludes

⁶⁶ Annex 16. National Army, Second Division, 18th Brigade, Communication 0371/DIV2-BR18-B6-DH-725, December 13, 1998. Appendix D.2 to the petitioners' brief received at the IACHR on October 28, 2003. See, also, Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 30. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁶⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 30. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁶⁸ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 30. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁶⁹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 30. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷⁰ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 30-31. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷¹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 36. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

[...] with certainty that cluster bombs struck the village [of Santo Domingo], one of them in front of the home of Olimpo Cárdenas where there with five casualties; another next to the store situated on the same side a little further west; three around the truck [alleged by the military to be a truck bomb], causing the highest number of fatalities in the establishment of Mario Galvis, situated behind the carriage; and the last to the east of the latter. Therefore, the court rules out that any of the bombs fell in the stand of trees and that the casualties were caused by shrapnel that reached them from there.⁷²

E. The judicial proceedings to elucidate the facts⁷³

77. Investigations were opened simultaneously in the civil jurisdiction and by the military criminal courts. On December 14, 1998, the Office of the 41st Prosecutor Assigned to the Circuit Courts of Tame (Arauca) ordered a preliminary investigation to be opened. Furthermore, in an official letter dated December 15, 1998, the then Commander-In-Chief of the Armed Forces requested an investigation of the events. The case was taken up by the Court of First Instance in and for Apiay (Meta Department). On January 12, 1999, the Court of Apiay instructed the 118th Military Preliminary Criminal Investigation Court to open a preliminary inquiry.⁷⁴

78. As regards to the investigation carried out in the military criminal jurisdiction, on May 20, 1999, the military preliminary criminal investigation under FAC Capt. Fabio Araque Vargas decided not to open an inquiry into the FAC servicemen for the deaths of persons in Santo Domingo during the fighting that took place from December 12 to 14, 1998. The Public Ministry (*Ministerio Público*) appealed that decision, as a result of which, the military preliminary criminal investigation decided not to open an inquiry and forward authenticated copies of the record to the Human Rights Unit of the Office of the Prosecutor General, where investigation 419 was already underway into the events of Santo Domingo, as well as to the Office of the Procurator General in order to begin a disciplinary inquiry.⁷⁵

79. On May 30, 2000, the Human Rights Unit of the Office of the Prosecutor General vacated the decision whereby the military criminal jurisdiction abstained from opening an inquiry and instead ordered an investigation to be opened, stating that the military criminal courts were the appropriate jurisdiction to investigate the events of Santo Domingo as they concerned acts that had to do with the service. Subsequently, based on a writ of protection issued by the Superior Tribunal of Bogotá on behalf of César Romero Pradilla, the interlocutory order of May 30, 2000, was partially vacated and the decision not to open an investigation came back into force.⁷⁶

80. In a decision of November 21, 2000, the Commander-in-Chief of the Armed Forces set up a special Military Preliminary Criminal Investigation Unit (UIPME) to investigate the facts. This unit was composed of FAC Capt. Mónica Ostos and two military preliminary criminal investigation

⁷² Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 63. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷³ For a chronology of the criminal proceeding see Annex 2.

⁷⁴ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 2. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷⁵ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 2. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷⁶ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 2. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

judges. On February 9, 2001, the UIPME vacated the writ of prohibition issued on May 20, 2000, by the military criminal courts and ordered formal proceedings to be instituted against the crew of helicopter UH1H – FAC 4407.⁷⁷

81. On June 14, 2001, the UIPME issued a decision on the legal situation of Capt. César Romero Pradilla, Lieut. Johan Jiménez Valencia, and First Technician Héctor Mario Hernández Acosta, in which it ordered their detention with the benefit of provisional release pending trial for the alleged crimes of manslaughter and bodily harm.⁷⁸ It should be noted that in their respective declarations in the preliminary inquiry, which were assessed in the decision of June 14, 2009, the FAC servicemen stated,

Capt. César Romero Pradilla

[...] That he heard about the targets and the information about the fighting from the SKYMASTER recordings and intelligence reports that personnel from the 18th [Brigade] were providing [...] That coordination with regard to targets was done directly with the armed helicopters that were supporting them, as well as with the SKYMASTER which were crewed by American pilots and that for the purposes of selecting a target for a cluster bomb that coordination was done with the armed helicopters that had special radio communication [...] That as a guarantee for his defense he requests the office to provide the videos from the SKYMASTER [...] That these videos may be located at Air Force Command or at the office where Command has sent them, as well as in Caño Limón; that these videos contain the audio for all air-surface and air-air communications [...] That before each operation there was a briefing that was attended by all the aircraft pilots, including those of the SKYMASTER; Cdr. Olaya Acevedo, Liaison Officer and Cdr. Gómez Márquez FAC Liaison Officer with OXY. That it is established in the briefings what is to be done in each operation and that the targets for which support was to be provided with the cluster munition were established by the videos from the SKYMASTER and a diagram made [...] That no FAC pilot installs a cluster bomb in their aircraft of their own accord, without an order to do so [...] that the targets on which the munitions were used were not selected by him [...] ⁷⁹

Lieut. Johan Jiménez Valencia

[...] That the SKYMASTER has videos and recordings of the crews in the combat area since that plane has all the necessary equipment to film by day or night and record conversations among crews, and it has the recording for the whole operation, absolutely all of it; there can be no period of time that they did not record [...] The coordinates are issued in the flight instructions and flight orders, but once in the theater of operations, the H-500, the helicopter "HARPY" and the SKYMASTER are the ones who helped the pilots of the 4407 to identify the target with the help of visual references on the ground [...] He is not privy to the videos but knows that the function of the SKYMASTER in that operation was to film the proceedings and a copy of those videos must be with the company OCCIDENTAL DE COLOMBIA [...] ⁸⁰

First Technician Héctor Mario Hernández Acosta

⁷⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 3. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁷⁸ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁷⁹ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, pp. 170 to 176. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁸⁰ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, pp. 176 to 183. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

[...] The pilots, according to the information supplied by the SKYMASTER and the troops on the surface, had the coordinates of the location. The pilots of the SKYMASTER were American and his understanding is that that plane belonged to OXY [...] The SKYMASTER was filming and siting locations for their launch [...]⁸¹

82. On June 14, 2001, a specialized prosecutor from the National Human Rights Unit of the Office of the Prosecutor General claimed jurisdiction in the case in view of the fact that new evidence had come to light that suggested the perpetration of a crime against humanity. On June 30, 2001, the 122nd Military Preliminary Criminal Investigation Court, in its capacity as the court of first instance, refused the request of the Office of the Prosecutor and blocked the motion of positive conflict of venue presented by the Prosecutor's Office.⁸²

83. On October 18, 2001, the Disciplinary Jurisdictional Chamber of the Superior Council of the Judicature declared that the military courts had jurisdiction over the instant case. In light of the foregoing, Alba Janeth García Guevara filed an action for a writ of protection against the decision of the Superior Council of the Judicature. On November 27, 2001, the 30th Criminal Circuit Court granted the writ of protection and vacated the judgment of the Superior Council of the Judicature. On February 12, 2002, the Superior Tribunal of the Judicial District of Bogotá ruled on an appeal and decided to reverse the lower court's ruling and deny protection. On October 31, 2002, the First Review Chamber of the Constitutional Court returned judgment T-932-02 in which it vacated the decision at second instance and upheld the judgment issued on November 27, 2001. In addition, it ordered the Disciplinary Jurisdictional Chamber of the Superior Council of the Judicature to issue a new judgment within 15 days.⁸³

84. As a result of the foregoing, the proceeding was assigned to the National Human Rights Unit, and on December 19, 2003, it brought an indictment against the defendants charging them as co-principals in the crimes of manslaughter and negligent bodily harm.⁸⁴ The indictment was appealed and on August 26, 2004, the Office of the 37th Prosecutor Assigned to the Superior Tribunal of Bogotá confirmed it with the modification that "the charges of manslaughter and negligent bodily harm against the accused should classify them as principals."⁸⁵ Thereafter, jurisdiction in the case corresponded to the Single Circuit Court of Saravena, which took it up on October 19, 2004 and set a preparatory hearing for December 16, 2004. The counsel for two of the accused requested that the venue for the proceeding be changed to the city of Bogotá and on February 17, 2005, the Criminal Cassation Chamber of the Supreme Court ordered the venue changed to the Criminal Courts of the Bogotá Circuit.⁸⁶

⁸¹ Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, pp. 183 a 188. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

⁸² Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 3. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁸³ Annex 17. Constitutional Court, First Review Chamber, Judgment T-932/02, October 31, 2002. Appendix C.3 to the petitioners' brief received at the IACHR on October 28, 2003.

⁸⁴ Annex 18. National Unit for Human Rights and International Humanitarian Law, indictment of December 19, 2003, case 419. Appendix to the petitioners' brief of August 15, 2006, received at the IACHR on August 21, 2006.

