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**REPORT No. 18/14**  
**PETITION 1625-07**  
REPORT ON ADMISSIBILITY

NICOLASA AND FAMILY  
COLOMBIA

Approved by the Commission at its session No. 1979 held on April 3, 2014  
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Colombia. April 3, 2014.

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**I. SUMMARY**

1. On December 19, 2007, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition filed by the *Corporación Sisma Mujer*, the *Red Nacional de Mujeres*, the Colombian Commission of Jurists and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”) against the State of Colombia (“Colombia” or “the State”) on behalf of Nicolasa (the “alleged victim”).<sup>1</sup>

2. The petitioners present three types of allegations before the IACHR. They first claim that the State failed in its duty to act with due diligence to investigate, prosecute and convict the person responsible for the rape of Nicolasa during her forced displacement. Secondly, they allege that the State is internationally responsible because it failed to adopt reasonable measures to prevent the forced displacement suffered by both Nicolasa and her family members. The petitioners lastly sustain that the support granted by the State to Nicolasa to redress the economic and social consequences of her displacement has been insufficient, and has not duly taken into account that she was a woman, a female head of household, a child, an Afro-descendant and a person of scarce economic means.

3. The petitioners contend that the facts alleged constitute a violation of the following rights guaranteed under the American Convention, to the detriment of Nicolasa and her next of kin:<sup>2</sup> the right to life (Article 4(1)); the right to judicial guarantees (Article 8(1)); the right to judicial protection (Article 25); the rights of the child (Article 19); and freedom of movement and residence (Article 22), read in conjunction with the obligation to respect and guarantee the Convention-protected rights, set forth in Article 1(1) of the Convention. The petitioners also alleged the violation of the right to preservation of health and to well-being (Article XI) and the right to education (Article XII) recognized in the American Declaration of the Rights and Duties of Man, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter the “Convention of Belém do Pará”), relying on articles 2, 3 and 4 thereof for purposes of interpretation.

4. For its part, the State argues that the petition is inadmissible because the facts alleged therein do not tend to establish a violation of the American Convention and the Commission does not have competence to examine acts alleged to be in violation of the American Declaration or violations of articles 2, 3 and 4 of the Convention of Belém do Pará. In regards to the American Declaration in particular, the State argues that based on a harmonic interpretation between what has been established in the OAS Charter, the American Convention, the IACHR Statute, and Rules of Procedure, the Commission only has competence to rule over presumed violations of the American Convention in the case of Colombia. The State also sustains that there are a number of remedies that the petitioners have not exhausted before presenting their claims before the IACHR.

5. After examining the parties’ positions and the compliance with the requirements set forth in articles 46 and 47 of the American Convention, the Commission concludes that it is competent to examine the petition and that the latter is admissible with respect to the alleged violation of the rights recognized in articles 8, 19, 22, and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof, and

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<sup>1</sup> The IACHR is keeping the identity of the alleged victim and her next of kin confidential, as the petitioners expressly requested in communications dated November 13, 2009, and October 3, 2011.

<sup>2</sup> In the petition and in the petitioners’ brief of June 9, 2010, they identify the next of kin of Nicolasa as being her mother, father, siblings, and her children who are minors.

the alleged violation of Article 7 of the Convention of Belém do Pará, to the detriment of the alleged victim. The Commission also concludes that the facts alleged could tend to establish violations of articles 5, and 24 of the American Convention, to the detriment of Nicolasa, and of articles 5, 8 and 25, read in conjunction with the obligation contained in Article 1(1), to the detriment of her next of kin. The IACHR also decides to declare the petition inadmissible with respect to the alleged violation of Article 4 of the American Convention, to notify the parties of the report, and to order its publication in the Commission's Annual Report.

## **II. PROCEEDINGS BEFORE THE IACHR**

6. The IACHR registered the petition under number P-1625-07 and, after a preliminary review, forwarded it to the State on October 29, 2009, giving it two months in which to present its response. On November 19, 2009, the IACHR forwarded to the State the updated information supplied by the petitioners, and gave the State two months in which to submit its observations. On January 19, 2010, the State requested a 30-day extension for purposes of submitting its observations, which the Commission granted. On February 19, 2010, the IACHR received the State's response and forwarded it to the petitioners with the request that they submit their observations within one month. The IACHR received observations and additional information from the petitioners on March 23, May 7 and June 9, 2010; those communications were duly forwarded to the State. The Commission also received observations and additional information from the State on April 5, August 25, and October 1, 2010; those communications were promptly forwarded to the petitioners.

7. The petitioners on January 16, 2013 requested a hearing related to this matter during the 147<sup>o</sup> Ordinary Period of Sessions, which was not granted by the IACHR due to the high number of hearings requested. The petitioners presented additional observations on April 17, 2013, which were forwarded to the State for its observations on April 19, 2013. The State requested extensions to respond to the observations of the petitioners on May 28, July 18 and September 22, 2013, which were granted by the IACHR. Additional observations from the State were received on December 20, 2013, which were forwarded to the petitioners on January 16, 2014 for their information.

