

REPORT N° 8/94
CASE 10.915
EL SALVADOR
February 1, 1994

BACKGROUND:

1. On July 8, 1991, the Inter-American Commission on Human Rights received a petition whose pertinent parts are summarized below:

On March 21, 1991, María Teresa Guardado, age 8, was killed by a bullet fired from amid a group of soldiers attached to the Chalatenango Military Post No. 1. On March 19, 1991, the child María Teresa Guardado and her mother, Mrs. María Leonor Orellana, were walking from Chalatenango to their home in Guarjila. According to testimony by Mrs. Orellana, at approximately 7:00 a.m. on that day there had been clashes between the Armed Forces and the FMLN near Guarjila. The fighting resumed as she was on her way home again, so that she, her daughter and a group of civilians took shelter in a house in the Las Cañas district and waited until the firing had ceased.

When they walked out into the street, they came upon soldiers from the Chalatenango Military Post No. 1 who were shouting military slogans and firing in all directions. Despite the fact that a woman among the civilians told the soldiers that they were civilians, at around 12:30 a shot was fired that struck the child María Teresa Guardado in the back and passed through her stomach. Even though the civilians shouted at the soldiers that they had wounded a little girl, the soldiers continued to fire bullets as they walked along. Mrs. Orellana took her little daughter to a house nearby and waited for an ambulance until 3:30 p.m. When the Salvadoran Red Cross ambulance finally arrived, the soldiers fired on it, leaving a hole in the windshield. This delayed the child's evacuation for approximately another hour and a half.

When they finally reached the Chalatenango hospital, the child was admitted for "a bullet wound in the right abdomen, with a bleeding exit wound" and then operated on. When the exploratory work was done, she was found to have a number of internal injuries. Mrs. Orellana was told that her daughter had come out of the operation well and that she could speak with her briefly. But two days later, on March 21, 1991, María Teresa Guardado died of what the medical report described as "a bullet wound - generalized sepsis".

2. On July 15, 1991, the Commission began processing the case and asked the Government of El Salvador to supply relevant information on the material facts reported

in the petition and any other information to apprise the Commission of the case history and enable it to determine whether the remedies under domestic law had been exhausted. The Government was given 90 days in which to reply.

3. On November 20, 1991, the petitioner sent additional information, and repeated his request that an investigation be conducted into the facts denounced.

4. Beyond the 90-day deadline which the Commission had given the Government, the Commission, it wrote by note of January 28, 1992, and again asked the Government of El Salvador to provide it with information, and this time set a deadline of 60 days for the Government's reply. It also pointed out that if no reply was received, the Commission would consider application of Article 42 of its Regulations.

5. On July 29, 1992, the petitioner sent more information, reporting that the Chalatenango Court of First Instance, which was conducting the investigation into the child's murder as Case 50-91, had decided to file the case, since "the case file had been reviewed and it was impossible to establish who killed the child María Teresa Guardado".

6. On August 19, 1992, the Commission forwarded to the Government of El Salvador the additional information sent by the petitioner and asked that the Government take the necessary measures to supply the Commission with all of the case reports within 60 days.

7. On August 20, 1992, the Government of El Salvador sent a communication concerning this case wherein it stated that the child in question had died in a combat zone on a day when the FMLN and the Salvadoran Army had several engagements; it reported that the respective legal proceedings had been instituted and conducted; that representatives of the Government's Human Rights Commission had visited the Chalatenango Court of First Instance to examine the proceedings; that Mrs. María Leonor Orellana, Mr. Adalberto Menjivar and Mrs. María Moreno Menjivar de Paz gave conflicting testimony, which made it impossible to establish which group had fired the shots. It also reported that on May 3 of that year, the Judge of First Instance ordered that the proceedings be filed since the Court was unable to establish who had injured the child; that the Office of the Attorney General of the Republic had requested elaboration of the statements made by witnesses Adalberto Menjivar, who confirmed his earlier statement, and Mrs. Morena Menjivar, who added that while there had been a clash on March 19, there were no longer any soldiers in the area at the time the girl was struck, and she believed guerrillas had shot the girl; that it had been very difficult to establish who the author of the crime was, as the court had been unable to identify any one individual, institution or armed group as the responsible party. The Salvadoran Government was therefore requesting that the Commission close the case, since after being "duly processed the identity of the guilty party could not be established."

