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Title/Style of Cause: Noel Emiro Omeara Carrascal, Guillermo Omeara Miraval and Hector Alvarez Sanchez v. Colombia
Doc. Type: Decision
Decided by: President: Juan Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Robert.
Dated: 27 February 2002
Citation: Omeara Carrascal v. Colombia, Petition 11.482, Inter-Am. C.H.R., Report No. 8/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by: APPLICANT: the Colombian Commission of Jurists
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I. SUMMARY

1. On May 4, 1995, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition lodged by the Colombian Commission of Jurists [Comisión Colombiana de Juristas] (hereinafter “the petitioners”) alleging the extrajudicial execution of Mr. Noel Emiro Omeara Carrascal, the subsequent forced disappearance and extrajudicial execution of his son Guillermo Omeara Miraval, and a physical assault upon Héctor Alvarez Sánchez, allegedly perpetrated by agents of the State in the Municipality of Aguachica, Department of Cesar, Republic of Colombia (hereinafter the “State”, the “Colombian State” or “Colombia”) between January 28 and October 21, 1994.

2. During the course of the proceeding, the petitioners alleged the State’s responsibility for violations of the right to life, the right to humane treatment, the right to personal liberty, the right to a fair trial and the right to judicial protection, recognized in articles 4, 5, 7, 8, and 25 of the American Convention on Human Rights (hereinafter “the American Convention”), all in relation to the State’s general obligation to respect the rights recognized in that instrument and ensure their free and full exercise. The petitioners also alleged that the petition lodged with the IACHR qualified for the exception to the rule requiring exhaustion of local remedies, provided for in Article 46(2) of the American Convention.

3. The State, for its part, reported that the judicial proceedings instituted to conduct an inquiry into the death of Noel Emiro Omeara Carrascal and his son Guillermo Omeara Miraval were still at the preliminary phase. The State did not supply any information concerning Mr. Héctor Alvarez Sánchez.

4. Having examined the positions of the parties, the Commission concluded that it was competent to take up this complaint and that the petition was admissible under articles 46 and 47 of the American Convention.

II. PROCESSING BY THE COMMISSION

5. On May 10, 1995, the Commission began the initial processing of the petition, which became number 11.482, all in accordance with the provisions of the Rules of Procedure in effect until April 30, 2001. It forwarded the pertinent parts of the complaint to the Colombian State, specifying that it had 90 days in which to submit information.

6. The State submitted its response on August 9, 1995. The pertinent parts of that response were forwarded to the petitioners for their observations. The petitioners supplied additional information on September 25, 1995, which was forwarded to the State. The latter's observations were presented on December 22, 1995, and forwarded to the petitioners. The petitioners supplied more information on March 19, 1996, which was sent to the State. On May 15, 1996, the State requested an extension, which the Commission promptly granted. On July 31, 1996, the State requested yet another extension, which the Commission also granted. On September 26, 1996, the State submitted its observations, which were forwarded to the petitioners.

7. On March 3, 1997, the State presented more information, which was sent to the petitioners. On March 20, 1997, the Commission again asked the petitioners to furnish more information. The petitioners submitted additional information on April 24, 1997, which was sent to the State. The latter requested an extension on July 22, 1997, which the Commission duly granted. On January 12, 1998, the State submitted additional information, which was forwarded to the petitioners. On May 22, 1998, the petitioners submitted more information, which was sent to the State. The State presented its observations on September 10, 1998, which were forwarded to the petitioners. On October 6, 1998, during its 100th regular session, the Commission held a hearing on this case, with both parties in attendance.

8. On March 2, 1999, during its 102nd regular session, the Commission held a second hearing on this matter, with both parties participating. In the course of the hearing, the petitioners presented additional information, which was forwarded to the State in writing. On March 27, 2000, the petitioners notified the IACHR that the Center for Justice and International Law (CEJIL) would join the case as co-petitioner. On July 27, 2001, the Commission wrote the petitioners to request additional information from them.