## **III. THE POSITIONS OF THE PARTIES**

### **A. Position of the petitioners**

8. The petitioners allege that Nicolasa and her next of kin were forcibly displaced in February 2000, as a result of the armed conflict in the Montes de María region of the municipality of San Onofre (Department of Sucre), in the context of massacres perpetrated in said zone by legal and illegal armed actors. They indicate that the armed conflict in the Montes de María region was a matter of public knowledge, and that the civilian institutions and the security forces in the area were aware of this conflict. The State nevertheless took no measures to protect the community and prevent the people's displacement. They contend that at the time of the displacement of Nicolasa and her next of kin, forced displacement had not yet been criminalized under Colombian law. It was made a crime by a law enacted on July 7, 2000.

9. The petitioners maintain that for the duration of their displacement and up to the present day, both Nicolasa and her next of kin have endured dire social and economic conditions. They maintain that those conditions forced them to move from the municipality of Cartagena to the Nelson Mandela squatter settlement where they occupied lots illegally and had to build a makeshift shelter from boards, pieces of wood, cardboard, pieces of plastic, canvas and tin roofing material.

10. The petitioners indicate that in the Nelson Mandela settlement, the family formed a friendship with a man about 60 years old, J.F., who raped Nicolasa three times when she was 12 years old and threatened to kill her. These events occurred between February and April 2002.

11. The petitioners assert that on July 4, 2002, when the alleged victim was 13 years old, accompanied by her father, mother and an attorney from Social Action, Nicolasa filed a criminal complaint with the Client Assistance Center of the Office of the Attorney General of the Nation, Cartagena Section,

accusing her alleged assailant of violent carnal knowledge. The attorney from Social Action worked in the development of an autoconstruction project in the neighborhood “Revivir”, and did not assume the victim’s legal representation, since Social Action does not provide legal services of that kind. He did not refer her either to another authority with these competencies.

12. The petitioners indicate that the Office of Section Prosecutor 32 of the Unit on Crimes against Life and Other Crimes was in charge of investigating the facts in this case, which were classified as the crime of “violent carnal knowledge.” In their petition, the petitioners state that the Prosecutor’s Office took a number of investigative measures. These included referring the victim to the National Institute of Legal Medicine to undergo various tests and, on three different occasions, issuing a summons to Nicolasa ordering her to appear to make a sworn statement. However, the petitioners allege that Nicolasa never had knowledge of the referred diligences and in consequence did not attend the same. They allege that the authorities never collected complete and necessary information to locate Nicolasa. They contend that the authorities only took note of the neighborhood and sector where she resided, and did not take information related to the parents of Nicolasa, even though she was a minor at the time of the events. This is evidenced in the communications sent to Nicolasa by the Prosecutor’s Office, which do not include the exact address of where she resides.

13. According to the petitioners, Law 600 of 2000 established at the time that victims could constitute themselves as civil parties to the case, but Nicolasa never availed herself of this opportunity, since she did not possess the legal knowledge to be aware that this was the mechanism established by law. The petitioners also point out that during the criminal proceedings, the State failed to adequately advise Nicolasa of the legal representation opportunities available to her, nor did it advise her that she was entitled to join the case as a civil party. The petitioners make the point that such advice was part of the enhanced obligation of protection incumbent upon the State as the alleged victim was a displaced, Afro-descendent girl with limited education and scarce resources. They maintain that Nicolasa did not have the financial resources either to retain a private attorney to advise her during the criminal case. The petitioners also indicate that on March 28, 2005, the Ombudsperson’s Office focused on the Cartagena region presented a request to the Prosecutor’s Office for a copy of the file related to the case of Nicolasa to understand the actual state of the case, to constitute themselves as a civil party, and to assume the representation of the victim. The Ombudsman’s Office never received a response to this request.

14. The petitioners allege that all these factors contributed to the Prosecution’s decision to close the investigation on February 23, 2004, based on the pretext that Nicolasa’s allegations were not credible.<sup>3</sup> The petitioners maintain that on March 29, 2004, the investigation was permanently terminated. Because of her lack of knowledge of the Prosecution’s decisions, Nicolasa never had an opportunity to challenge them by availing herself of the remedies that the law provides for that purpose, such as an appeal. The petitioners contend that even so, through her representatives the alleged victim filed requests with the Office of the Attorney General of the Nation seeking execution of the order contained in Constitutional Court Order 092 of April 14, 2008 (hereinafter “Order 092”). This order –which addresses a series of rights and gender-related risks that displaced women in Colombia face– named the alleged victim as one of the beneficiaries and ordered that the criminal case into her rape be reviewed. The Court indicated concretely in its Order that: “the citizen [Nicolasa] has been a victim of continuous violations to her fundamental rights to the vital minimum, to equality, to education, to work in fair and dignified conditions, and to her rights as a victim of the armed conflict, as well as her rights to access the system of official protection as a displaced person”.