8. On August 27, 1992, the Commission sent the petitioner the pertinent parts of the Government's reply so that the petitioner might make whatever observations he

deemed necessary. The petitioner was asked to convey his observations and any additional information within 45 days.

9. On October 13, 1992, the petitioner, in a communication addressed to the Commission, requested a 60-day extension on the deadlines established for presenting his observations and additional information. That extension was granted in a communication from the Commission sent on October 19 of that year.

10. On December 18, 1992, the Commission received from the petitioner the latter's observations on the information supplied by the Government of El Salvador. Summarizing this submission, the petitioner stated that the Government of El Salvador had not conducted an effective investigation and had confined itself to the inadequate measures on record in the case file; that in her testimony, María Leonor Orellana had blamed soldiers from Military Post No.1 (DM1). In her complaint to the Office of the Attorney General, she had even asked that said military unit be investigated. Although this was sufficient grounds to order such an investigation, no effective inquiry was conducted before the case was closed. The petitioner pointed out that the court with jurisdiction over this case was only a few meters from DM1, so that it was only logical to suppose that those who made statements were subject to pressure; supposed members of the tribunal and an individual who identified himself as a detective with the National Police had pressured Mrs. María Leonor Orellana not to make charges against members of the DM1. The petitioner reiterated his request that an investigation be conducted, focusing on the DM1, and that the guilty parties be tried and punished and that the victim's next-of-kin be compensated.

11. On January 26, 1993, the Commission forwarded to the Government of El Salvador the petitioner's observations on the information that the Government had supplied on August 20, 1992, and gave it a deadline of 30 days to take whatever measures it deemed appropriate to supply the Commission with all the reports on this case.

12. On February 22, 1993, the Commission again asked the Salvadoran Government to provide whatever information it deemed appropriate with regard to this case within 30 days.

13. On March 2, 1993, the Commission received a communication from the Government of El Salvador wherein it informed the Commission that in the inquiry into this case conducted by the Chalatenango Court of First Instance, the body of the minor María Teresa Guardado was examined; it repeated the statements made by witnesses, which it had described in its communication of August 20, 1992, as well as the conclusion of the case, in other words, the fact that it was impossible to identify any single individual, institution or armed group as the guilty party because it was very difficult to establish who the author of the crime was; therefore, it again requested that the case be closed.

14. On March 22, 1993, the Commission forwarded to the petitioner the

information conveyed by the Salvadoran Government and asked the petitioner to send his observations and any new information on the case within 45 days.

15. On May 17, 1993, the Commission received the petitioner's observations, which point out that in its reply of March 2, 1993, the Salvadoran Government made no reference at all to the fact that Mrs. María Leonor Orellana had directly named troops from Military Post No.1; nor did the communication mention the fact that although two years had passed, the unit involved in this case had never been investigated.

16. On July 20, 1993, the Commission received another communication from the petitioner reporting that he had visited the Chalatenango Court of First Instance on July 15 and established that the case was still filed and that no investigation had been made of the troops at Military Post No. 1. He repeated his request that in the instant case, the Commission demand that the Salvadoran Government fulfill its obligation to investigate the facts, try the suspects and compensate the victim's next-of-kin.

17. On October 5, 1993, the Inter-American Commission on Human Rights, sitting at its 84th Regular Meeting considered this case and issued Report No. 20/93, pursuant to Article 50 of the American Convention on Human Rights.

18. The Inter-American Commission on Human Rights resolved to send the Report, on a confidential basis, to the Government of El Salvador, granting it three months to implement the recommendations contained therein.