III. THE PARTIES' POSITIONS

A. The petitioners' position

9. The petitioners allege that on January 28, 1994, Mr. Noel Emiro Omeara Carrascal and Mr. José Erminson Sepúlveda Saravia, Clerk at the Mayor's Office in the Municipality of Aguachica, were assaulted by a group of armed men in civilian dress. Mr. Sepúlveda Saravia was killed in the attack and Mr. Omeara Carrascal was gravely wounded.

10. On August 26, 1994, Mr. Noel Emiro Omeara Carrascal died from the wounds sustained in the assault. The petitioners allege that prior to his death, Mr. Omeara Carrascal told his son, Guillermo Omeara Miraval, that the assailants were members of the Army's Anti-Extorsion and Kidnapping Unit (UNASE). They further allege that Guillermo Omeara Miraval conducted a series of inquiries and was able to ascertain the identity of the UNASE members allegedly responsible for the attack, who were stationed at the Aguachica military base.

11. The petitioners allege that on August 27, 1994, Mr. Guillermo Omeara Miraval was stopped by a group of heavily armed men wearing camouflage uniforms. He was forced into a blue pickup truck with a canvas cover. The petitioners further allege that a number of people from the area witnessed the incident. The petitioners also state that Guillermo Omeara Miraval has not been seen since.

12. Guillermo Omeara Miraval's next of kin allegedly informed police authorities and the Attorney General of the forced disappearance of Guillermo Omeara Miraval, and named members of the UNASE group based at Aguachica as the responsible parties.

13. The petitioners' account states that the body of Guillermo Omeara Miraval was found on September 23, 1994, at the "La Granja" ranch located 10 kilometers from the Municipality of San Martín. The petitioners allege that the body showed signs of torture.[FN1] They also report that a flag was found next to his body bearing the acronym AGC, which is that of a paramilitary group active in the municipalities of San Martín and Aguachica. They report that members of the UNASE had allegedly worked with paramilitary groups active in the region.

[FN1] In their original petition of April 28, 1995, the petitioners told the Commission that there was evidence of torture over Guillermo Omeara Miraval's entire body. Specifically, they stated that his face had been burned with acid, that his toenails had been pulled out, that his genitalia had been mutilated and that he had been shot four times.

14. According to the allegations made, on October 21, 1994, while Mr. Héctor Alvarez Sánchez, the father-in-law of Guillermo Omeara Miraval, was at home, he was fired upon by men on a motorcycle. They assert that the bullet wounds he sustained left him semi-paralyzed and virtually unable to speak. The petition states that the family of Guillermo Omeara Miraval was forced to leave the Municipality of Aguachica because of multiple threats and acts of harassment.

15. Based on these allegations, the petitioners are asking the Commission to declare the State responsible for violation of the rights to life, the right to humane treatment, the right to personal liberty, and the right to judicial protection, and violation of its generic obligation to respect the rights protected under the American Convention and ensure their free and full exercise.

16. As for the investigation of the facts by the judicial authorities, the petitioners point out that the Aguachica Regional Prosecutor opened the inquiry into the death of Mr. Noel Emiro

Omeara Carrascal on July 28, 1994. On November 8, 1994, the investigation was handed over to the Office of the Regional Prosecutor of Valledupar. They then learned, via the note that the State submitted to the IACHR on January 5, 1998, that the Office of the Attorney General of the Nation did not have Mr. Noel Emiro Omeara Carrascal listed as a homicide victim. Therefore, it was not until 1998 that the Barranquilla Regional Bureau of Prosecutor's Offices ordered the preliminary investigation.

17. In the case of the death of Guillermo Omeara Miraval, the petitioners cited the information that the State supplied to the Commission during the processing of this petition, and expressed their disagreement given the scanty and confusing information supplied by the State on his death.

18. As for the assault and the injuries sustained by Mr. Héctor Alvarez Sánchez, the petitioners point out that the investigation is being conducted by the Medellín Regional Prosecutor's Office, but they have no idea where that investigation is headed since the Colombian State has not given them any information. The petitioners also informed the Commission that the V Brigade of the National Army had allegedly instituted a criminal inquiry against the members of the UNASE. However, they said that they did not know what the outcome of that investigation was.