⁸⁵ Annex 19. Prosecution Unit Assigned to the Superior Tribunal of Bogotá, decision of August 26, 2004. Appendix to the petitioners' brief of August 15, 2006, received at the IACHR on August 21, 2006.

⁸⁶ Annex 20. Supreme Court of Justice, Criminal Cassation Chamber, Opinion of the Court presented by Judge Sigifredo Espinosa Pérez, February 17, 2005. Appendix to the petitioners' brief of August 15, 2006, received at the IACHR on August 21, 2006.

85. On September 21, 2007, the 12th Criminal Court of the Bogotá Circuit issued a judgment at first instance in which it found Air Force servicemen César Romero Pradilla, Johan Jiménez Valencia, and Héctor Mario Hernández Acosta guilty of simultaneously committing, with a single act, 17 counts of manslaughter and 18 counts of negligent bodily harm and sentenced them to the principal penalty of 72 months of imprisonment and a fine of \$270,000.00 Colombian pesos, together with the ancillary penalty of prohibition from the exercise of public rights and duties for the same period of time as the prison sentence.⁸⁷ That judgment was appealed and on January 30, 2009, the Superior Tribunal of Bogotá annulled the decisions adopted after the closure of the evidentiary stage on the basis that in the course of the trial evidence came to light that required the indictment to be changed to include wanton disregard for human life.

86. The Prosecutor's Office subsequently changed the legal classification and on September 24, 2009, the 12th Criminal Court of the Bogotá Circuit issued a new decision at first instance in which it found Captain César Romero Pradilla and Lieutenant Johan Jiménez Valencia guilty of simultaneously committing, with a single act, 17 counts of homicide and 18 counts of bodily harm with wanton disregard for human life, and sentenced them to the principal penalty of 380 months in prison and a fine of \$44,000 Colombian pesos, along with the ancillary penalty of prohibition from the exercise of public rights and duties for 10 years and disqualification from occupying any position in the public administration for five years. The court also found Technician Héctor Mario Hernández Acosta guilty of simultaneously committing, with a single act, 17 counts of manslaughter and 18 counts of negligent bodily harm, and sentenced him to 72 months in prison and a fine of \$181,000 Colombian pesos, together with the ancillary penalty of prohibition from the exercise of public rights and duties for the same period of time as the prison term and disqualification from occupying any position in the public administration for five years.⁸⁸

87. In addition, with respect to César Romero Pradilla and Johan Jiménez Valencia, the judgment provided that official letters be sent to the appropriate authorities with a view to instituting administrative proceedings for complete separation from the armed forces in accordance with Article 111 of Decree 1790 of 2000,⁸⁹ that the two convicted men were not entitled to parole or substitution of the sentence with house arrest, and that it would issue a warrant for their arrest once the judgment became final.

88. As for Héctor Mario Hernández Acosta, the decision provided that he was not entitled to parole, ordered his arrest once the judgment became final, and granted him the benefit of substitution of the sentence with house arrest.

89. The judgment stated that

⁸⁷ Annex 4. Twelfth Criminal Court of the Bogotá Circuit, Case 2005-102, September 21, 2007. Appendix to the communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

⁸⁸ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁸⁹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010. See also Article 111 of Decree 1790 of 2000. "Complete separation. When an officer or noncommissioned officer of the armed forces is sentenced to imprisonment as a principal penalty by a military criminal courts, unless the conviction is for an offense committed with negligence when it is so determined in a disciplinary ruling, they shall be completely separated from the armed forces and shall not be permitted to belong to them in the future."

[t]he crew of the UH1H was unquestionably aware of the prohibition against attacking the village and its residents, not only because they repeatedly said as much during the proceedings, but also because, in accordance with the principle of distinction, the manuals and rules of procedure of the FAC in force since December 13, 1998, with they had a duty to be familiar, required them not to.⁹⁰

90. The judgment also concluded that

In the record it was sufficiently attested that before the aerial operation of the morning of December 13, 1998, which resulted in the outcome that gave rise to this proceeding, the pilots of the aircraft that took part attended a meeting, along with other persons, to select the targets to attack, the aircraft that would be involved, and the weapons that they would use. Furthermore, upon delivering the cluster munitions, the pilot of the UH 500, then-Lieut. Germán Lamilla told the crew of the UH1H where they were to launch the munition, and for that reason, the court believes that there is sufficient evidence in the proceeding to forward authenticated copies of this order against them, on the basis that the statute of limitations has not run on these offenses.

It is also clear that there is an abundance of evidence in the record that seriously incriminates Sergio Garzón Vélez, then a major and now a colonel in the Colombian Air Force, to the extent that he was the ranking officer in the aerial operation [...] he was aware of the launch of the cluster munition and took part in the respective briefing. Furthermore, it is not true, as it appears in the mission-complete report signed by him, that he canceled any operation, despite the fact that he had a legal duty to do so. Given that those who took part in the briefing are being tried for wanton disregard of human life and total indifference with respect to the ultimately fatal outcome, the court will forward authenticated copies to ensure that there is an investigation of his criminal responsibility therein as well as in the also proven fact that he fired on civilians as they were fleeing with the wounded in the direction of Tame [...].

[...] [A]s it has been mentioned in the proceeding that this same officer could have been involved in the adulteration of video footage of the operation and that the videos received by the Office of the Procurator General did not have a soundtrack, it is appropriate to forward authenticated copies so that he is investigated to determine if he committed the crime of procedural fraud.⁹¹

The judgment provided that in view of the fact that the above-mentioned FAC officers bore a high military rank, a copy of the judgment would be sent to the Office of the Vice Prosecutor General of the Nation, so that it might assign the investigation to the appropriate prosecution unit.⁹²

91. The counsel for the convicted men filed an appeal against the judgment, which is pending before the Criminal Chamber of the Superior Tribunal of Bogotá.⁹³

92. It should be noted that the petitioners reported that in the course of the investigations at the domestic level, Mr. Angel Trifilo Riveros, a survivor of and witness to the

⁹⁰ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 62. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁹¹ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, pp. 79 and 80. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁹² Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 80. Appendix 2 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

⁹³ Consultation of proceedings, Judicial Branch of Colombia, No. 11001310401220050010204, <http://200.74.129.89/procesos/consultap.aspx>, current as of February 10, 2011.

massacre, was murdered on January 24, 2002, allegedly by members of paramilitary groups in collaboration with members of the Army.⁹⁴

F. Disciplinary investigation and contentious administrative proceeding

93. Following the events of December 13, 1998, the National Director of Special Investigations of the Office of the Procurator General launched, *motu proprio*, a preliminary disciplinary inquiry, as a result of which, on June 13, 2000, the Office of the Procurator General ordered an investigation of Capt. César Romero Pradilla, Lieut. Johan Jiménez Valencia, Flight Technician Héctor Mario Hernández Acosta, and the commander of the Army's 36th Counter-Guerrilla Battalion ("Comuneros"), Maj. Juan Manuel González González.⁹⁵

94. Disciplinary charges were brought against the above mentioned officers on October 27, 2000. Specifically, Capt. Cesar Romero Pradilla was charged with the launch of a cluster munition, knowing the danger that it entailed, inasmuch as the chosen target was located inside the village, very close to where the civilian population, who were plainly visible from the helicopter, had gathered that morning. The Office of the Procurator General held that such behavior constituted a gross violation of international humanitarian law and wanton disregard for human life. Flight Technician Héctor Mario Hernández Acosta was charged with the fact that on December 13, 1998, at the time of the military operations in the village of Santo Domingo, heeding an order given by the pilot of the aforementioned aircraft, he fired a cluster munition at a preselected target, knowing that it was situated inside the village near to where the majority of the inhabitants were assembled, a fact that could be observed from the helicopter under on the local visibility conditions. Such conduct constituted wanton disregard for human life.⁹⁶

95. Maj. Juan Manuel González González was brought up on a disciplinary charge of negligent omission of duty for failure to exercise his authority over the troops located in the urban area of the District of Santo Domingo between December 16 and 22, 1998, during which time he negligently allowed the soldiers to arbitrarily enter the residences, taking advantage of the fact that their inhabitants had moved to other municipalities as result of the bombardment on December 13, 1998. Finally, Lieut. Johan Jiménez Valencia was charged with omission of duty because he knowingly concealed the possibly irregular conduct of his fellow crewmembers.⁹⁷

96. On October 2, 2002, the Special Disciplinary Committee established by the Procurator General delivered a judgment at first instance in which it punished Capt. César Romero Pradilla and Flight Technician Héctor Mario Hernández Acosta with suspension from duty for three months and acquitted Maj. Juan Manuel González González and Lieut. Johan Jiménez Valencia.⁹⁸

⁹⁴ IACHR, Report No. 25/03, Petition 289-02, Admissibility, Santo Domingo, Colombia, March 6, 2003, par. 9. Available at: <http://www.cidh.oas.org/annualrep/2003eng/Colombia.289.02.htm>. The State controverted that allegation and indicated that the petitioners did not provide evidence to support their allegations. Additionally it indicated that those facts were not declared admissible by the Commission and because of that they should not be taken into consideration in the merits stage.