19. The Government of El Salvador failed to answer the Commission request of October 18, 1993.

ANALYSIS

1. On the question of admissibility:

a. The petition satisfies the formal requirements for admissibility contained in Article 46 of the American Convention on Human Rights and in articles 31 and 32 of the Commission's Regulations.

b. The petition is not pending settlement in another procedure under an international organization and is not essentially the same as a petition already examined by the Commission, as required under Article 47 of the Convention.

2. With regard to the Commission's competence in the instant case:

a. The Commission is competent in the instant case because it concerns violations of rights recognized in the American Convention on Human Rights, mainly Article 4 on the

right to life and Article 25 on the right to judicial protection, as provided in Article 44 of that Convention, of which El Salvador is a State Party.

b. Article 1.1 of the American Convention, which is binding for El Salvador, states that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction, the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

3. On the content of the petition:

a. Despite the fact that more than 2 years have elapsed since the events transpired and despite the seriousness of the charges, the Government of El Salvador has not given a satisfactory response to the facts submitted by the petitioner concerning the attack upon a group of civilians and a Salvadoran Red Cross units by troops from Military Post No. 1, based in Chalatenango; no serious investigation to identify, try and punish those responsible has been conducted and no compensation for the victim's next-of-kin has been set.

b. As for the right to life established in Article 4 of the American Convention, the Commission believes that the following factors have to be considered:

This is not an isolated or unusual case; in fact, in the Commission's Annual Report for 1991, the year when the material facts in this case occurred, it reported that it had received information on various cases involving military actions by the armed forces that adversely affected the civilian population; for example, there was the case of the Air Force bombing on April 10 of that year, in a place known as Plano Samuria, near the town of Jucuapa in the department of Usulután, which had left two children dead and five other people wounded.

The victim in this case was an 8-year old child who should have received not only the general protection accorded under humanitarian law for civilian victims of armed conflict, but also special treatment because she was a minor. The United Nations Convention on the Rights of the Child, which El Salvador signed on January 26, 1990 and ratified on July 10 of that year, provides that:

Article 6:

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

Protocol II of the Geneva Convention of 1949, relating to the protection of victims of non-international armed conflicts, which El Salvador signed in 1977 and ratified in 1978 and in effect since May 1979, provides that:

Article 9:

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

Article 11:

1. Medical units and transport shall be respected and protected at all times and shall not be the object of attack.

Article 13:

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:

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.

Civilians shall enjoy the protection afforded by this Part, and for such time as they take a direct part in hostilities".

The above rules were obviously not respected in the instant case and the facts reported -i.e., that one of the bullets that the DM1 soldiers fired at the civilian population struck and mortally wounded the child and that the ambulance attempting to carry her to hospital was attacked, thereby delaying the medical attention she so urgently needed- are acts and omissions that violate the rights to life and physical safety of the child María Teresa Guardado.

The right to the judicial protection that the State is obliged to provide was also violated by its failure to conduct a serious investigation to identify, try and punish those responsible and compensate the victim's next-of-kin, and by the acts it committed to cover up the identity of those responsible, such as failing to name the DM1 soldiers as the suspects in the attack in either the findings of the proceedings or in the communications to the Commission, despite incriminating testimony given to that effect by the child's mother; by its failure to investigate the intimidation tactics used against Mrs. María Leonor Orellana by supposed agents of the State, and by having terminated the judicial protection by ordering that the case be filed.

c. Even though the victim's mother clearly accused troops of the DM1 and despite the circumstances described in the petition -i.e., that María Teresa Guardado was hit by a single bullet aimed intentionally at a group of civilians from the direction of the soldiers and that at the time those soldiers spotted the civilians, the former were already marching and firing in the air since by that time the clash with FMLN troops had ended-, the court authorities did not conduct an investigation of the kind described by the Inter-American Court of Human Rights as follows:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.¹

In reference to the duty to investigate, the Court found that:

The duty to investigate] must be undertaken in a serious

¹ Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 174.

manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the Government, thereby making the State responsible on the international plane.²

d. The failure to conduct a serious investigation is evident by what the Chalatenango Court of First Instance did, which was merely to take statements from two witnesses, whose relationship to the events in question was not made clear in the communications sent to the Commission; based on those two statements alone, it ordered the case filed and took no other measures. The Federal Prosecutor, for his part, merely requested an elaboration of the statements made by those witnesses, which did not in any way alter the obvious flaws in the procedure.

