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Title/Style of Cause: Alfredo Diaz Bustos v. Bolivia
Doc. Type: Decision
Decided by: First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Paulo Sergio Pinheiro, Florentin Melendez.
Commissioner Evelio Fernandez Arevalos and Commissioner Freddy Gutierrez dissented from the decision of the majority.
Dated: 13 October 2004
Citation: Bustos v. Bolivia, Petition 14/04, Inter-Am. C.H.R., Report No. 52/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANT: the Ombudsman of the Republic of Bolivia
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I. SUMMARY

1. On January 8, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by the Ombudsman of the Republic of Bolivia (hereinafter “the petitioner”) in which he alleges that the State of Bolivia (hereinafter “the State” or “the Bolivian State”) violated Articles 1(1), 2, 12, 24 and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) to the detriment of Alfredo Diaz Bustos.

2. The petitioner alleges that Mr. Alfredo Díaz Bustos is a Jehovah’s Witness whose right to conscientious objection the State violated, thereby directly violating the alleged victim’s freedom of conscience and religion and failing to comply with its obligation to respect and ensure the rights protected under the American Convention, to which the Bolivian State is party. The petitioner also alleges that the Bolivian State violated his client’s right to equal protection of the law. The petitioner contends that Mr. Bustos is the victim of discrimination because he is a Jehovah’s Witness, as the Bolivian National Defense Service Act institutionalizes inequality between Catholics and followers of other faiths: exemption from military service is possible for Catholics, whereas it is not for others. Finally, the petitioner alleges that the Bolivian State has violated the alleged victim’s right to judicial protection: in a ruling not subject to challenge, the Constitutional Court held that the right to conscientious objection to compulsory military service was not within the purview of the courts. In other words, conscientious objectors whose right to freedom of conscience and religion has been violated cannot look to the courts for protection.

3. The State, for its part, presented its arguments on September 2, 2004. The State did not raise an objection challenging the question of whether the admissibility requirements had been met, but it did contend that no Article of the American Convention had been violated.

4. After examining the parties' positions in the light of the admissibility requirements set forth in Articles 46 and 47 of the American Convention and Article 30 of the Commission's Rules of Procedure, the IACHR decided to declare this case admissible in that it concerns potential violations of Articles 1(1), 2, 12, 13.1, 22, 23, 24 and 25 of the American Convention. It also decided to notify the parties, make this decision public, and include it in its Annual Report.

II. PROCESSING WITH THE COMMISSION

5. The original petition was received at the Commission on January 8, 2004, and forwarded to the Government on February 12, 2004. The Bolivian Government was given a two-month period in which to submit information. The State presented its arguments on September 2, 2004, which were forwarded to the petitioners on September 10, 2004. On April 26, 2004, the Commission sent a communication to the State, forwarding to it additional information received from the petitioner and repeating the request for information. It gave the State 30 days to send its observations.

III. THE PARTIES' POSITIONS

A. The petitioner's position

1. The facts

6. The petitioner contends that on February 29, 2000, the alleged victim, Bolivian citizen Alfredo Díaz Bustos, was called up for military service. Mr. Díaz Bustos went to recruitment center XII-A where he explained that for reasons of religion and conscience, he could not perform military service. The petitioner states that because military regulations do not make provision for conscientious objection as grounds for exemption, the military service officials gave the alleged victim a Military Service Extension Certificate, which classified the alleged victim as Class "A" Auxiliary Service Personnel, a category reserved for "those recruits who have some partial or minor handicap and weak constitution, but are able to perform duties commensurate with their condition." [FN1]

[FN1] Regulations MD-DGTR-152 on Military Health for Recruitment, Article 1(g). The petitioner states that in order to classify Alfredo Díaz Bustos as Class "A" Auxiliary Personnel, military officials used the scar on the victim's right forearm as the basis for invoking Article 57(h) of the Regulations on Military Health for Recruitment, which states the following: [Those with] dislocation in upper limb joints, varus elbow, shall be exempt from military service."

7. On October 8, 2002, Mr. Díaz Bustos went to the Ministry of National Defense. There, in the General Territorial Office, he made his case for conscientious-objector status based on Article 12 of the American Convention on Human Rights.[FN2] The petitioner states that the authorities' response was that Article 12 of the American Convention did not apply to military service, so that no solution could be found to the alleged victim's situation. On October 9, 2002, the alleged victim wrote to the Minister of National Defense, recounting the facts of his case and requesting that his Class "A" Auxiliary Service Personnel classification be changed and that he not be charged the military tax required of persons declared exempt from military service under Article 77 of the National Defense Service Act. The argument that the alleged victim used to make his case that he should not be charged that tax was that his beliefs –which do not permit him to receive military instruction- also forbid him to make financial contributions to institutions of that nature. On November 12, 2002, the alleged victim received a reply to his letter in which he was told that his request was denied based on Article 8(a) and (f) of Bolivia's Constitution.[FN3] Other arguments for denying his request cited Article 22 of the National Defense Service Act, which provides that military service is compulsory for all Bolivian males between the ages of 18 and 45, except in cases of proven disability, and Article 77 of that same law, which requires payment of a one-time military tax, stipulating that those who violate the law in question shall be subject to a fine and arrest, under Article 79.

