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Diomedes Obed Garcia and Orlando Alvarez Rios v. Honduras
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Decided by: President: Juan Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commission members: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts.
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Represented by: APPLICANTS: the Center for Justice and International Law and Covenant House Latin America
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I. SUMMARY

1. On October 11, 2000, the Center for Justice and International Law (CEJIL) and Covenant House Latin America (hereinafter the petitioners) lodged a petition with the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission", or "the IACHR"). The petition alleges the international responsibility of the State of Honduras ("the State", "Honduras" or "the Honduran State"), for the illegal detention, torture, and subsequent murder of Marco Antonio Servellón García (aged 16), Rony Alexis Betancourt Hernández (aged 17), Diómedes Obed García (aged 18), and Orlando Alvarez Ríos (aged 32).

2. The petitioners assert that the facts alleged in the petition constitute violation of the following rights recognized in the American Convention on Human Rights (hereinafter "the American Convention"): right to life (Article 4); right to humane treatment (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8), and right to judicial protection (Article 25); and, furthermore, as regards Marco Antonio Servellón García and Rony Alexis Betancourt Hernández, the rights of the child (Article 19). They also allege violation of the general obligation of the State to ensure the rights protected in Article 1 of the Convention.

3. With respect to admissibility, the State holds that the petition is inadmissible for failure to exhaust domestic remedies in accordance with Article 46(1) of the American Convention. For their part, the petitioners alleged unwarranted delay in investigation and in rendering a decision under those remedies, and that said remedies were not effective because they were not capable of

producing the results for which they were designed. Therefore the exceptions provided at Article 46(2) of the American Convention apply.

4. Without prejudging the merits of the matter, the IACHR concludes in this report that the petition is admissible in accordance with the exceptions contained in Article 46(2) (a) and (b) of the American Convention. On that basis, it finds that the petitioners are exempt from the requirement to exhaust the remedies under domestic law provided at section 1(a) of the same provision and decides to continue its examination of merits with regard to alleged violation of Articles 1(1), 4, 5, 7, 8, 19, and 25 of the above-mentioned international instrument.

II. PROCESSING BY THE INTER-AMERICAN COMMISSION

5. The petition was received on October 11, 2000, and transmitted to the Honduran State on October 24, 2000, as case number 12.331, in keeping with the Regulations of the Commission then in effect. On June 12, 2001, the petitioners presented a communication in which they requested that Article 39 of the Rules of Procedure of the IACHR currently in force be applied and the facts alleged in the petition be presumed to be true.[FN1] because since the processing of the petition began the State had not disputed the allegations.[FN2] The request was duly brought to the attention of the State, which replied on September 10, 2001.

[FN1] Article 39 of the Rules of Procedure of the IACHR: The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

[FN2] In this connection, the petitioners say that:

The State of Honduras has ignored the request for information by the Inter-American Commission and has not presented any well-founded request that might justify its silence. Thus far, it has not offered an opinion on the allegations, and, therefore, we ask the Honorable Commission to presume the facts alleged to be true, in accordance with Article 39 of its Rules of Procedure.

Communication of the petitioners of June 12, 2001, p.1.

III. POSITIONS OF THE PARTIES

A. The petitioners

6. The petitioners have alleged that in Honduras there is an organized practice tolerated by the State of allowing to remain unpunished crimes involving agents of the National Police committed against street children and youths. According to them, this situation is attested in the court file.