<sup>3</sup> In its decision, the Prosecution underscored that:

There is no documentary or scientific evidence or testimony to establish whether the minor was in fact the victim of violent carnal knowledge [...]. There is one striking detail, which is the number of incidents of carnal knowledge and the fact that the victim repeatedly went back to the assailant’s home. It defies logic that a child who was raped would continue to go back over and over again to be raped. What happened became public knowledge [...]; otherwise, the *notitia criminis* would never have made its way to the courts. This shows that the minor had no interest in reporting what happened. [...] From these arguments it is obvious that the minor’s story is not altogether credible.

Office of Section Prosecution 8 of Cartagena de Indias, Order Closing the Investigation, February 23, 2004, p. 4.

15. On July 1, 2009, the Attorney General's Office reported that the Office of the Prosecutor General of the Nation had decided not to go forward with that review. The petitioners state that Nicolasa's assailant died in 2009. On the basis of these considerations, the petitioners highlight that the personal circumstances of Nicolasa as a girl, afrodescendent, and displaced person, along with the actions of the Colombian authorities, impeded that she exhaust all domestic remedies in this matter. Therefore, they consider that one of the exceptions to the exhaustion rule should be applied.

16. The petitioners also present a series of claims related to the quality and sufficiency of the social assistance that Nicolasa and her next of kin have received to mitigate the effects of the forced displacement, and to overcome the precarious economic conditions in which she finds herself in the present. Nicolasa's father reported his family's forced displacement to the authorities in February 2000, being delayed their inscription in the Single Registry for Displaced Persons [*Registro Único de Población Desplazada*] ("RUPD") until November 30, 2000. However, the petitioners indicate that Nicolasa and her family members only received assistance for housing, groceries, a kitchen kit, and a place where to build their home with funds donated by a Swiss agency.

17. In order to obtain the full guarantee of her economic, social, and cultural rights, on October 10, 2006, the alleged victim filed an *acción de tutela (amparo)* against Social Action in the Contentious-Administrative Court of Bolívar seeking the court's protection. The petitioners assert that the Contentious-Administrative Court of Bolívar denied the mentioned protection on October 26, 2006 by considering that Nicolasa and her family had not completed the necessary processes to access the state programs for the displaced population. On November 8, 2006, Nicolasa appealed this denial.

18. On March 22, 2007, the Council of State revoked the first instance ruling and in its place it granted an *amparo* to the fundamental rights to life, health, education, and dignified housing to Nicolasa and her family members. The Council of State considered it proven that Social Action did not perform effective actions to resolve the situation of Nicolasa and her family members, in particular in regards to their socioeconomic rehabilitation. The Council of State ruling however limited itself to ordering Social Action to offer orientation to Nicolasa and her family about the programs of attention for displaced populations and to offer them humanitarian assistance to address basic needs according to budgetary availability. The alleged victim filed an appeal on April 23, 2007 with the Constitutional Court asking it to examine the Council of State's decision in order to determine whether it could be revised. On June 19, 2007, the Constitutional Court informed Nicolasa's attorneys of the order issued on May 24, 2007, which precluded any possibility of reviewing the Council of State's decision. The petitioners contend that there are no further challenges allowed against this decision of the Constitutional Court. Therefore, they consider that all domestic remedies have been exhausted without the guarantee of the rights of Nicolasa in her condition as a victim of forced displacement.

19. The petitioners also consider in general that the economic support and assistance granted by the national government to Nicolasa and her next of kin has been insufficient, and maintain her and her family in a situation of economic and social vulnerability. As of the date of the approval of this report, Nicolasa and her next of kin continue living in precarious conditions in the community of San José de los Campanos and in the neighborhood named "Revivir", where they built the house where they live at the moment. The petitioners also allege that since September of 2011, Nicolasa has been a victim of different threats against her and her family members due to her activities as a leader and in representation of the rights of women, as well as her membership in the Regional Committee of Follow-Up to Order 092 of 2008. The *Corporación Sisma Mujer* has requested to the State of Colombia the adoption of urgent measures of protection to guarantee the right to life and integrity of Nicolasa and her family.

## **B. Position of the State**

20. First, the State alleges that the context-related claims made by the petitioners and their allegations regarding the inadequate assistance given to the displaced population must be dismissed as irrelevant and immaterial to the facts of the petition. The State claims that context-related facts are not a

legal basis from which to infer or even characterize a State's international responsibility for specific acts committed by third parties.

21. The State maintains that the displacement of a population due to the actions of third parties operating beyond the law does not compromise the State's responsibility. The obligation to prevent is one of means and not results; the forced displacement described in the petition was not the result of any action or omission on the State's part. The State argues that the criminal activities of illegal armed groups and their persistent attacks on the civilian population are not unique to the Municipality of San Onofre; instead, they can and do occur anywhere in the country.