[FN2] The petition mentions IACHR admissibility report No. 45/0[2][1], ADMISSIBILITY, PETITION 12,219, CRISTIÁN DANIEL SALÍ VERA ET AL., CHILE, October 9, 2002. Published in the 2002 Annual Report.

[FN3] Subparagraphs (a) and (f) of Article 8 of the Constitution of Bolivia read as follows:

Article 8: Every person has the following basic duties:

a) To honor and obey the Constitution and laws of the Republic;

...

f) To render the civil and military services that the Nation requires for its development, defense and preservation;

...

8. On January 16, 2003, the alleged victim turned to the Minister of National Defense to appeal the November 12, 2002 note, and requested that the decision taken be rescinded, that his conscientious-objector status be recognized and that he be provided with the military service identification, as that document was essential to exercise other political, economic, social and cultural rights. On May 20, 2003, the Minister of National Defense declared that "the challenge filed by Mr. Alfredo Díaz Bustos is out of order." In his note, the Minister wrote that

[t]he economy of our legal system is such that no law on conscientious objection has been enacted ... [f]urther, nowhere in our laws is there any provision that could be invoked, even by analogy, to give ourselves some option other than compliance with Article 213 of the Constitution. Until such time as the National Congress fills that gap in our laws, every Bolivian is required to obey that Article of the Constitution and the National Defense Service Act.

9. Once the administrative recourse had been exhausted, on September 1, 2003 the Ombudsman, as the alleged victim's representative, filed a petition with the First Social and Administrative Chamber of the La Paz District Superior Court seeking constitutional relief and accusing the Minister of Defense of violating Articles 3, 6(1) and 35 of the Constitution, Articles 1(1), 12 and 24 of the American Convention on Human Rights, and Articles 2(1), 18 and 26 of the International Covenant of Civil and Political Rights. On September 4, 2003, the First Social and Administrative Chamber of the La Paz District Superior Court dismissed the petition seeking constitutional relief. With that, the District Court automatically referred the case file and its decision to the Constitutional Court for review and a final ruling. On November 17, 2003, the Constitutional Court upheld the September 4, 2003 decision delivered by the First Social and Administrative Chamber of the La Paz District Superior Court.[FN4] Under Article 42 of Law 1836, the Constitutional Court's decision is final and not subject to appeal.[FN5]

[FN4] The Constitutional Court argued that:

it has not been institutionalized in law; in other words, no law has been enacted that makes conscientious objection grounds for exemption from compulsory military service (...) Therefore, as conscientious objection is neither established nor regulated in the State's legal system, persons of military service age cannot invoke such a right as grounds for exemption from compulsory military service; correspondingly, Armed Forces officials cannot entertain a request from persons claiming a conscientious objector exemption.

[FN5] Article 42 of the Constitutional Court Law (No. 1836 of April 1, 1998) provides that: "Decisions of the Constitutional Court are not subject to appeal."

10. The petitioner alleges that the Bolivian State took measures that violated the alleged victim's right to freedom of conscience and religion by virtue of the Constitutional Court's ruling that conscientious objection is not an exigible right because nothing in the law makes it so. The petitioner argues that as a consequence of the violation of Article 12 of the American Convention, in relation to Article 1(1) thereof, the alleged victim's right to equal protection of the law was also violated. He contends that Article 49(1) of the National Defense Service Act states that in peacetime, clergy, seminarians, religious, and novices are exempt from military service; he argues that the alleged victim has therefore been the victim of discrimination for being a Jehovah's Witness, inasmuch as he was not covered under the exemptions allowed under Article 49(1) of the National Defense Service Act.[FN6] The petitioner argues that the alleged victim is not just a faithful member of the Jehovah's Witness religious congregation, but also a Ministerial Servant and as such serves as Assistant Principal of the Theocratic Ministry School that operates in La Paz' Kingdom Hall of the Jehovah's Witnesses. The petitioner argues that the only thing that distinguishes the alleged victim from Catholic theological students is the religion they practice: the former is a Jehovah's Witness, while the latter are Catholics.[FN7]

[FN6] Article 49(i) of the National Defense Service Act lists the following among the exemptions to compulsory military service (active duty) in peacetime: "Theology students (under the Agreement concluded with the Holy See on the subject of ecclesiastical military jurisdiction, November 29, 1958), provided they do not abandon their studies or ordinations until age 27."

Article X of that Agreement on Ecclesiastical Military Jurisdiction provides that “in peacetime, clerics, seminarians, religious and novices shall be exempt from military service.” Agreement between the Holy See and the Republic of Bolivia on Ecclesiastical Military Jurisdiction and Religious Assistance of the Armed Forces.