7. The petitioners say that on September 15, 1995, a police operation was carried out in the vicinity of Tiburcio Carías Andino National Stadium, in the city of Tegucigalpa, aimed to

prevent crimes being committed during the parades to commemorate Honduras' Independence Day. During that operation the police patrols, registered with the numbers 50, 77 and 82 of the Public Security Force (hereinafter FUSEP) of the Seventh Regional Command, detained 128 youths in an illegal and arbitrary manner, given that the police did not have court orders, nor did they catch those youths in flagrante delicto. Among the youths that the police detained were Rony Alexis Betancourt, Marco Antonio Servellón García, and Orlando Alvarez Ríos, who were taken to headquarters of the Seventh Regional Command (hereinafter CORE 7) of the FUSEP,[FN3] and whose admittance to the police cells was registered as numbers 45, 63 and 76, respectively, in the record of arrests kept by that command.[FN4] Diómedes Abel García was intercepted by agents of the Honduran police near an electronic games arcade on September 16, 1995, and was taken in a patrol car to CORE 7. His arrest was not formally entered in the respective records but was confirmed by other detainees (Appendix 1 of the petition).

[FN3] The petitioners clarify that it is no longer called CORE 7, but Metropolitan Headquarters [Jefatura Metropolitana] N° 1.

[FN4] As the court file shows at p. 42 et seq. criminal accusation against officials of the Police of Honduras, Marco Tulio Regalado Hernández, Alberto José Alfaro, Hugo Antonio Vivas, and José Antonio Martínez Arrazola; and against Ms. Roxana Sierra Ramírez filed with the First Lower Court for Criminal Matters by attorney Mercedes Suyapa Vásquez Coello, Assistant Prosecutor of the Office of the Special Prosecutor for Human Rights under the supervision of the Attorney General's Office. (Appendix 1 of the petition of October 11, 2000).

8. The petitioners say that the Police Judge of Regional Command Number Seven of the Public Security Forces, Roxana Sierra Ramírez, told the relatives of Marco Antonio Servellón and of Rony Betancourt that they would be released on Monday, September 18, 1995. Furthermore, Dilcia Alvarez Ríos, the sister of Orlando Alvarez, declared before the Second Justice of the Peace for Criminal Matters in and for the Central Municipality of Tegucigalpa that on September 16, 1995, she received a telephone call from her brother from CORE 7, telling her that he would be released on Monday, September 18 of that year. Judge Roxana Sierra signed the alleged release orders for Marco Antonio, Rony, and Orlando at 11 a.m. on September 16, 1995.

9. According to the petitioners, on September 17, 1995, that is, the day after the alleged releases, Marco Antonio Servellón was murdered in the community of "El Lolo", at the side of the old North Road. On the same day, the lifeless bodies were also found of Rony Alexis Bentancourt, 50 meters from the bridge of the main road through the community of Nueva Suyapa; of Orlando Alvarez Ríos, at kilometer 41 of the North Road; and of Diómedes García, between kilometers 8 and 9 of the road to the Department of Olancho. The petitioners allege that the persons responsible are police officials David Abraham Mendoza, Marco Tulio Regalado, Alberto José Alfaro Martínez, Hugo Antonio Vivas, and José Antonio Martínez Arrazola; as well as police judge Roxana Sierra.[FN5] The locations of the bodies led this to be known as the Cuatro Puntos Cardinales [Cardinal Points] case.

[FN5] See petition of October 11, 2000, pp.1-4.

10. The petitioners say that, according to the autopsy, the deaths occurred between 3 a.m. and 6 a.m. on September 17, 1995, and that there is a similar pattern or modus operandi, which indicates the same perpetrator or perpetrators. All of the victims were clandestinely held during their arbitrary detention; all were threatened with death by members of the police prior to their detention; and all were murdered with the same firearm in the space of a few hours.[FN6]

[FN6] According to the opinion of the ballistics expert at the Criminal Investigation Directorate the projectiles removed from the victims' corpses "were fired by the same firearm: a 38SPL revolver." (Appendix 1 of the complaint).

11. On March 5, 1996, the father of one of the victims, Mr. Betancourt, filed a criminal accusation with the First Lower Court for Criminal Matters. On May 6, the Office of the Special Prosecutor for Human Rights of the Attorney General's Office applied for arrest warrants for several FUSEP agents and for police judge Roxana Sierra on the charges of murder, abuse of authority, violation of duties of public employees, and illegal detention to the detriment of the public administration.