22. The State maintains that around the year 2000, the Municipality of San Onofre was the scene of clashes between illegal armed groups seeking to establish control over that area. The State argues that it took reasonable measures to prevent the population's displacement. It indicated that by the date on which its brief of reply was filed, self-defense groups had been demobilized and the criminal activity of the guerrilla groups had been reduced thanks to the operations conducted by the Army, the Marines, and the National Police. The State made reference to various measures taken by the Police Force of the Department of Sucre, the National Police and the Marines to ensure the community's peace and security, such as creating five police stations within the jurisdiction of the Municipality of San Onofre and dismantling illegal armed groups.

23. The State acknowledges that the alleged victim personally filed a criminal complaint with the Client Assistance Center of the Office of the Attorney General of the Nation, Cartagena Section, accusing J.F. of raping her. She was accompanied by her father, her mother and her attorney from Social Action. On the day the complaint was filed, the Attorney General's Office prepared a memorandum referring the victim to the Institute of Legal Medicine for the necessary tests. The Office of Section Prosecutor 32 of the Unit on Crimes against Life and Other Crimes was also in charge of investigating the facts denounced and on three different occasions issued a summons for the alleged assailant to make a statement and assigned the police the job of identifying and locating him. It also issued three different summonses to the alleged victim to make a sworn statement, and requested her birth certificate. The State asserts that the complainant did not respond to any of the summonses and did not make an appearance.

24. The State highlights that the notifications made to Nicolasa regarding different investigative measures requiring her presence were sent to the address that the alleged victim informed when she presented her complaint before the authorities, while accompanied by her parents. In this sense, there can be no *prima facie* conclusion pointing to negligence in this regard by justice officials. Even though it is clear for the State that the duty to investigate does not depend on the private actions and initiative of the victims involved, the nature of the facts alleged make difficult than an effective investigation is developed without the active participation of the alleged victim. The investigation was concluded due to the absence of evidentiary elements which would implicate the responsibility of the alleged perpetrator. The State considers that the Office of the Attorney General duly pursued the investigation and that the victim received legal assistance from the Ombudsperson.

25. Concerning the humanitarian assistance provided to the alleged victim, the State asserts that two key moments in time have to be distinguished: i) one for the emergency humanitarian assistance the alleged victim received because, thanks to her father, she was registered in the RUPD in 2000, pursuant to Law 387 of 1997, which was when the program to assist the displaced population was being created and taking shape; and ii) the second was when the alleged victim was named a beneficiary of Order 092, by virtue of which she received personalized attention from the Constitutional Court.

26. The State points out that special attention for more vulnerable displaced groups was recognized in the Constitutional Court's orders to implement the measures called for in judgment T-025 of January 22, 2004. It acknowledges that the assistance provided to the displaced population between 2000 and 2005 did not make distinctions for especially vulnerable groups, and the assistance program was still being planned and consolidated. The State admits that the humanitarian assistance provided in the early stages was insufficient, because the state institutions were ill-prepared to adequately address the needs of a population that grew exponentially as a result of a phenomenon that was frequently of a magnitude that

dwarfed the institutions' response capability. The State alleges that Social Action carried out the measures ordered in the March 22, 2007 decision of the Council of State to assist Nicolasa and her next of kin. It maintains that the assistance provided through Social Action rescued the victim from the extremely vulnerable condition caused by her displacement.

27. The State points out that the assistance provided to Nicolasa's next of kin since November 30, 2000, included food, housing assistance, and income-generating resources (strengthening of a business), spanning the period from 2005 to 2008. It added that through her father, the alleged victim received full emergency aid supports, as part of the measures contemplated in the phase involving humanitarian assistance and emergency relief for the forcibly displaced population.

28. The State also maintains that pursuant to Order 092 of August 6, 2008, it deployed inter-institutional actions and measures to provide institutional protection to the alleged victim and her family. The State contends that the petitioners are disregarding the fact that the elements offered and actually provided to the alleged victim and her family throughout 2008 ensured that she no longer lives in the state of extreme vulnerability she once experienced and is able to provide for her nuclear family's every need. It adds that in keeping with Order 092, while she still cannot be said to have definitively conquered her displaced status, she has indeed made the transition from reliance on humanitarian assistance to socioeconomic stabilization; and although this is a work in progress, the alleged victim and her family can no longer be said to be living in a situation of extreme vulnerability, contrary to what the petitioners maintain.

29. Regarding the *acción de tutela (amparo)* mentioned by the petitioners, the State highlights that the same was ruled in favor of Nicolasa. On the basis of this positive ruling, and according to the orders adopted by the Constitutional Court related to the attention of the displaced population, attention measures have been granted to Nicolasa, and she has been linked to various programs according to her concrete needs. After the decision of the Council of State on March 22, 2007, Nicolasa and her next of kin were beneficiaries of various programs under which her and her family were included after a comprehensive analysis of their needs. Among others, they have been registered in programs related to education, income generation, the creation of productive projects, and psychosocial attention. Additionally, they have also been beneficiaries to subsidies related to nutrition, housing, and transportation. In this sense, it has been demonstrated in the case at hand that in a complimentary fashion with the other recourses, the recourse of *amparo* is adequate to remedy the legal situation infringed, and that it has been effective in the granting of measures to guarantee a level of dignified life.