⁹⁵ Annex 21. Office of the Procurator General of the Nation, Special Disciplinary Committee, Case 155-45564-00, October 2, 2002. Appendix C.1 to the petitioners' brief received at the IACHR on October 28, 2003.

⁹⁶ Annex 21. Office of the Procurator General of the Nation, Special Disciplinary Committee, Case 155-45564-00, October 2, 2002. Appendix C.1 to the petitioners' brief received at the IACHR on October 28, 2003.

⁹⁷ Annex 21. Office of the Procurator General of the Nation, Special Disciplinary Committee, Case 155-45564-00, October 2, 2002. Appendix C.1 to the petitioners' brief received at the IACHR on October 28, 2003.

⁹⁸ Annex 21. Office of the Procurator General of the Nation, Special Disciplinary Committee, Case 155-45564-00, October 2, 2002. Appendix C.1 to the petitioners' brief received at the IACHR on October 28, 2003.

97. The punished men appealed the ruling and on December 19, 2002, the Disciplinary Chamber of the Office of the Procurator General of the Nation upheld the decision at first instance.⁹⁹ Specifically, the disciplinary ruling stated that

[g]iven that the aircraft of the Colombian Air Force were supporting the troops on the ground with bombardment, that is, that public servants activated the explosive device, in clear disregard of international humanitarian law, specifically ignoring the principle of distinction enshrined in Article 48 of Protocol 1 and Article 13 of Protocol II of 1977, and Common Article 3 of the four Geneva Conventions of August 12, 1949, which provide that parties in conflict shall make a distinction at all times between the civilian population and combatants, and between civilian property and military objectives, and shall only direct their operations against military objectives, we are compelled to conclude that we are in the presence of disciplinable conduct.

It should be clarified that, based on the evidence, the acts arose as the occurrence of isolated and unfortunate conduct on the part of one crew, which in no circumstances involves the public security forces as such.¹⁰⁰

98. As to the contentious administrative proceeding, on September 25, 2000, Mr. Alejandro Álvarez Pabón, in representation of the families of 16 of the persons who died¹⁰¹ and 13 of those who were injured,¹⁰² filed suit for direct reparation against the Nation (Ministry of Defense – Colombian Air Force) for the deaths and injuries caused by the launch of a cluster munition at the civilian population of Santo Domingo from an FAC helicopter; the looting and destruction of the establishment “El OASIS” owned by the spouses Mario Galvis and Teresa Mujica; looting and destruction of the establishment “Droguería y Misceláneas Santo Domingo” owned by María Panqueva; the destruction of a Chevrolet vehicle, license plate UR-2408, owned by Víctor Julio Palomino; looting of the establishment dedicated to the sale of garments, shoes, and miscellaneous goods owned by Henry Ferney Pastrana Vargas; and arson and total destruction of a gasoline service station, restaurant, and hostel owned by María Antonia Rojas.¹⁰³

99. On May 20, 2004, the Contentious Administrative Tribunal of Arauca found that the State bore responsibility for having failed its duty to serve as a result of the events of December 13, 1998, in Santo Domingo, in favor of 23 family groups (optional joint parties – *litisconsortes facultativos*). Both sides appealed the ruling and following a conciliation hearing in which no agreement was reached, on November 24, 2006, the parties reached an agreement which was

⁹⁹ Annex 7. Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640, December 19, 2002. Appendix to the petitioners’ brief of August 15, 2006, received at the IACHR on August 21, 2006.

¹⁰⁰ Annex 7. Disciplinary Chamber of the Office of the Procurator General of the Nation, Case 161-01640, December 19, 2002. Appendix to the petitioners’ brief of August 15, 2006, received at the IACHR on August 21, 2006.

¹⁰¹ Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Egna Margarita Bello (5), Katherine (or Catherine) Cárdenas Tilano (7), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), and Rodolfo Carrillo. Annex 22. Communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

¹⁰² Marcos Neite González (5), Erinson Olimpo Cárdenas (9), Hilda Yuraimé Barranco (14), Neftalí Neite (17), Alba Yaneth García, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Amalio Neite González, María Panqueva, and Fernando Vanegas. Annex 22. Communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

¹⁰³ Annex 22. Communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

ratified at a hearing held on November 8, 2007.¹⁰⁴ In a decision adopted on December 13, 2007, Section Three of the Council of the State approved the conciliation between the Nation and 19 of the 23 optional joint parties and declared the process concluded with respect to them; it also disapproved the agreement with respect to the other four parties and ordered the process to continue.¹⁰⁵ On November 19, 2008, Section Three of the Council of State declared the Nation-Ministry of Defense-FAC) financially liable for the damages caused to the four joint parties in respect of whom the proceeding for the events of December 13, 1998, continued.¹⁰⁶

100. By resolution 0979 of March 18, 2009, and resolution 1560 of April 27, 2009, the Nation-Ministry of Defense paid the representative of the alleged victims a total of five thousand fifty-eight million seven hundred fifty-nine thousand nineteen pesos and twenty cents (\$5,758,759,019.20) in reparation and compensation for the events at Santo Domingo¹⁰⁷ to 23 family groups, composed 111 persons, among which there are families of 16 of the persons who were killed, as well as 13 of the persons that were murdered and their families.

V. LEGAL ANALYSIS

101. It should be pointed out that the submissions of the petitioners in the merits stage refer to article 22 of the American Convention which was not considered in the Admissibility Report 25/03. In the instant case, the state has been privy to the relevant facts since the beginning of the proceeding, and to the submissions with respect to the provisions in reference since the beginning of the merits stage. Therefore, the State has had ample opportunity to contest them. In that regard, it is worth noting that the provisions that set out the requirements to be met by a petition in order to be admitted by the Commission (Article 46(1) of the American Convention, Article 32 of the Rules of Procedure in force at the time the complaint was lodged, and Article 36 of the Rules of Procedure currently in force) do not require specification of the articles considered to be violated in relation to the facts reported.¹⁰⁸ Therefore, the Commission will consider the arguments and admissions made with respect to Article 22 of the American Convention inasmuch as they are connected with the facts with which this case is concerned.¹⁰⁹

102. In view of these elements and in keeping with the principle of *iura novit curia*, which allows international organizations to apply all pertinent legal provisions,¹¹⁰ the Commission will consider the arguments as to fact and law of the parties as a whole in order to determine the extent

¹⁰⁴ Annex 23. Section Three, Council of State, Mario Galvis Gelves et al., Case No. 28259 (00-00348-01). Record of November 8, 2007. Appendix to the communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

¹⁰⁵ Annex 23. Section Three, Council of State, Mario Galvis Gelves et al., Case No. 07001-23-31-000-2000-0348-01, December 13, 2007. Appendix to the communication presented by a third party, received by the IACHR on February 6, 2009, received on March 9, 2009, and transmitted to both parties on April 21, 2010.

¹⁰⁶ Annex 24. Section Three, Council of State, Mario Galvis Gelves et al., Case No. 07001-23-31-000-2000-0348-01, November 19, 2008. Available at: <http://www.lealecheveryabogados.com/docs/SENTENCIA1.pdf>.

¹⁰⁷ Annex 25. Ministry of National Defense, resolution 0979 of 2009, March 18, 2009, and Annex 26. resolution 1560 of 2009, April 27, 2009. Appendix 1 to the State's brief of October 5, 2010, received at the IACHR on October 6, 2010.

¹⁰⁸ As the Inter-American Court of Human Rights has established, as long as the petitioners set out in their original petition the facts on which they base their claims of violations of the Convention, and these are relevant to making a legal determination, they are under no legal obligation to specify precise provisions in the initial petition, nor are there impediments to the submission of additional legal arguments in subsequent pleadings based on the same facts. See I/A Court H.R., *Case of Hilaire v. Trinidad and Tobago*. Preliminary Objections. Judgment of September 1, 2001. Series C, No. 80, par. 42.

¹⁰⁹ IACHR, Report 62/08 *Manuel Cepeda Vargas*, July 25, 2008, par. 72.