12. The petitioners allege that even though the court file contained sufficient evidence against the accused, including expert opinions from the Coroner's Office at the Attorney General's Office, judicial inspections, and statements from witnesses, the First Lower Court for Criminal Matters refused the application for arrest warrants "for insufficient grounds".[FN7] The Court also rejected the motion for the reversal of its decision presented by Mr. Betancourt, the father of one of the victims, and by the Office of the Special Prosecutor for Human Rights.[FN8] On August 6, 1996, the First Court of Appeals upheld the lower court's ruling.[FN9] After an appeal was denied, in a new effort to obtain justice the Office of the Special Prosecutor continued to seek remedies, which, to this day, more than six years after the murders, have failed to lead to the identification and prosecution of the culprits.

[FN7] See procedural ruling at page 288 (Appendix 1).

[FN8] See pp.289 and 292 (Appendix 1).

[FN9] See pp.298 and 299 (Appendix 1).

13. In light of the foregoing, the petitioners request that the instant petition be declared admissible based on the exceptions provided at Article 46(2) (a) and (c) of the Convention, on the grounds that there has been an unwarranted delay in administration of justice and that the domestic remedies available to the victims were not effective.

B. THE STATE

14. The State expressly invoked the objection of failure to exhaust remedies under domestic law in accordance with Article 46(1)(a) and said that those remedies were still being processed. The State also referred to the proceedings conducted in 1995 and 1996,[FN10] to which the petitioners had already referred in their petition,[FN11] although it said that the accusation filed with the First Lower Court for Criminal Matters against the agents of the National Police, the police judge, and the public administration was presented by the Office of the Special Prosecutor for Human Rights on September 17, 1995. It also stated that the arrest warrants for the accused were requested by that office on August 6, 1996, and that on the same day the judge presiding over the case denied the request for insufficient grounds. The Honduran State also provided information on a number of new measures adopted and on others that were pending.[FN12]

[FN10] The State provided information on the following proceedings conducted between 1995 and 1996: Formal accusation presented by the Office of the Special Prosecutor for Human Rights on September 17, 1995; performance of autopsies; taking of statements from witnesses; inspections of the Offices of Regional Command N° 7; application for arrest warrants for the accused (this application was denied; therefore the Office of the Special Prosecutor in charge of the case appealed the decision) (See Report of the State of September 10, 2001).

[FN11] See original petition brief of October 11, 2000.

[FN12] The State informed that it has requested the criminology laboratories at the Attorney General's Office for the ballistics report on the case to determine if there is any link with other crimes. Efforts continue to locate other youths who are thought might know about other crimes that occurred in similar circumstances. (See Reply of the State of September 10, 2001).

15. The State concurred with the petitioners that the deaths of the alleged victims constituted homicide; that they were interrelated because they were caused by the same 38SPL caliber firearm or firearms; that the Office of the Prosecutor for Human Rights appealed the decision and that First Court of Appeals upheld that decision.

16. The State also mentioned that the Office of the Special Prosecutor for Human Rights will spare no effort to strengthen the evidence to hand and apply again for the respective arrest warrants for all those who might be responsible for the deeds with which they are charged.

IV. ANALYSIS

A. Competence *ratione loci*, *ratione personae*, *ratione temporis* and *ratione materiae* of the Commission.

17. The Commission has *ratione loci* competence to take up this petition because it claims violations of rights protected in the American Convention that allegedly took place in the territory of a state party to that treaty.

18. The Commission has *ratione personae* competence by virtue of standing to be sued, since the petition is lodged against a state party, in accordance with the generic provisions contained in Articles 44 and 45 of the Convention. This competence arises from the very nature of the inter-

American system of protection of human rights, under which states parties undertake to respect and ensure the rights and freedoms recognized in the Convention (Article 1).

19. The Commission has *ratione personae* competence because of the standing to sue of the petitioners in the instant case, in accordance with Article 44 of the Convention, which provides that "any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party," to the detriment of one or more individuals.