19. As to the question of the admissibility requirements provided for in the American Convention, the petitioners argue that given the unwarranted delay in the investigation, the present case must qualify for the exception that Article 46(2)(c) of the American Convention provides for the rule requiring exhaustion of local remedies.[FN2] They argue that more than six years after the events occurred, the preliminary investigation is still underway, without result. The petitioners cite the case-law of the Inter-American Court, to the effect that an investigation must be undertaken in a serious manner, and not as a mere formality preordained to be ineffective.[FN3]

[FN2] Idem.

[FN3] Communication from the petitioners dated March 2, 1999.

B. The State's position

20. In its original response, the State alleged that the facts denounced were being investigated and that measures were being taken to combat armed groups operating in the municipalities of San Martín and Aguachica.[FN4]

[FN4] Note EE/DH/6295, from the Office of the Director General of Special Affairs of the Ministry of Foreign Affairs of Colombia, August 9, 1995.

21. It later reported that the Barranquilla Regional Prosecutor's Office had instituted the investigation into the death of Guillermo Omeara Miraval on September 6, 1994. For reasons of jurisdiction, it was later transferred to the Aguachica Investigative Section, where the investigation ended up on September 30, 1994. The Aguachica Investigative Unit ordered that the investigation should be handed over to the Valledupar Regional Prosecutor's Office, on the grounds that this was a crime against public safety and security. On October 19, 1994, Investigative Office N° 28 of the Valledupar Anti-Extorsion and Kidnapping Unit referred the investigation to the Valledupar Regional Prosecutor's Office on the grounds that this was a crime of kidnapping for extortion. That Office decided to hand the investigation over to the Barranquilla Regional Prosecutor's Office on March 28, 1995, which finally ordered the preliminary proceedings.

22. The State maintains that on September 27, 1995, the National Bureau of Investigations assigned investigation of the case to the Human Rights Unit. On November 3, 1995, the Human Rights Unit became seized of the investigation and ordered that evidence be taken.

23. In its communication of December 12, 1995, the State reported that the Barranquilla Regional Prosecutor's Office was not conducting any investigation into the death of Noel Emiro Omeara Carrascal. It stated that the lack of information on the status of the inquiries into the death of Mr. Omeara Carrascal and Mr. Alvarez Sánchez was not because internal remedies did not exist or were ineffective; instead, its contention was that the friends or relatives of the victims had an obligation to bring facts that might be considered crimes to the attention of the judicial authorities.[FN5]

[FN5] Note EE/DH/591-95 from the Office of the Director General of Special Affairs of the Ministry of Foreign Affairs of Colombia, December 12, 1995.

24. On November 28, 1998, the State reiterated that Noel Emiro Omeara Carrascal was not listed as a homicide victim with the Barranquilla Regional Prosecutor's Office; because of that, no investigation into his death had been conducted.[FN6] At the hearing held on March 2, 1999, during the Commission's 102nd regular session, the State asserted that it did not have any information about the injuries that Héctor Alvarez Sánchez had sustained and that the only investigation being conducted was the one looking into the death of Noel Emiro Omeara Carrascal and his son.

[FN6] Note EE/DH/033112, from the Office of the Director General of Special Affairs of the Ministry of Foreign Affairs of Colombia, November 28, 1998.

25. The State asserted that State agents were not implicated in the case and that the judicial inquiries conducted at the local level had not produced any evidence of the involvement of State agents in the violations alleged by the petitioners.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

26. Under Article 44 of the American Convention, the petitioners are authorized to file complaints with the IACHR. The alleged victims named in the present petition are individuals whose Convention-recognized rights Colombia undertook to respect and ensure. Colombia has been a State Party to the American Convention since July 31, 1973, the date on which the respective instrument of ratification was deposited. Therefore, the Commission is competent *ratione personae* to examine this petition.

27. The Commission is competent *ratione loci* to hear this petition, because it alleges violations of rights protected under the American Convention, said to have occurred within the territory of a State party to that instrument. The Commission is competent *ratione temporis* because the obligation to respect and ensure the rights protected by the American Convention was already binding upon the State on the date on which the events alleged in the petition occurred. Finally, the Commission is competent *ratione materiae*, because the petition denounces violations of human rights protected by the American Convention.