30. On the basis of these considerations, the State asked the IACHR to declare the petition inadmissible under Article 47(b) of the American Convention, as the facts that gave rise to the petition no longer obtain; the assistance provided by Social Action has enabled the alleged victim to conquer the extreme vulnerability caused by her displacement. The State also indicates that in the domestic proceedings conducted, all the guarantees of due process were observed. Finally, the State asserts that the Commission does not have competence to examine the alleged violations of the American Declaration and of articles 2, 3 and 4 of the Convention of Belém do Pará.

31. Regarding the exhaustion of domestic remedies, the State indicates that there exist a number of domestic remedies that the petitioners have not exhausted before presenting their claims before the IACHR. In the first place, the State indicates that there is an ongoing investigation open domestically for the crime of forced displacement which was initiated *ex officio* by the National General Prosecutor's Office. In response to the request formulated by the petitioners and with the goal of guaranteeing the effectiveness of the investigation, on August 2, 2013, the National General Prosecutor's office reassigned the investigation. Since September 9, 2013, the Office of Section Prosecutor 48 of the unit on disappearances and forced displacements has been in charge of this investigation. On September 12, 2013, the mentioned Prosecutor's Office ordered the practice of measures to collect evidence.

32. The State also considers that it is necessary to exhaust the action for direct reparations in the contentious-administrative jurisdiction with the goal of requesting reparations for the alleged harm suffered by Nicolasa as a displaced person. The State indicates that this action would have been a suitable remedy in

this case to obtain the establishment of State responsibility of facts which could have generated human rights violations, and to obtain the grant of the corresponding reparations.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. The Commission's competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci***

33. Under Article 44 of the American Convention, the petitioners are, in principle, authorized to file petitions with the Commission. The petition names as alleged victims individuals whose rights under the American Convention Colombia undertook to respect and guarantee. As for the State, the Commission observes that Colombia has been a State party to the American Convention since July 31, 1973, the date on which it deposited its instrument of ratification. Therefore, the Commission has competence *ratione personae* to examine the petition. Furthermore, the State has been party to the Convention of Belém do Pará since November 15, 1996, so that the Commission also has competence *ratione personae* to declare violations of that Convention.

34. The Commission has competence *ratione loci* to examine the petition because it alleges violations of rights protected under the American Convention and the Convention of Belém do Pará, said to have occurred within Colombian territory. The Commission has competence *ratione temporis* because the obligation to respect and guarantee the rights protected by the American Convention was already in force for Colombia on the date the facts alleged in the petition were said to have occurred. Likewise, the Convention of Belém do Pará was also already in force for the State on the date the facts alleged in the petition were said to have occurred.

35. The Commission has competence *ratione materiae* because the petition denounces possible violations of human rights protected by the American Convention. The Commission would also remind the State and the petitioners that it has competence to declare violations of Article 7 of the Convention of Belém do Pará, since under Article 29 of the American Convention and the Vienna Convention on the Law of Treaties,<sup>4</sup> the Commission may, under certain circumstances, make reference to other provisions of that treaty or international law for purposes of interpreting the article.<sup>5</sup>

36. As for the Commission's competence *ratione materiae* to declare violations of the American Declaration, this Commission reminds the State and the petitioners that it has competence to declare violations of the American Declaration with respect to events that predate the American Convention's ratification. Once the American Convention enters into force for a State party, the primary source of applicable law shall be the American Convention and not the American Declaration, provided the petition concerns a violation of rights basically identical to those recognized in both instruments and does not involve a continuing violation.<sup>6</sup> On the basis of these considerations, the Commission is competent to declare violations to the American Declaration, even though in the present case it will perform its analysis on the basis of the American Convention since it is the main instrument applicable.

##### **B. Other admissibility requirements**

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

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<sup>4</sup> Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entry into force January 27, 1980, Article 31.

<sup>5</sup> IACHR Report No. 149/10, Petition 1147-05, Admissibility, *M.P.C. and Family Members*, Peru, November 1, 2010, paragraph 29, and Report No. 93/09, Petition 337-07, Admissibility, *Samanta Nunes da Silva*, Brazil, September 7, 2009, paragraph 35.

<sup>6</sup> IACHR, Report No. 36/05, Petition 12.170, Inadmissibility, *Fernando A. Colmenares Castillo*, Mexico, March 9, 2005, paragraph 29; Report No. 03/01, Case 11.670, Admissibility, *Amílcar Menéndez, Juan Manuel Caride et al. (Social Security System)*, Argentina, January 19, 2001, paragraph 41.