20. The Commission has *ratione temporis* competence inasmuch as the events alleged in the petition occurred when the duty to respect and ensure the rights recognized in the Convention was in force for the Honduran State, which ratified it on September 8, 1977.

21. Finally, the Commission has *ratione materiae* competence because the petition alleges violation of Articles 1(1) (general duty to ensure rights); 5 (right to humane treatment); 7 (right to personal liberty); 19 (rights of the child); 8.1 (right to a fair trial), and 25 (right to judicial protection) of the American Convention.

B. Other admissibility requirements for the petition

a. Exhaustion of domestic remedies

22. Article 46(1) of the American Convention on Human Rights provides that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the requirement "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

23. The petitioners request that the exceptions contained in Article 46(2) of the Convention be applied because the investigation that the State should have initiated *ex officio*, in order to clarify the murders that are the subject matter of the petition, as well as to prosecute and punish those responsible, has been unreasonably delayed, has not been effective, and has left these crimes completely unpunished.

24. Article 46(2), invoked by the petitioners, provides that the rules on prior exhaustion of domestic remedies and on timeliness of the petition are not applicable when:

- 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; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

25. The Honduran State invoked the objection of non-exhaustion of domestic remedies in its reply to the petition and asserted that it is not admissible in accordance with Article 46(1) of the Convention.[FN13] The petitioners, however, say that almost seven years have elapsed since the

events occurred, without the remedies available to them having been capable of identifying, prosecuting, and punishing those responsible. They also say that the trial is still at the preliminary enquiry stage, even though Article 174 of the Honduran Code of Criminal Procedures establishes a limit of 30 days for the preliminary enquiry. Based on the foregoing, they ask that the petition be found admissible in accordance with the exceptions provided at Article 46(2) of the Convention.

[FN13] Inter-Am. Ct. H.R., Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996, Series C. No. 24, para. 41.

26. The Commission has repeatedly found that it is not enough for the State to assert non-exhaustion of domestic remedies for that objection to succeed. As the Inter-American Court of Human Rights has ruled, the State invoking this objection must also identify the domestic remedies that remain to be exhausted and show their effectiveness in such circumstances, which Honduras has not done.

27. In order to provide an adequate remedy for the alleged violations, which constitute crimes against public order, it was incumbent on the State, particularly in light of its obligation to take punitive action, to institute, ex officio, proceedings to identify, prosecute, and punish all those responsible, diligently pursuing every stage of the proceedings to a conclusion. In the opinion of the Commission, the seven years elapsed between the events and the date of the instant report has been more than enough for the Honduran State to determine responsibilities, initiate proceedings, and punish those responsible in the domestic sphere.

28. The Inter-American Court and the IACHR have repeatedly found that the general rule of prior exhaustion of domestic remedies recognizes the right of the State “to resolve the problem under its internal law before being confronted with an international proceeding,”[FN14] in this case, in the international jurisdiction of human rights, which “reinforces or complements” the domestic jurisdiction.[FN15] This general rule not only recognizes the above-cited right of the State, but imposes on it the duty to provide the persons under its jurisdiction with remedies that are suitable to address the infringement of a legal right and capable of producing the result for which they were designed. If the remedies offered by the State do not meet these requirements it is fitting to apply the exceptions contained in Article 46(2) of the Convention, which have been established with the aim of guaranteeing international action when remedies under domestic law and the domestic judicial system are not expeditious and capable of ensuring respect for the human rights of victims.

[FN14] Inter-Am. Ct. H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C., No. 4, para. 61.

[FN15] Inter-Am. Ct. H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C., No. 4, para. 61.

29. The Commission finds that in this case the domestic remedies have not been capable of redressing the infringement of a legal right, for which reason the exception provided in Article 46(2) (a) of the Convention applies. Also applicable is the exception established in section (c) of the same provision because there has been an unwarranted delay in rendering a decision under the domestic remedies, which eliminates any reasonable possibility of obtaining the remedy or result for which they were designed. This unwarranted delay of justice is incompatible with the obligation of the State to place suitable and effective remedies at the disposal of the persons under its jurisdiction.