¹¹⁰ Permanent Court of International Justice, *Lotus Case*, Judgment of 7 September 1927, Series A No. 10, p. 31.

the State's responsibility and its impact on the enjoyment of human rights by the alleged victims in the instant case.¹¹¹

103. It should also be mentioned that, with regard to the identification of the victims, the Commission notes that in the instant case there coexist a series of circumstances that pose serious difficulties for the identification of the next of kin of the alleged victims, of the persons whose property was looted and/or destroyed, and of those persons who moved away from the village of Santo Domingo. As regards to the next of kin of the alleged victims and the persons who were displaced, in keeping with its analysis below, the Commission considers proven that the terror caused by the bombardment drove all of the villagers to abandon the village of Santo Domingo and set off for Betoyes and the cities of Tame and Saravena. Furthermore, the inspections carried out in the framework of the investigations revealed irregularities in 70% of the homes in the village of Santo Domingo.¹¹² However, they were not thoroughly documented. The Commission believes that given the above, it is necessary to adopt flexible criteria in the identification of the victims in the instant case.

104. Finally, based on all the evidence contained in the record, the Commission has reached the conclusion that the families of the victims, the persons who were displaced from the village of Santo Domingo, and those whose property was looted and/or destroyed could exceed the number of persons identified thus far and considered victims in the present report. In light of the foregoing, and as is mentioned in the recommendations, it is incumbent upon the State to establish a collective reparation mechanism that recognizes the impact that the bombardment had on the civilian population of the village of Santo Domingo which was forced by the events to abandon the village.

A. Right to life, right to humane treatment, and rights of the child (Articles 4(1), 5(1), and 19 of the American Convention in connection with Article 1(1) thereof)

105. Article 4(1) of the American Convention provides:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

106. For its part, Article 5(1) of the American Convention states:

1. Every person has the right to have his physical, mental, and moral integrity respected.

107. Article 19 of the Convention stipulates:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

108. The Commission has taken it as proven that on December 13, 1998, at 10:02 a.m., the crew of FAC helicopter UH1H 4407, comprising the pilot Lieut. César Romero Pradilla, the copilot Lieut. Johan Jiménez Valencia, and the aircraft's flight technician Héctor Mario Hernández Acosta, launched a cluster munition composed of six fragmentation bombs at the urban area of the

¹¹¹ IACHR, Report 62/08 *Manuel Cepeda Vargas*, July 25, 2008, par. 73.

¹¹² Annex 5. Special Military Preliminary Criminal Investigation Unit, June 14, 2001, pp. 165-166. Appendix C.4 to the petitioners' brief received at the IACHR on October 28, 2003.

village of Santo Domingo, which caused the deaths of 17 persons, including six children, namely, Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Eгна Margarita Bello (5), Katherine (or Catherine) Cárdenas Tilano (7), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), Luis Enrique Parada Roperero, and Rodolfo Carrillo.

109. Furthermore, the blast from the cluster munition also wounded 27 people, including nine children, namely Marcos Neite (5), Erinson Olimpo Cárdenas (9), Hilda Yuraime Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17), Neftalí Neite (17), Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, Pedro Uriel Duarte Lagos, Lida Barranca (8), Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora.

110. The Commission has further considered proven that the precision of cluster munitions is limited and that they have enormous antipersonnel power; that the persons who were in the village of Santo Domingo at the time of the bombardment were civilians, and that, as has been corroborated from the Skymaster airplane video footage, the servicemen who were crewing the aircraft that took part in the military operations were aware of the civilian status of the persons who were in the village. The State, for its part, has not contested these facts.

111. In its Third Report on the Situation of Human Rights in Colombia (1999), the Commission found that “[t]he Colombian Army has made clear that it includes in its count of guerrilla forces many individuals who should be treated as civilians pursuant to international humanitarian law.”

112. The Commission also said that it had

[...] received credible information indicating that the State’s public security forces, particularly the Army, carry out disproportionate and indiscriminate attacks, resulting in civilian loss of life and damages to civilian objects. According to this information, some of these attacks are land-based while others are aerial.

The Commission has received a significant number of complaints indicating that the Army attacks residences, plazas, schools or other similar objects and areas where it expects to find members of armed dissident groups. According to the complaints, the Army carries out these attacks indiscriminately by firing their weapons at and throwing explosives into the residences or other areas without any apparent concern for civilians whom it knows or should know are also present within the structure or vicinity.¹¹³

113. As regards the right enshrined in Article 4 of the American Convention, the Inter-American Court has ruled that

[...] The right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights.¹¹⁴ When the right to life is not respected, all other rights

¹¹³ Annex 27. IACHR. Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, February 26, 1999, pars. 178 and 179. Available at: <http://www.cidh.oas.org/countryrep/Colom99en/chapter.4c.htm>.

¹¹⁴ I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C, No. 160, par. 237; I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 120; I/A Court H.R., *Case of Huilca Tecse v. Peru*. Judgment of March 3, 2005. Series C, No. 121, par. 65.

lack meaning. States have the obligation to ensure the creation of such conditions as may be required to avoid violations to this inalienable right and, specifically, the duty of avoiding attempts against it by the agents of the State.¹¹⁵ Compliance with Article 4, in combination with Article 1(1) of the American Convention, “not only requires that no person be deprived of his life arbitrarily (negative obligation), but also that the States take all appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights by all persons under their jurisdiction.”¹¹⁶

114. The right to life is a prerequisite for the enjoyment of all other human rights and if it is not respected all other rights are meaningless.¹¹⁷ In this regard, the Court has held:

As the Human Rights Committee created by the United Nations International Covenant on Civil and Political Rights has stated, [t]he protection against arbitrary deprivation of life, which is explicitly required by the third paragraph of Article 6.1 [of the International Covenant on Civil and Political Rights] is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, [the State] must strictly control and limit the circumstances in which [a person] may be deprived of his life by such authorities.¹¹⁸

115. Furthermore, under Article 29(b) of the American Convention¹¹⁹ and as the Inter-American Court found in the *Case of the “Mapiripán Massacre” v. Colombia*

with regard to establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict.¹²⁰

¹¹⁵ I/A Court H.R., *Case of Zambrano-Vélez et al. v. Ecuador*. Judgment of July 4, 2007. Series C, No. 166, par. 79; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006. Series C, No. 150, par. 64; I/A Court H.R., *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C, No. 149, par. 125; I/A Court H.R., *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C, No. 147, par. 83; See also, *Human Rights Committee*, General Comment 6/1982, par. 3 in *Compilation of General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.Doc.HRI/GEN/1/Rev 1 at 6 (1994); *Human Rights Committee*, General Comment 14/1984, par. 1 in *Compilation of General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.Doc.HRI/GEN/1/Rev 1 at 18 (1994).

¹¹⁶ I/A Court H.R., *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C, No. 155, par. 75; I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C, No. 148, par. 130; I/A Court H.R., *Case of the Indigenous Community Sawhoyamaya v. Paraguay*. Judgment of March 29, 2006. Series C, No. 146, par. 152.

¹¹⁷ I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala* Merits. Judgment of November 19, 1999. Series C, No. 63, par. 144.

¹¹⁸ I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala* Merits. Judgment of November 19, 1999. Series C, No. 63, par. 145.

¹¹⁹ Article 29(b) of the American Convention on Human Rights – Restrictions Regarding Interpretation: “No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party [...]”

¹²⁰ I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs. v. Colombia*. Judgment of September 15, 2005. Series C, No. 134, par. 114.

116. Common Article 3 of the Geneva Conventions expressly forbids under any circumstances violence against “[p]ersons taking no active part in the hostilities.”¹²¹ For its part Article 13 of Protocol II recognizes the principle of civilian immunity as follows:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.¹²²

117. In this connection, the Commission has taken it as proven that, in keeping with the principle of distinction, there was a prohibition against attacking the civilian population of the village of Santo Domingo. Moreover, the crew of the UH1H and the crews of the other aircraft that were involved in the operations knew that the people in the village were civilians.¹²³ Therefore, they committed a violation of Article 4(1) of the American Convention.

118. Furthermore, it should be noted that in the *Case of the Rochela Massacre v. Colombia* the Inter-American Court, making reference to the jurisprudence of the European Court of Human Rights, declared a violation of the right to life with respect to individuals who did not die as a result of the massacre. Specifically, the Court referred to the case of *Makaratzis v. Greece* in which the European Court held that

[...] the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents’ actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Article 2 of the Convention.

In the light of the above circumstances, and in particular the degree and type of force used, the Court concludes that, irrespective of whether or not the police actually intended to kill him, the applicant was the victim of conduct which, by its very nature, put his life at risk, even though, in the event, he survived. Article 2 is thus applicable in the instant case.¹²⁴

119. The Commission considers as proven that cluster munitions have limited precision as well as great antipersonnel power, since the bombs burst into countless pieces of shrapnel that spread out in all directions.¹²⁵ The Commission also takes it as proven that after the explosion of

¹²¹ Colombia ratified the Geneva Conventions on November 8, 1961. Available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

¹²² Colombia ratified Protocol II Additional to the Geneva Conventions on August 14, 1995. Available at: <http://www2.ohchr.org/english/law/protocol2.htm>.