37. Under Article 46(1)(a) of the American Convention, in order for a case to be admissible, the remedies under domestic law “must have been pursued and exhausted in accordance with generally recognized principles of international law.” The purpose of this requirement is to afford the national authorities an opportunity to examine the alleged violation of a protected right and, if appropriate, resolve it before the violation is taken up by an international body. Article 46(2) of the Convention establishes three circumstances under which the rule requiring exhaustion of domestic remedies shall not apply: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

38. First, the petitioners contend that Nicolasa exhausted the criminal remedy to secure proper punishment of the acts of sexual violence she suffered. The petitioners have alleged that the victim – 13 years of age at the time of the events – had a limited participation in said process since Nicolasa never received advice from the State regarding possibilities for legal representation. They indicate that this advice from the State constituted part of the reinforced obligation of protection it had since the events were related to a girl, displaced, afrodescendent, with a low education level, and with scarce resources. This resulted in her lack of knowledge of the decisions adopted by the Prosecutor and in not having the opportunity to dispute these decisions. The State, for its part, contends that the criminal process observed the guarantees of due process and that the investigation was closed as there was no evidence with which to convict the presumed perpetrator. The State argues that the alleged victim’s presence to establish that a criminal act had been committed was essential.

39. In cases involving alleged acts of sexual violence, the Commission has determined that the proper remedy to exhaust is criminal proceedings to identify and punish those responsible; a process the State must pursue rigorously and with due diligence.<sup>7</sup> Therefore, the criminal investigation conducted by the Office of Section Prosecutor 32 of the Unit on Crimes against Life and Other Crimes based on the complaint filed by Nicolasa on July 4, 2002, is the one which must be considered for purposes of the petition’s admissibility. Both parties contend that the Prosecution closed the investigation on February 23, 2004, when it concluded that the facts denounced were not credible; the investigation was then permanently terminated on March 29, 2004. The Commission also considers the fact that in Order 092-08 of April 14, 2008, Colombia’s Constitutional Court instructed the Attorney General of the Nation to review the criminal case into the victim’s alleged rape; on July 1, 2009, Nicolasa was informed of the Prosecutor General’s decision not to pursue the review.

40. Based on these considerations, the Commission concludes that Nicolasa reported the acts of sexual violence she allegedly suffered when she was 12 years old with the goal of obtaining an adequate criminal sanction. The petitioners however refer to a series of obstacles that Nicolasa faced to participate fully in the criminal process undertaken against her aggressor, including not being adequately informed that she had the opportunity to constitute herself as a civil party, and the possibilities of legal representation which were within her reach considering her limited economic resources. These considerations contributed to the closing of the investigation by the Office of the Attorney General of the Nation by means of a decision which alludes in its text to the possibility that Nicolasa could have consented to the acts of sexual violence at the age of 12. In this stage of admissibility, the Commission considers pertinent to conclude that a series of factors impeded that the victim could fully access the remedies available under domestic law to obtain a sanction of the acts of sexual violence at issue. Consequently, the Commission considers applicable in this case the exception to exhaustion of domestic remedies contained in Article 46.2 (b) of the American Convention. In regards to this point, the Commission also takes into account the duty of the State to provide

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<sup>7</sup> IACHR, Report No. 154/10, Petition 1462-07, Admissibility, *Linda Loaiza López Soto and Next of Kin*, Venezuela, November 1, 2010, paragraph 49.

special protection to girls during judicial processes linked to acts of sexual violence, the scope of which it will review in the merits phase.<sup>8</sup>

41. Secondly, the petitioners claim that the State has not investigated those allegedly responsible for the forced displacement of Nicolasa and her next of kin. Given the complete absence of a proper investigation, they maintain that the exception contained in Article 46(2)(b) of the Convention applies. The State has presented generic information related to an investigation for the crime of forced displacement that was initiated *ex officio* by the Office of the Attorney General of the Nation. The State also indicates that in response to the request formulated by the petitioners and with the goal of guaranteeing the effectiveness of the investigation, on August 2, 2013, the Attorney General's Office varied the assignment of the investigation, and on September 9, 2013 it was assumed by the Office of Section Prosecutor 48 of the unit on disappearances and forced displacements. On September 12, 2013, the mentioned Prosecutor's Office ordered the adoption of measures to collect evidence. The petitioners have indicated in their presentations that they understand that said investigation was opened on January of 2011, and that they have not been adequately informed about its content and progress; allegations which have not been controverted by the State.

42. According to the standards of the system, whenever a crime prosecutable *ex officio* is committed, the State has the obligation to bring criminal proceedings and to see them through to completion,<sup>9</sup> as this is the proper avenue to pursue to clarify the facts, pass judgment on the responsible parties, establish the corresponding criminal sanctions, and make other types of pecuniary reparations possible.<sup>10</sup> The arguments presented by the parties indicate that the authorities have opened an investigation linked to the forced displacement alleged by Nicolasa and her next of kin, and that the same was allegedly opened more than 10 years after the events subject to this matter occurred. The Commission therefore deems that there has been an unwarranted delay in investigating a crime that is prosecutable *ex officio*;<sup>11</sup> hence, the exception allowed under Article 46(2)(c) of the American Convention to the rule requiring exhaustion of the remedies under domestic law applies in this case.<sup>12</sup>

43. The State has also argued before the IACHR that it considers necessary that the petitioners exhaust the action for direct reparations in the contentious-administrative jurisdiction with the goal of requesting reparations for the alleged harm suffered by Nicolasa, as a result of the forced displacement which is the subject of this matter. The State reiterates that since this matter is related to events which would constitute crimes, the criminal process constitutes the suitable remedy to clarify the facts, pass judgment on those responsible, and to establish the corresponding criminal actions, as well as making possible other forms of reparation. The IACHR considers pertinent to clarify that for the effects of determining the admissibility of this matter, the action for direct reparations is not a suitable remedy, and its exhaustion is not necessary.