4. On other aspects of the processing:

a. The facts prompting the petition are such that they cannot be resolved by recourse to the friendly settlement procedure provided for in Article 48.1.f of the Convention and Article 45 of the Commission's Regulations, and neither the government nor the petitioners asked the Commission to use this procedure.

b. Since the friendly settlement procedure does not apply, the Commission must comply with the provisions of Article 50.1 of the Convention and issue its opinion and conclusions on the matter placed before it for consideration.

c. All legal and statutory procedures established in the Convention and in the Commission's Regulations have been exhausted, and more than the prescribed time periods have been allowed.

5. With regard to the exhaustion of the remedies under domestic law:

a. In the instant case, the petitioner has been unable to secure effective protection from the body having jurisdiction; she filed and exhausted the available domestic remedies and hence complied with the provisions of Article 46 of the Convention, as shown below:

² Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 177.

On March 21, 1991, Mrs. María Leonor Orellana filed a complaint with the Chalatenango Court, which was placed on the docket of the Chalatenango Court of First Instance. After taking statements from two witnesses and without any further investigation, that court decided to file the case.

On April 19, 1991, Mrs. María Leonor Orellana also filed a brief with the Office of the Attorney General of the Republic wherein she described the facts and requested that a commission be appointed to investigate and determine the responsibility of troops from Military Post No. 1. The only outcome of this petition was the expanded testimony from the two witnesses mentioned earlier.

b. There is no other suitable, adequate or effective internal remedy that the victim's family can use.

c. Moreover, the Government of El Salvador has not challenged the admissibility of the petition on the grounds of a failure to exhaust the remedies under domestic law; therefore, in keeping with the jurisprudence of the Inter-American Court of Human Rights, the interpretation must be that the Government has tacitly waived that challenge.

6. With regard to noncompliance with Report 20/93 of October 1993

The three-month deadline given the Government of El Salvador has elapsed and it has not complied with the Commission's recommendations in Report No. 20/93, nor has it answered the communication of October 18, 1993, notifying it that the report was adopted and sending it a text thereof.

CONCLUSIONS:

1. The Inter-American Commission on Human Rights finds that the Government of El Salvador is responsible for the facts denounced in the communication of July 8, 1991, to the effect that on March 21, 1991, María Teresa Guardado, age 8, died from a bullet fired from a weapon carried by a group of soldiers from Military Post No. 1, headquartered in Chalatenango. After an engagement with FMLN troops, these soldiers were walking along, firing in all directions; one of those bullets struck María Teresa Guardado.

2. The Commission also finds that the Government has violated the American Convention on Human Rights, chiefly its Article 4 on the right to life and Article 25 on the right to judicial protection, in relation to Article 1.1 of that Convention of which El Salvador is a State Party.

3. The Commission makes the following recommendations to the Government of El Salvador:

a. That it conduct an exhaustive, rapid and impartial investigation into the facts denounced to identify those responsible for the death of the child María Teresa Guardado, and the identity of those who attacked the ambulance in which she was being transported, and that they be tried to receive the punishment which this serious conduct deserves.

b. That it redress the consequences of the violation of the aforementioned rights and pay the victim's next-of-kin a just compensation.

c. That it adopt the measures necessary to avoid a recurrence of similar acts in the future; specifically, that courses be established to instruct members of the military on how the civilian population must be treated, especially children, in situations of armed conflict, regardless of the type, and in the respect that medical units and medical personnel must receive.

4. The Commission invites the Government to accept the jurisdiction of the Inter-American Court of Human Rights in this specific case which is the subject of this report.

5. To publish this report pursuant to Article 48 of the Commission's Regulations and Article 53.1 of the Convention, because the Government of El Salvador did not adopt measures to correct the situation denounced within the time period.