¹²³ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 62. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

¹²⁴ *Eur.C.H.R., Makaratzis v. Greece [GC]*, Judgment of 20 December 2004, App. No. 50385/99, paras. 51 and 55. The Spanish version of this opinion uses a translation by the Secretariat of the Court. The above is the original. *Cf. Eur.C.H.R., Acar and Others v. Turkey*, Judgment of 24 May 2005, App. Nos. 36088/97 and 38417/97, para. 77. I/A Court H.R., *Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C, No. 163, par. 126.

¹²⁵ Annex 4. Judgment of the Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 64. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010. It transpires from the judgment that on August
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the cluster bomb the survivors and wounded were attacked by helicopter “Harpy”.¹²⁶ In that regard, the manner in which the massacre was executed through an attack with a cluster bomb of the aforementioned magnitude, after which the surviving victims were attacked as they sought to escape, constituted a threat to the lives of all 27 individuals who were wounded. The fact that 27 people were wounded and not killed is merely fortuitous.¹²⁷ For these reasons, in addition to the right to humane treatment recognized in Article 5(1) of the American Convention, the Commission considers that Article 4 of the American Convention also applies with regard to the 27 people who were wounded in the bombing.

120. The Commission has further proven that six children were killed and nine others were wounded as a result of the bombing of the village of Santo Domingo with a cluster munition. By the Court’s case law, Article 19 of the American Convention should be understood as a complementary right that the Convention establishes for individuals who need special measures of protection, owing to their stage of physical and emotional development.¹²⁸ The Commission recalls that where children are concerned the principle of their best interests is paramount, a fact based on their special characteristics as children, the need to encourage their development taking full advantage of their potential, and the dignity of the individual.¹²⁹ The rights of children must be safeguarded both in view of their status as human beings and by reason of their special condition, to which end special protective measures must be adopted. This added obligation to provide protection¹³⁰ and these special duties should be regarded as determinable based on the needs of the child as a person with rights.¹³¹

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12, 2003, the CTI carried out a targeted launch of two cluster munitions, which made it possible to confirm: “i) that the precision of these devices is limited, given that only one of the bombs that comprised them hit the paved road, the predetermined target, while the rest fell on either side of the road, with one even falling many meters away from the rest; and, ii) that they have enormous antipersonnel power, as could be seen by the cloud of dense, black smoke that arose when the bombs hit and fragmented into countless pieces of shrapnel that spread out in all directions, passing right through wooden structures and even metal markers, leaving craters in the ground and oxidized tails similar to those found in the judicial inspection conducted on December 17, 1998, in the village of Santo Domingo.”

¹²⁶ Annex 4. Twelfth Criminal Court of the Bogotá Circuit with functions under Law 600 of 2000, Judgment at First Instance, Case 2005-102, César Romero Pradilla et al., September 24, 2009, p. 47. Appendix 2 to the State’s brief of October 5, 2010, received at the IACHR on October 6, 2010.

¹²⁷ I/A Court H.R., *Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C, No. 163, pars. 127 and 128.

¹²⁸ I/A Court H.R., *Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C, No. 148, par. 106; I/A Court H.R., *Case of Baldeón García v. Peru. Merits, Reparations and Costs*. Judgment of April 6, 2005. Series C, No. 147, par. 244; I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 152; I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C, No. 112, par. 147; and I/A Court H.R., *Case of Servellón-García et al. v. Honduras. Merits, Reparations and Costs*. Judgment of September 21, 2006, par. 113.

¹²⁹ I/A Court H.R., *Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C, No. 148, par. 244. See, also, I/A Court H.R., *Case of the “Mapiripán Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 134; I/A Court H.R., *Case of the Girls Yean and Bosico v. the Dominican Republic Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 8, 2005. Series C, No. 130, par. 134; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C, No. 125, par. 172.

¹³⁰ I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C, No. 112, par. 160; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C, No. 110, pars. 124, 163-164, and 171; I/A Court H.R., *Case of Bulacio v. Argentina. Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C, No. 100, par. 126 and 134; and I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C, No. 63, pars. 146 and 191; and I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005, par. 172. See, Continúa...

121. In addition, the Inter-American Court has found, “the special vulnerability of boys and girls due to their condition as such becomes even more evident in a situation of domestic armed conflict, as in the instant case, since they are least prepared to adapt or respond to said situation and, sadly, it is they who suffer its abuse in a disproportionate manner.”¹³²

122. The Inter-American Court has referred in its case-law to the *corpus juris* on the human rights of children.¹³³ The Commission has previously addressed this concept in the following terms:

For an interpretation of a State's obligations *vis-a-vis* minors, in addition to the provision of the American Convention, the Commission considers it important to refer to other international instruments that contain even more specific rules regarding the protection of children. Those instruments include the Convention on the Rights of the Child and the various United Nations declarations on the subject. This combination of the regional and universal human rights systems for purposes of interpreting the Convention is based on Article 29 of the American Convention and on the consistent practice of the Court and of the Commission in this sphere.¹³⁴

123. Specifically, the Court found that both the American Convention and the Convention on the Rights of the Child¹³⁵ form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention. Indeed, in various cases concerning children, the Court has relied on specific provisions contained in the Convention on the Rights of the Child to interpret Article 19 of the American Convention.¹³⁶

124. In that regard, the Commission believes that, bearing in mind the armed conflict that framed the facts in the instant case, it is appropriate to draw attention to Articles 6 and 38 of the Convention on the Rights of the Child, which provide

Article 6

1. States Parties recognize that every child has the inherent right to life.

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also, I/A Court H.R., *Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002*. Series A, No. 17, pars. 56 and 60.

¹³¹ I/A Court H.R., *Case of Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006, par. 154.

¹³² I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 156.

¹³³ I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.)*. Merits. Judgment of November 19, 1999. Series C, No. 63.

¹³⁴ IACHR, Report No. 41/99, Case 11.491, Minors in Detention, Honduras, March 10, 1999, par. 72. See also: United Nations, General Assembly, Resolution 3318 (XXIX), of December 14, 1974; Resolution 2597 of December 18, 1968; Resolution 2597 of December 16, 1969; Resolution 2674 and 2675 December 9, 1970 and Resolution of the Security Council 1882 of 2009.

¹³⁵ Colombia ratified the Convention on the Rights of the Child on January 28, 1991.

¹³⁶ I/A Court H.R., *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C, No. 63, par.194; See, also, I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs* Judgment of September 2, 2004. Series C, No. 112, par. 148; and I/A Court H.R., *Case of the Gómez Paquiyauri Brothers. Merits, Reparations and Costs*. Judgment of July 8, 2004, par. 166.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 38:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

[...]

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

125. In view of the foregoing, the Commission finds that the State is responsible for violation of the right to life enshrined in Article 4(1) of the Convention to the detriment of Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Egna Margarita Bello (5), Katherine (or Catherine) Cárdenas Tilano (7), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), Luis Enrique Parada Roper, and Rodolfo Carrillo

126. The State is also responsible for violation of the rights to life and humane treatment enshrined in Articles 4(1) and 5(1) of the Convention to the detriment of Marcos Neite (5), Erinson Olimpo Cárdenas (9), Hilda Yuraime Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17), Neftalí Neite (17), Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, Pedro Uriel Duarte Lagos, Lida Barranca (8), Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora. The Commission finds that the State is responsible for violation of Article 4(1) of the American Convention with respect to the persons who were wounded in the bombing since, given the nature of the cluster munition, its launch at the civilian population by the FAC placed the wounded in a situation of risk to their lives.

127. Finally, the State is responsible for violation of the rights of the child under Article 19 of the Convention to the detriment of Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Egna Margarita Bello (5), Katherine (or Catherine) Cárdenas Tilano (7), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Marcos Neite (5), Erinson Olimpo Cárdenas (9), Hilda Yuraime Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17), Neftalí Neite (17), and Lida Barranca (8). All of the foregoing in conjunction with the obligations set forth in Article 1(1) of the American Convention.

B. Right to property (Article 21(1) and (2) of the American Convention in connection with Article 1(1) thereof)

128. Article 21(1) of the American Convention provides:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

129. The Inter-American Court has defined property as “those material objects that may be appropriated, and also any right that may form part of a person’s patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.”¹³⁷

130. The Commission takes it has proven that owing to the limited precision and enormous antipersonnel power of cluster munitions (see Section IV.A above), the bombing of the village of Santo Domingo caused destruction to homes and properties in it. It is also taken as proven that in some of the homes property was stolen and destroyed by the soldiers who arrived in the village after the incident. The Commission finds that these facts constitute a violation of the right to property enshrined in Article 21(1) and (2) of the Convention, in conjunction with the obligations set forth in Article 1(1) thereof, to the detriment of Plinio Granados, Milciades Bonilla, Emilia Calderón, Mario Galvis, Olimpo Cárdenas, María Panqueva, Víctor Julio Palomino, Margarita Tilano Yáñez, Hugo Ferney Pastrana Vargas, María Antonia Rojas, and other surviving victims who lived in the village of Santo Domingo, and that their property was looted or destroyed and/or their homes damaged.