<sup>8</sup> See, for example, United Nations General Assembly resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, June 16, 2010; United Nations General Assembly resolution, *Intensification of efforts to eliminate all forms of violence against women*, A/RES/64/137, February 11, 2010, and A/RES/63/155, January 30, 2009; United Nations, *Declaration on the elimination of violence against women*, United Nations General Assembly resolution 48/104, December 20, 1993; A/RES/48/104, February 23, 1994; United Nations, February 23, 1994; United Nations, *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, September 15, 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); CEDAW, *General Recommendation 19, Violence against women* (11<sup>th</sup> Session, 1992), UN Doc.A/47/38 (1993).

<sup>9</sup> IACHR, Report No. 124/10, Case 11.990, Admissibility, *Oscar Orlando Bueno Bonnet et al.*, Colombia, October 23, 2010, paragraph 30, and Report No. 62/00, Case 11.727, Admissibility, *Hernando Osorio Correa*, Colombia, October 3, 2000, paragraph 24.

<sup>10</sup> IACHR, Report No. 15/09, Petition 1-06, Admissibility, *Massacre and Forced Displacement in the Montes de María*, Colombia, March 19, 2009, paragraph 55.

<sup>11</sup> IACHR, Report No. 51/10, Petition 1166-05, Admissibility, *Tibú Massacres*, Colombia, March 18, 2010, paragraph 110, and Report No. 86/06, Petition 499-04, Admissibility, *Marino López et al. (Operation Genesis)*, Colombia, October 21, 2006, paragraph 51.

<sup>12</sup> IACHR, Report No. 51/10, Petition 1166-05, Admissibility, *Tibú Massacres*, Colombia, March 18, 2010, paragraph 110, and Report No. 86/06, Petition 499-04, Admissibility, *Marino López et al. (Operation Genesis)*, Colombia, October 21, 2006, paragraph 51.

44. Thirdly, the petitioners raise claims related to the insufficiency of the social assistance received to mitigate the economic and social effects of the forced displacement in Nicolasa and her next of kin. The petitioners contend that they have been included in the National Registry for the Displaced Population for fourteen years, and have yet to receive the benefits ordered under Law 387 of 1997. As was explained in the position of the petitioners, they have presented before the authorities a series of suits since 2006 in order to have their rights guaranteed without success. The IACHR understands from the facts alleged that Nicolasa and her next of kin have exhausted all domestic remedies which are offered by the national domestic framework in order to receive social assistance which is sufficient and comprehensive to which they have a right at the national level due to their condition as displaced. Therefore, the IACHR deems that their claims in this regard satisfy the requirement of prior exhaustion of the remedies under domestic law, stipulated in Article 46(1)(a) of the American Convention.

## **2. Deadline for filing a petition**

45. Article 46(1)(b) of the Convention provides that for a petition to be declared admissible, it must be lodged within a period of six months from the date on which the party alleging violation of his or her rights was notified of the final judgment that exhausted domestic remedies. Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

46. The petition in the instant case was lodged with the IACHR on December 19, 2007. The Commission observes that the investigation into the facts surrounding the rapes that Nicolasa suffered was closed on February 23, 2004 and permanently terminated on March 29, 2004. The Constitutional Court of Colombia, by means of its Order 092-08 of April 14, 2008, instructed the Attorney General of the Nation to review the criminal case linked to the alleged rape of Nicolasa and the Attorney's General's Office notified Nicolasa of the decision of the Office of the Prosecutor General of the Nation to not undertake the mentioned revision on July 1, 2009. The Commission has established the applicability of the exception to the exhaustion of domestic remedies contained in Article 46.2(b) of the American Convention in relation to events related to the sexual violence acts suffered by Nicolasa. Based on these considerations, the Commission considers that the petition was filed within a reasonable period of time, and that the admissibility requirement concerning the statute of limitations for filing a petition is therefore deemed satisfied.

47. Furthermore, the facts associated with the forced displacement of Nicolasa and her next of kin were said to have occurred in February of 2000 and the effects of the alleged failure to investigate and punish those responsible continue right up to the present day, even with the opening of the investigation by the State on 2011. Moreover, given the context and characteristics of this case and the failure to investigate them, the Commission considers that the petition was filed within a reasonable period of time and therefore finds that the admissibility requirement pertaining to the filing deadline has been satisfied.