B. Admissibility requirements

a. Exhaustion of local remedies

28. The State reported that investigations were underway in Colombia to clarify the facts denounced in the present petition. For their part, the petitioners allege that the exception to the rule set forth in Article 46(1)(a) of the American Convention, requiring exhaustion of local remedies, should apply to this petition by reason of the unwarranted delay in rendering final judgment, provided for in Article 46(2)(c) of the Convention.

29. The Commission notes that the deaths of Noel Emiro Omeara Carrascal and his son Guillermo Omeara Miraval are still under investigation, even though they were killed more than seven years ago. The Commission also notes that the State did not provide any information concerning investigations into the assault on Mr. Héctor Álvarez Sánchez; the Commission therefore assumes that said investigation, too, is unresolved.

30. As the Inter-American Court has held, the State is the party that has to invoke the rule requiring failure to exhaust local remedies and may, therefore, waive it either expressly or by implication.[FN7] The Court has also held that in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly.[FN8] In this regard, the Court has also held that merely reporting information on the progress of the proceedings before the domestic courts and the State's willingness to comply with the judgments they deliver, is not the same as filing an express objection claiming a failure to exhaust local remedies; failure to do so expressly must therefore be regarded as a tacit waiver of its right.[FN9]

[FN7] IACtHR, Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996. Series C No. 24, par. 40; Loayza Tamayo Case, Preliminary Objections. Judgment of January 31, 1996, Series C No. 25, par. 40.

[FN8] IACtHR, Mayagna (Sumo) Awas Tingni Community Case, Preliminary Objections, Judgment of February 1, 2000, paragraphs 53 and 54.

[FN9] Ibid., paragraph 55.

31. In the present case, the Commission observes that the State did not file at the appropriate time an objection claiming failure to exhaust local remedies. Therefore, the conclusion is that it tacitly waived its right to file such objection. Moreover, the State did not challenge the petitioners' allegations regarding application of the exception provided for in Article 46(2)(c) of the American Convention. Therefore, the requirement stipulated in Article 46(1)(a) of the Convention does not apply in the present case.

b. Time period for submitting a petition

32. In the petition under study, the IACHR has established the Colombian State's tacit waiver of its right to file the objection asserting failure to exhaust the remedies under domestic law, so that Article 46(1)(b) of the American Convention does not apply. However, the treaty-based requirements regarding exhaustion of local remedies and the rule requiring that the petition be submitted within six months of the date on which the petitioner was notified of the final judgment, are two separate matters. Therefore, the Commission must determine whether the petition under study was lodged within a reasonable period. The Commission notes that the original petition was lodged on May 4, 1995, which, given the circumstances of the present petition, is considered reasonable.

c. Duplication of proceedings and res judicata

33. There is nothing in the case file to indicate that this matter is pending with another international arrangement for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. The IACHR therefore concludes that the exceptions allowed under Article 46(1)(c) and in Article 47(d) of the American Convention do not apply.

d. Characterization of the facts alleged

34. If true, the facts reported by the petitioners concerning alleged violations of the right to life, the right to humane treatment, the right to personal liberty and the right to judicial protection of Noel Emiro Omeara Carrascal, Guillermo Omeara Miraval and Héctor Álvarez Sánchez, could tend to establish violations of the rights recognized in articles 4, 5, 7, 8 and 25 of the Convention, in relation to Article 1(1) thereof.

V. CONCLUSIONS

35. The Inter-American Commission concludes that it is competent to take up the complaint filed by the petitioners concerning the alleged violation of articles 4, 5, 7, 8 and 25 of the Convention, in relation to Article 1(1) thereof, and that the case is admissible under articles 46 and 47 of the American Convention.

36. Based on these 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 case admissible, which concerns the alleged violation of articles 4, 5, 7, 8, 25 and 1(1) of the American Convention.
2. To notify the Colombian State and the parties of this decision.
3. To proceed with the analysis of the merits of the case, and
4. To publish this decision and include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 27 day of February in the year 2002. (Signed): Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Commissioners Robert K. Goldman, Julio Prado Vallejo, and Clare K. Robert.