C. Freedom of movement and residence (Article 22(1) of the American Convention in connection with Article 1(1) thereof)

131. Article 22(1) of the American Convention provides:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

132. The Inter-American Court has determined that Article 22(1) of the Convention “protects the right not to be forcefully displaced within a State Party [thereto]”¹³⁸ and that “freedom of movement is an indispensable condition for free development of each person.”¹³⁹ The Court has also recognized that

given the complexity of the issue of internal displacement and the broad array of human rights it affects or jeopardizes, and given the especially vulnerable and defenseless status of most displaced persons, they could be deemed to have, de facto, no protection [...] Under the American Convention, this would oblige States to grant them preferential treatment and take

¹³⁷ I/A Court H.R., *Ivcher Bronstein Case v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C, No. 74, par. 122; I/A Court H.R., *Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C, No. 148, par. 174.

¹³⁸ I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 188. “The Court has concurred with the conclusion of the United Nations Human Rights Committee, in its General Comment No. 27, where it establishes that freedom of movement and of residence consist, inter alia, of the following: a) the right of those lawfully in the territory of a State to move about freely in that State and to choose their place of residence; and b) the right of each person to enter their country and remain in it. Enjoyment of this right does not depend on any specific objective or motive of the person who wishes to move about or to remain in a certain place.”

¹³⁹ I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 168; I/A Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs* Judgment of June 15, 2005. Series C, No. 124, par. 110, and I/A Court H.R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C, No. 111, par. 115. *Human Rights Committee*, General Comment 27 of November 2, 1999, paras. 1, 4, 5, and 19.

active measures to reverse the effects of their weak, vulnerable, and defenseless status, including vis-à-vis acts and practices of individual third parties.¹⁴⁰

133. In this connection, the Commission considers that forced displacement cannot be taken in isolation from other violations, given its complexity and the “broad range of human rights affected or endangered by it, and bearing in mind said circumstances of special weakness, vulnerability, and defenselessness in which the displaced population generally finds itself, as subjects of human rights.”¹⁴¹

134. In the same vein, with regard to forced displacement, the Court has found,

The circumstances of the instant case and the special and complex situation of vulnerability that affects said persons include but also transcend the content of the protection that the States must provide in the framework of Article 22 of the Convention. Displacement [...] originates in the lack of protection during the massacre and reveals its effects in the violations of their right to humane treatment [...] and in the consequences of non-fulfillment of the duty to investigate the facts, which have led to partial impunity [...]. [B]eyond the provisions of Article 22 of the Convention, the situation of displacement addressed here has also affected the right of [...] the victims to a decent life, in connection with non-fulfillment of the obligations to respect and to guarantee the rights embodied in those provisions.¹⁴²

135. Concretely, the Commission takes it as proven that following the bombing of December 13 and as a consequence of the terror that it inspired in the population, the attacks against the survivors who tried to escape, and the destruction of their homes, every inhabitant of Santo Domingo abandoned the village. Specifically, as was mentioned in the section on established facts, at an open town meeting held in the municipality of Tame on December 17, 1998, the inhabitants of Santo Domingo publicly denounced the crimes and said that owing to the continuous bombardment on December 13 and 14, 1998, the inhabitants of the village moved to the district of Betoyes in the Municipality of Tame, and to the cities of Tame and Saravena. According to publicly known information, the inhabitants returned to the village in January 1999, whereupon they set about its reconstruction.¹⁴³

136. The Commission finds that the plight of these people belongs in the category of forced displacement and since it came about as a direct consequence of the bombing perpetrated by the security forces, the State is responsible for violation of the right enshrined in Article 22(1) of the American Convention, in connection with the obligations set forth in Article 1(1) thereof, to the detriment of Marcos Neite (5), Erinson Olimpo Cárdenas (9), Hilda Yuraime Barranco (14), Ricardo Ramírez (11), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17), Neftalí Neite (17), Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo

¹⁴⁰ I/A Court H.R., *Case of Chitay-Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 25, 2010, par. 141.

¹⁴¹ I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 177.

¹⁴² I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C, No. 134, par. 186; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C, No. 125, pars. 162 and 163; and I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C, No. 112, par. 164; and *The “Street Children” Case (Villagrán Morales et al.)*, par. 191.

¹⁴³ Annex 13. Equipo Nizkor, Support Group for Displaced People Organizations, Report on Forced Displacement in Colombia, 1999, March 2000. Available at: http://www.derechos.org/nizkor/colombia/doc/gad1e.html#N_26.

Tamayo, María Panqueva, Pedro Uriel Duarte Lagos, Lida Barranca (8), Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora, and all the other inhabitants of the village of Santo Domingo who were displaced.

137. In the recommendations contained in the instant report the Commission notes that, based on the circumstances of the case and the corresponding responsibility of the State, it is incumbent upon the State to establish a collective reparation mechanism that recognizes the impact that the bombardment had on the civilian population of the village of Santo Domingo which was forced by the events to abandon the village.

D. Right to a fair trial and judicial protection (Articles 8(1) and 25 of the American Convention in connection with Article 1(1) thereof)

138. Article 8(1) of the American Convention provides,

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

139. For its part, Article 25 of the Convention provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b) to develop the possibilities of judicial remedy; and
- c) to ensure that the competent authorities shall enforce such remedies when granted.

140. In the *Case of the Massacre of Pueblo Bello*¹⁴⁴ the Court asserted that the States' obligation to conduct an effective official investigation in cases of extrajudicial, illegal, arbitrary or summary executions derives from the general obligation to guarantee to all persons under their jurisdiction the human rights enshrined in the Convention laid down in Article 1(1) thereof, together with the right to life, as provided by Article 4 of said Convention. The Court also held that in these cases the authorities of a State must initiate a rigorous, impartial and effective investigation *ex officio* and as soon as is practicable after they take knowledge of the facts,¹⁴⁵ regardless of whether they are committed by agents of the State or private individuals.

¹⁴⁴ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 142.

¹⁴⁵ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 143; and I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C, No. 124, par. 145.

141. The Court has also ruled that “the conduct of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by those situations, such as the right to life, personal liberty and personal integrity.”¹⁴⁶

142. The Commission has stated that these provisions enshrine the obligation of the State to ensure access to justice with guarantees of legality, independence and impartiality within a reasonable time, as well as the general obligation to provide an effective judicial remedy to any violation of fundamental rights, observing the principle of effectiveness of procedural instruments or mechanisms.¹⁴⁷

143. The Inter-American Court, for its part, has found that

under the the American Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1(1)).¹⁴⁸

144. By the same token, the Court has ruled that victims and their next of kin have the right to expect, and the States the obligation to ensure, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired.¹⁴⁹ Based on the foregoing, once state authorities have knowledge of a violation of human rights, in particular of the rights to life, humane treatment, and personal liberty,¹⁵⁰ they should initiate a serious, impartial and effective investigation, *ex officio* and without delay,¹⁵¹ which should be carried out within a reasonable time.¹⁵²

145. As regards reasonableness of time, the Court has found that the right of access to justice goes beyond the processing of domestic proceedings, but that the investigation should be undertaken utilizing all the legal means available and should be oriented toward the determination of

¹⁴⁶ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 145.

¹⁴⁷ IACHR. Application of the Inter-American Commission on Human Rights. *Case of Jesús María Valle Jaramillo v. Colombia*, February 13, 2007, par. 118.

¹⁴⁸ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C, No. 148, par. 287.

¹⁴⁹ I/A Court H.R., *Case of García-Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C, No. 168, par. 103; I/A Court H.R., *Case of Bulacio v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of September 18, 2003. Series C, No. 100, par. 114; and I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C, No. 160, par. 382.

¹⁵⁰ I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 10, 2007. Series C, No. 167, par. 100.

¹⁵¹ I/A Court H.R., *Case of García-Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C, No. 168, par. 101; I/A Court H.R., *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C, No. 110, pars. 146; I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 10, 2007. Series C, No. 167, par. 130.

¹⁵² I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C, No. 100, par. 114; I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C No. 163, par. 146; I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C, No. 160, par. 382.

the truth.¹⁵³ In that same vein, the Court has found that the State has the duty to ensure that everything necessary is done to learn the truth about what happened and for those responsible to be punished,¹⁵⁴ and involving every State institution.¹⁵⁵ Furthermore, with regard to the principle of a reasonable time established in Article 8(1) of the American Convention, the Court has established that it is necessary to take into account three elements in order to determine the reasonableness of the time in which the proceedings are held: (a) the complexity of the case; (b) the procedural activity of the party concerned, and (c) the conduct of the judicial authorities. However, the pertinence of applying these three criteria to determine the reasonableness of the time of the proceedings depends on the circumstances of each case.¹⁵⁶

146. Based on the above-cited precedents, the Commission will analyze if in the instant case the Colombian State carried out a meaningful and diligent investigation within a reasonable time into the events described in the present report as a means to ensure the substantive rights to life and humane treatment,¹⁵⁷ and to ensure access to an effective judicial remedy for violations of human rights.