48. As for the claims related to the humanitarian assistance, the Commission observes that the IACHR received the petition on December 19, 2007, and that notification of the order through which the Constitutional Court precluded review of the Council of State's decision was dated June 19 of that year; hence, the requirement set forth in Article 46(1)(b) of the American Convention has been satisfied.

## **3. Duplication of proceedings and international *res judicata*.**

49. Nothing in the petition suggests that the present matter is pending in another international proceeding for settlement or that it is substantially the same as one previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided in Article 46(1)(c) and Article 47(d) of the American Convention do not apply.

## **4. Colorable claim**

50. Neither the American Convention nor the Commission's Rules of Procedure require petitioners to identify the specific rights alleged to have been violated by the State in a matter brought to the Commission's attention, although the petitioners are free to do so. On the other hand, based on the case law of the system, in its admissibility reports the Commission is required to name which provisions of the relevant inter-American instruments apply; if the facts alleged are proven through sufficient means, it may rule that those instruments have been violated.

51. In view of the elements of fact and of law presented by the parties and given the nature of the matter under consideration, the IACHR is of the view that the petitioners' claims regarding the scope of the State's alleged responsibility could tend to establish violations of Nicolasa's rights to personal integrity, to freedom of movement and residence, to judicial guarantees, to judicial protection and to the rights of the child, protected by articles 5, 19, 22, 8(1) and 25 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof. Regarding Article 22 in particular, the State alleges that it adopted a series of measures with the goal of preventing the forced displacement in the region of Montes de María of the Municipality of San Osofre at the time of the facts alleged, while the petitioners sustain that the State did not comply with its obligations in relation to this issue. The Commission will review the response of the State to the forced displacement at issue at the merits stage.

52. Likewise, the facts alleged could tend to establish violations of Article 7 of the Convention of Belém do Pará. Articles 2, 3 and 4 of the Convention of Belém do Pará do not constitute a legal basis to admit the petition. However, where relevant the Commission will take them into account in its interpretation of Article 7 of the Convention of Belém do Pará in the merits phase.<sup>13</sup>

53. The Commission observes that the present petition also raises questions related to the right to equal protection recognized in Article 24 of the American Convention, read in conjunction with articles 1(1) and 2 thereof. A detailed examination of those questions will be required in the merits phase. The petitioners argue that the State's lack of due diligence in investigating and punishing the party responsible for the rapes suffered by Nicolasa was a form of discrimination, a failure of the State's duty not to discriminate, and its duty to guarantee equal access to justice. The petitioners additionally allege that Nicolasa did not receive a humanitarian assistance which was full, sufficient and differentiated, taking into consideration her risk to human rights violations on the basis of her sex, age, race, economic position, and condition as displaced person, in violation of the obligations to not discriminate and the principle of equality.

54. The Commission moreover considers that in the case of the alleged victim's next of kin, the facts alleged could constitute violations of articles 5, 8(1) and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof, based on their forced displacement and its effects on their inherent dignity; their support of Nicolasa during the legal investigation into her rape; and the long-term effects that Nicolasa's alleged rape and the alleged impunity of the perpetrator had on Nicolasa's family. The Commission will also review under article 5 of the American Convention, the allegations presented related to voids in the social assistance received by Nicolasa and her family members as displaced persons, in the areas of health, education, housing, and food. The petitioners consider that these voids had a discriminatory impact in the exercise of their economic, social, and cultural rights.

55. The Commission is of the view that it does not have sufficient information to establish a possible violation of Article 4(1) of the American Convention. Therefore, it deems this claim to be inadmissible.

## V. CONCLUSIONS

56. The Commission concludes that it is competent to examine the claims asserted by the petitioners regarding the alleged violation of articles 5, 8, 19, 22, 24, and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof, and Article 7 of the Convention of Belém do Pará, and that

<sup>13</sup> IACHR, Report No. 93/09, Admissibility, Petition 337-03, *Samanta Nunes da Silva*, Brazil, September 7, 2009, paragraph 52.

these claims are admissible under articles 46 and 47 of the American Convention, It also concludes that the assertions made claiming an alleged violation of Article 4 of the American Convention must be deemed inadmissible.

57. Based on the above arguments of fact and of law and without prejudging the merits of the case,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**DECIDES:**

1. To declare the present petition admissible with respect to the possible violations of articles 5, 8, 19, 22, 24, and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof, and Article 7 of the Convention of Belém do Pará.

2. To declare the present petition inadmissible as it pertains to possible violations of Article 4 of the American Convention.

3. To notify the parties of this decision.

4. To proceed with its analysis of the merits of the case.

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

Done and signed in the city of Washington, D.C., on the 3<sup>rd</sup> day of the month of April, 2014. (Signed): Tracy Robinson, President; Rose-Marie Belle Antoine, First Vice President; Felipe González, Second Vice President; José de Jesús Orozco, Rosa María Ortiz, Paulo Vannuchi and James Cavallaro, Commissioners.