30. In this context, the Commission reiterates that the rule of exhaustion of domestic remedies should not be understood to require mechanical attempts at formal procedures, and that if there is unwarranted delay in the proceedings under domestic remedies, it may be deduced that those remedies lack the possibility of producing the remedy or result for which they were designed. Accordingly, the right of the State to allege that a petition is not admissible due to non-exhaustion of remedies under domestic law cannot be grounds to halt or delay indefinitely an international action in support of the defenseless victim. Indeed, the lawmaker sought to prevent such a situation by establishing the exceptions to this rule contained in Article 46(2) of the Convention, the result of which is to remove the need to meet that requirement.

31. The Commission finds that, as a general rule, a criminal investigation should be carried out promptly to protect the interests of the victims and to preserve evidence, and that, in this case, the time elapsed without an effective investigation, prosecution, and punishment of all those responsible, constitutes unwarranted delay and is an indication of the scant probability of the effectiveness of this remedy, since:

A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective as when there is an unjustified delay in the decision.[FN16]

[FN16] Inter-Am. Ct. H.R., Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87 of October 6, 1987, (Ser. A) No. 9 (1987) para. 24.

32. The Commission considers it important to clarify that the exceptions to the rule of exhaustion of domestic remedies are closely associated with examination of the existence of possible violations of certain rights enshrined in the Convention, such as the right to a fair trial (Article 8) and the right to judicial protection (Article 25). However, Article 46(2), which establishes three exceptions to that general rule, by its nature and purpose, is a self-contained provision vis á vis the substantive provisions contained in the Convention and, therefore, depends on a different standard of appreciation to that used to establish whether or not there has been a violation of the substantive rights set down in Articles 8 and 25 of that international instrument. Therefore, the Commission resolves in this report the applicability of the aforesaid exceptions as a matter for a special decision rendered in advance. The reasons why domestic remedies were not exhausted and the legal effect of their non-exhaustion will be examined when

the Commission studies the merits of the case in order to determine whether or not Articles 8 and 25 have been violated.[FN17]

[FN17] See IACHR, Report 54/01, Case 12.250, Massacre of Mapiripán, Colombia, para. 38; and IACHR, Juan Humberto Sánchez- Honduras, Report 65/01, Case 11.073, March 6, 2001, para. 51.

33. In light of the foregoing, the Commission finds that the domestic remedies have been ineffective, which has led to denial and unwarranted delay of justice. Consequently the Commission concludes that the petition sub judice is admissible by reason of the exceptions provided at Article 42(2)(a) and (c) of the American Convention and exempts the petitioners from exhaustion of the remedies under domestic law.

b. Timeliness of the petition

34. Since the instant petition is covered by the exceptions provided in Article 46(2)(c) of the Convention, the IACHR concludes that the requirements contained in Article 46(1)(b) of same are not applicable.

c. Duplication of proceedings and res judicata

35. The record in the instant case contains no information whatever that might lead to the conclusion that this matter might be pending in another international proceeding for settlement, or that it has been previously decided by the Inter-American Commission. Accordingly, the IACHR concludes that the exceptions provided in Article 46(1)(d) and in Article 47(d) of the American Convention do not apply.

d. Nature of the alleged violations

36. The IACHR finds that the alleged violations, if proven, could establish violations of the rights recognized in Articles 4, 5, 7, 8, 19, and 25 of the American Convention.

V. CONCLUSIONS

37. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible in accordance with Article 46(2)(a) and (b) of the American Convention. Based on the factual and legal arguments given above and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible as regards the alleged violations of rights protected in Articles 4, 5, 7, 8, 19, and 25 of the American Convention.
2. To notify the parties of this decision.
3. To continue with its analysis of the merits of the case; and
4. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

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