147. The Commission has proven that legal proceedings were instituted in the military and civilian criminal jurisdictions as a result of the events in the instant case, as were proceedings of a disciplinary and contentious administrative nature.

148. As far as military criminal justice is concerned, the Inter-American Court has expressed its opinion on the lack of suitability of the military criminal courts as a forum to examine, prosecute, and punish cases that concern human rights violations and has established that

under the democratic rule of law this jurisdiction must have a restricted and exceptional scope and be designed to protect special juridical interests associated with the functions assigned by law to the military forces. Hence, it should only try military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system.¹⁵⁸

149. In the instant case, the investigation into the events remained in military criminal jurisdiction from January 12, 1999 until October 31, 2002, when the First Review Chamber of the Constitutional Court delivered Judgment T-932-02, with which jurisdiction was granted to the

¹⁵³ I/A Court H.R., *Case of García-Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C, No. 168, par. 101.

¹⁵⁴ I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C, No. 100, par. 114; I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C No. 163, par. 146; I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C, No. 160, par. 382.

¹⁵⁵ I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 10, 2007. Series C, No. 167, par. 130; I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 120; and I/A Court H.R., *Case of Huilca Tecse v. Peru*. Judgment of March 3, 2005. Series C, No. 121, par. 66.

¹⁵⁶ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 171.

¹⁵⁷ I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Judgment of November 16, 2009, par. 287; I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 142.

¹⁵⁸ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 189; I/A Court H.R., *Case of Palamara Iribarne v. Chile*, Judgment of November 25, 2005. Series C, No. 137, par. 124; I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C, No. 134, par. 202; and I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004, Series C No. 119, 142.

civilian criminal courts and the case was assigned to the National Human Rights Unit of the Office of the Prosecutor General.

150. Nevertheless the military criminal jurisdiction was not the appropriate venue to investigate acts such as those committed in the instant case, and the lack of independence and suitability of the venue jeopardized the possibilities of elucidating the facts and, thus, determining who was responsible; it is important to recognize that, in light of a writ of protection filed by one of the family members of the alleged victims, the Constitutional Court decided that the investigation should be referred to the ordinary jurisdiction.

151. After the investigation was reassigned to the civil criminal courts in 2002, on September 24, 2009, the 12th Criminal Court of the Bogotá Circuit returned a judgment at first instance that convicted Capt. César Romero Pradilla, Lieut. Johan Jiménez Valencia, and Flight Technician Héctor Mario Hernández Acosta as the physical perpetrators of the acts. The judgment also directed that two other FAC officers who were involved in the aerial operation be investigated. The counsel for the convicted men filed an appeal against the judgment, which is pending before the Criminal Chamber of the Superior Tribunal in and for Bogotá.

152. As mentioned above, despite these judicial decisions, which establish, at first instance, the direct responsibility of the crew members of the helicopter that launched the cluster munition as the physical perpetrators of the acts, and in even though the determinations as to facts suggest the participation of other agents of State, the responsibilities of those who oversaw the planning and execution of the bombing of the village of Santo Domingo have not been fully explained. Consequently, the persons who masterminded the bombing remain in impunity.

153. In the case sub lite, despite the criminal conviction at first instance against the three physical perpetrators, more than 12 years have elapsed since the Santo Domingo massacre without effective measures having been adopted to reach a final decision in the proceeding or steps taken to prosecute the architects of the crimes and their possible accomplices. The delay in this case undermines and reduces the possibility of clarifying who masterminded the massacre and prosecuting those responsible. As a general rule, criminal investigations must be conducted promptly, in order to protect the interests of the victims, preserve the evidence, and safeguard the rights of anyone considered a suspect in the context of the investigation. Furthermore, the Court has held that the right of access to justice should ensure, within a reasonable time, the right of the alleged victims or their next of kin to have everything necessary done to learn the truth about what happened and for those responsible to be punished.¹⁵⁹

154. The Commission has reiterated that “the obligation to investigate and punish every act that entails a violation of the rights protected by the Convention requires that not only the direct perpetrators of human rights violations be punished, but also the masterminds.”¹⁶⁰ In that connection, the Inter-American Court has found that the right of access to justice should ensure, within a reasonable time, the right of the alleged victims or their next of kin to have everything necessary done to learn the truth about what happened and for those responsible to be punished.”¹⁶¹

¹⁵⁹ I/A Court H.R., *Case of the “Las Dos Erres” Massacre v. Guatemala*. Judgment of November 24, 2009. par. 105; I/A Court H.R., *Case of Bulacio v. Argentina. Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C, No. 100, par. 114; *Case of Zambrano-Vélez et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C, No. 166, par. 115.

¹⁶⁰ IACHR, *Report on the Situation of Human Rights Defenders in the Americas OEA/Ser.L/V/II.124*. Doc. 5 rev.1, March 7, 2006, par. 109.

¹⁶¹ I/A Court H.R., *Case of Kawas-Fernández v. Honduras. Merits, Reparations and Costs*. Judgment of April 3, 2009. Series C, No. 196, par. 112.

155. The Commission has considered as proven that the military operation in which aircraft from FAC participated as well as the installation of a cluster bomb in helicopter UH1H was done with authorization of high military officials, nevertheless they have not been investigated or held criminally responsible. In this regard it is important to note the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia which indicates that “the principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law, applicable to [...] internal armed conflicts”¹⁶² like in the case of Colombia.

156. The impunity of the masterminds of the acts affects the search for the truth by the families of the victims. The Inter-American Court has made clear its position on the right of victims or their relatives to know what happened and has found that the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.¹⁶³ The right to the truth [...] constitutes an important means of reparation for victims and their next of kin and creates an expectation that the State must fulfill.¹⁶⁴

157. As regards to the disciplinary proceeding, the Commission has consistently held that the disciplinary jurisdiction does not constitute a sufficient means for prosecuting, punishing, and repairing the consequences of human rights violations.¹⁶⁵ Furthermore, the Inter-American Court has determined that a disciplinary investigation “tends to protect the administrative function and the correction and control of public officials, so that, in cases of grave human rights violations, it can complement but not substitute completely the function of the criminal jurisdiction.”¹⁶⁶ On October 2, 2002, the Special Disciplinary Committee established by the Procurator General delivered a judgment at first instance in which it punished Capt. César Romero Pradilla and Flight Technician Héctor Mario Hernández Acosta with suspension from duty for three months and acquitted Maj. Juan Manuel González González and Lieut. Johan Jiménez Valencia.¹⁶⁷

158. As regards to the contentious-administrative jurisdiction is a mechanism that seeks to oversee the administrative activity of the State, and that only allows one to obtain compensation for damages caused by acts or omissions by agents of the State.¹⁶⁸ Furthermore, the Court has held

¹⁶² See, among others, ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, November 30, 2005, par. 519.

¹⁶³ I/A Court H.R. *Barrios Altos Case v. Peru*. Judgment of March 14, 2001. Series C, No. 75, par. 48. I/A Court H.R., *Bámaca Velásquez Case v. Guatemala*. Judgment of November 25, 2000. Series C, No. 70, par. 201. I/A Court H.R., *Case of Blanco-Romero et al. v. Venezuela*. Judgment of November 28, 2005. Series C, No. 138, par. 62; I/A Court H.R., *Case of Almonacid-Arellano et al v. Chile*. Judgment of September 26, 2006. Series C, No. 154, par. 148, and I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, Series C No. 101, pars. 217 and 218.

¹⁶⁴ I/A Court H.R., *Case of Gómez Palomino v. Peru*. Judgment of November 22, 2005. Series C, No. 136, par. 78, and I/A Court H.R., *Case of the Serrano-Cruz Sisters v. El Salvador*. Judgment of March 1, 2005. Series C, No. 120, par. 62.

¹⁶⁵ IACHR. Report No. 74/07 (Admissibility). José Antonio Romero Cruz et al. v. Colombia. October 15, 2007, par. 34.

¹⁶⁶ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 203.

¹⁶⁷ Annex 21. Office of the Procurator General of the Nation, Special Disciplinary Committee, Case 155-45564-00, October 2, 2002. Appendix C.1 to the petitioners' brief received at the IACHR on October 28, 2003.

¹⁶⁸ IACHR. Report No. 74/07 (Admissibility). José Antonio Romero Cruz et al. v. Colombia. October 15, 2007, par. 34.

When establishing the international responsibility of the State for the violation of the human rights embodied in Articles 8(1) and 25 of the American Convention, a substantial aspect of the dispute before the Court is not whether judgments were delivered at the national level or whether settlements were reached on the civil or administrative responsibility of a State body with regard to the violations committed to the detriment of the next of kin of the persons disappeared or deprived of life, but whether the domestic proceedings allowed real access to justice to be ensured, according to the standards established in the American Convention.¹⁶⁹

159. The Commission recognizes the efforts of the State to redress the damaged caused by the bombardment through judgment of May 20, 2004 issued by the Administrative Tribunal of Arauca, as a result of the action for direct reparation filed by some of the families of the alleged victims and observes that after five years of the ruling, on 2009, the State paid compensation to the families of 16 of the persons that were killed and 13 persons that were wounded and their families. Those efforts constitute a partial reparation for some of the families but they have not had an impact in the lack of investigation and sanction established in the present report.

160. In view of the foregoing, the Commission concludes that the State has not adopted measures necessary to discharge its obligation to investigate, prosecute, and punish all those responsible for the deaths of 17 persons and the injuries caused to another 27 in the village of Santo Domingo, in accordance with Articles 8(1) and 25 of the American Convention, in connection with the obligation to ensure rights set out in Article 1(1) thereof, to the detriment of the victims who were wounded and the next of kin of the victims listed in Appendix 1 to this report.

E. Right to humane treatment (Article 5(1) of the American Convention in connection with Article 1(1) thereof)

161. Article 5 of the American Convention provides,

1. Every person has the right to have his physical, mental, and moral integrity respected.

162. The Inter-American Court has indicated that the next-of-kin of victims of certain human rights violations may, in turn, become victims.¹⁷⁰ Specifically, the Court found that the right to mental and moral integrity of the next of kin of victims [may be] violated based on the [...] particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts.¹⁷¹

163. Furthermore, the Inter-American Court has established that “[t]he obligation to investigate human rights violations is among the positive measures that the State must adopt to guarantee the rights established in the Convention. Additionally, the State must, if possible, try to reestablish a right that has been violated and, if applicable, repair the damage produced by human

¹⁶⁹ I/A Court H.R., *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C, No. 140, par. 206 and I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs. v. Colombia*. Judgment of September 15, 2005. Series C, No. 134, par. 211.

¹⁷⁰ I/A Court H.R. *Case of Cantoral-Huamani and García-Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 10, 2007. Series C, No. 167, par. 112; I/A Court H.R., *Case of Bueno-Alves*. Judgment of May 11, 2007. Series C No. 164, par. 102.

¹⁷¹ I/A Court H.R. *Case of Cantoral-Huamani and García-Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 10, 2007. Series C, No. 167, par. 112; I/A Court H.R., *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C, No. 155, par. 96.

rights violations.”¹⁷² Specifically, the Commission has concluded in section V.E above (Right to a fair trial and judicial protection) that in the instant case a thorough and effective investigation of the facts was not conducted, given that the architects of the bombing remain in impunity.

164. The Commission takes it as established that in the instant case several survivors were wounded who were, in turn, related to the victims killed in the bombing. In that regard the Commission may reasonably infer that the loss of a loved one in circumstances such as those described caused suffering incompatible with Article 5(1) of the American Convention.

165. Based on the foregoing, the Commission concludes that the State violated the right to mental and moral integrity recognized in Article 5(1) of the American Convention, in connection with duty to observe rights set out in Article 1(1) thereof, to the detriment of the next of kin of the victims who names appear in Appendix 1 to the present report.

F. Duty to adopt provisions under domestic law (Article 2 of the American Convention)

166. In the instant case, no factual or legal elements have been offered to demonstrate or lead to the reasonable deduction that the facts described constitute a violation of Article 2 of the American Convention. Accordingly, the Commission concludes that it has not been possible to sustain an alleged violation of the duty to adopt provisions under domestic law.

VI. CONCLUSIONS

167. Based on the factual and legal arguments given above, the Commission concludes that the Republic of Colombia is responsible for:

- violation of right to life enshrined in Article 4(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Levis Hernando Martínez Carreño, Teresa Mojica Hernández de Galvis, Edilma Leal Pacheco, Salomón Neite, María Yolanda Rangel, Pablo Suárez Daza, Carmen Antonio Díaz Cobo, Nancy Ávila Castillo (or Abaunza), Arnulfo Arciniegas Velandia (or Calvo), Luis Enrique Parada Roperó, and Rodolfo Carrillo;
- violation of right to life enshrined in Articles 4(1) and 19 of the American Convention, in connection with Article 1(1) thereof, to the detriment of the children Jaime Castro Bello (4), Luis Carlos Neite Méndez (5), Oscar Esneider Vanegas Tulibila (12), Geovani Hernández Becerra (14), Eгна Margarita Bello (5) and Katherine (ó Catherine) Cárdenas Tilano (7).
- violation of the rights to life and humane treatment enshrined in Articles 4(1) and 5(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Alba Yaneth García, Fernando Vanegas, Milciades Bonilla Ostos, Ludwing Vanegas, Xiomara García Guevara, Mario Galvis, Fredy Monoga Villamizar (or Fredy Villamizar Monoga), Mónica Bello Tilano, Maribel Daza, Amalio Neite González, Marian Arévalo, José Agudelo Tamayo, María Panqueva, Pedro Uriel Duarte Lagos, Ludo Vanegas, Adela Carrillo, Alcides Bonilla, and Fredy Mora;
- violation of the rights to life and humane treatment enshrined in Articles 4(1), 5(1) and 19 of the American Convention, in connection with Article 1(1) thereof, to the

¹⁷² I/A Court H.R. *Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C, No. 192, par. 98. Cf. I/A Court H.R., *Velásquez Rodríguez Case. Honduras*. Judgment of July 29, 1988. Series C, No. 4, par. 166; I/A Court H.R., *Case of Heliodoro-Portugal v. Panama*. Judgment of August 12, 2008. Series C, No. 186, par. 142, and I/A Court H.R., *Case of García-Prieto et al v. El Salvador*. Judgment of November 20, 2007, Series C No. 168, par. 99.

detriment of the children Marcos Neite (5), Erinson Olimpo Cárdenas (9), Ricardo Ramírez (11), Hilda Yuraime Barranco (14), Lida Barranca (8), Yeimi Viviana Contreras (17), Maryori Agudelo Flórez (17), Rosmira Daza Rojas (17) and Neftalí Neite (17);

- violation of the right to property recognized in Article 21(1) and (2) of the American Convention, in connection with Article 1(1) thereof, to the detriment of the victims who were divested of their property, as well as of the survivors who lived in the village of Santo Domingo, whose homes and property were destroyed or looted;
- violation of freedom of movement and residence embodied in Article 22(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of the persons who were displaced from the village of Santo Domingo;
- violation of the right to a fair trial and judicial protection protected in Articles 8(1) and 25 of the American Convention, in connection with Article 1(1) thereof, to the detriment of the victims who were wounded and the next of kin of the victims who are mentioned in Appendix 1 to the present report, and
- violation of the right to humane treatment recognized in Article 5(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of the next of kin of the victims whose names appear in Appendix 1 to the present report.

VII. RECOMMENDATIONS

168. Based on the arguments of fact and law given above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE COLOMBIAN STATE:

1. Conduct an impartial and thorough investigation within a reasonable time in order to prosecute and punish all those who carried out and masterminded the human rights violations found in the instant report.

2. Investigate the link between State agents and the extractive industry that operates in the area where the facts occurred and adopt the adequate measures to prevent that the facts described in the instant report happen again.

3. Establish, with the participation of the community in its design and implementation, a collective reparation mechanism that recognizes the impact that the bombardment had on the civilian population of the village of Santo Domingo to remedy the grave and durable consequences for the community as a whole and that takes into consideration development initiatives on health, housing and education.

4. Adopt such measures as may be necessary to prevent a repetition of patterns of violence against the civilian population in keeping with the duty to protect and ensure the fundamental rights recognized in the American Convention. In particular, implement permanent programs on human rights and international humanitarian law in the armed forces training schools.

5. Provide adequate reparation for the human rights violations found in the instant report in material as well as moral respects, including elucidation and circulation of the truth of the events, remembrance of the deceased victims, and implementation of an adequate program of psychosocial care for surviving family members.

6. Provide reparation to the children affected by the bombardment of the village of Santo Domingo through measures in which the best interest of the child prevails, the respect for

their dignity, the right of children to participate, as well as the respect for their opinions in the process of design and implementation of the reparatory measures.

VIII. NOTIFICATON

169. The Commission decides to transmit the instant report to the Colombian State and to grant it two months to implement the recommendations it contains. That period will be counted from the date of transmission of the instant report to the State, which shall not be at liberty to make it public. The Commission also decides to notify the petitioners of the adoption of a report under Article 50 of the American Convention.