[FN7] The petitioner states that for Jehovah’s Witnesses, ordination is theocratic; in other words, all the faithful are ministers ordained and dedicated by God at baptism. The structure of a Jehovah’s Witness congregation is as follows: the Elders, the Ministerial Servants, the regular pioneers and auxiliary pioneers. The alleged victim in this case is a Ministerial Servant.

11. The petitioner contends that the Bolivian State violated Article 25 of the American Convention (judicial protection) in relation to Article 1(1) thereof, with the ruling delivered by the Constitutional Court which states that matters of conscientious objection to compulsory military service cannot be brought to the courts for adjudication; in other words, that courts cannot exercise jurisdiction in a case asserting violation of the right to freedom of conscience and religion on the grounds of compulsory military service.

12. Finally, the petitioner argues that the fact that there are no laws that protect the alleged victim’s situation is a violation of Article 2 of the American Convention.

B. The State’s position

13. In its response, the State did not raise any objection asserting failure to comply with the rule requiring exhaustion of local remedies. As for the other requirements for this complaint’s admissibility, the State’s response contains a report of the Constitutional Court of Bolivia in which it finds that Mr. Alfredo Díaz Bustos’ rights were not violated.

14. In the Constitutional Court report, the State puts forward a number of arguments interpreting Constitutional Court ruling No. 1662/2003 of November 17, 2003. It argues that Bolivia’s Constitution does not assert, either explicitly or implicitly, the right of conscientious objection as either a basic right or constitutional law, inasmuch as conscientious objection is not in itself a autonomous right, but rather a right that flows from the rights to freedom of conscience and freedom of religion. Moreover, the State acknowledges that Bolivia’s domestic laws provide no guarantee to those persons who believe that they cannot perform compulsory military service by reason of conscientious objection. The State asserted that conscientious-objector status cannot be permitted in Bolivia without there being a “statute that defines the terms and conditions under which the right to claim conscientious-objector status may be exercised and that uses the exception to the constitutional duty” of compulsory military service to good effect by introducing alternative forms of service. This, the State argues, is a complex undertaking. The State further argues that “there is no international treaty to which Bolivia is party that requires States parties to allow conscientious objection to military service.” The State therefore considers that the complaint does not substantiate violations of Mr. Díaz Bustos’ human rights.

15. As for the petitioners’ allegation that Bolivia’s National Defense Service Act creates an inequality between Catholics and followers of other religious faiths, thereby violating Mr. Díaz Bustos’ right to equal protection of the law, the State contends that the “exemption provided

under the law in question does not constitute an application of conscientious-objector status, but rather a qualified release from compulsory military service under the Agreement between the Holy See and the Republic of Bolivia and “applicable only in peacetime and on condition that they [the beneficiaries] do not abandon their studies or postpone ordination beyond a certain age.” The State concludes that Mr. Díaz Bustos’ right to equal protection of the law was not violated since, in its understanding, Mr. Bustos’ situation is in no way analogous to that of the theology students who qualify for the exemption in question.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Preliminary observations

16. The State presented its arguments on September 2, 2004, which was six months after the deadline stipulated in Article 30 of the Commission’s Rules of Procedure. Article 30(3) of those Rules reads as follows: “The State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of this period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State.” Furthermore, the State is not filing a challenge alleging failure to fulfill the admissibility requirements, but it does believe that no Articles of the American Convention were violated.

B. Competence

1. The Commission’s competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

17. Under Article 44 of the American Convention, Bolivia’s Ombudsman is authorized to file complaints with the IACHR. The alleged victim named in the petition is a natural person whose Convention-recognized rights the Bolivian State undertook to respect and ensure. As for the State, Bolivia has been a State party to the American Convention since July 19, 1979, the date on which it deposited its instrument of ratification. The Commission is, therefore, competent *ratione personae* to examine the petition.

18. The Commission is competent *ratione loci* to take cognizance of the petition inasmuch as it alleges violations of rights protected under American Convention, said to have occurred in the territory of a State party to the Convention.

19. The Commission is competent *ratione temporis* since the obligation to respect and ensure the rights protected under the American Convention was already binding upon the State on the date the facts alleged in the petition were said to have occurred.

20. Finally, the Commission is competent *ratione materiae*, because the petition denounces violations of human rights protected by the American Convention.

2. Exhaustion of domestic remedies

21. Article 46(1)(a) of the Convention provides that admission of a petition shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted. Inasmuch as the State did not file preliminary objections claiming the failure to exhaust the remedies available within the State's internal jurisdiction, the Commission finds that in this case, the State did not claim failure to exhaust the remedies under domestic law in the early stages of the proceedings.

22. Time and time again the Inter-American Court has held that "the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."

23. The Commission therefore presumes that the State waived the objection claiming failure to exhaust the remedies under domestic law, as it did not file any such objection at the first opportunity it had in the proceedings, which would have been its reply to the petition that triggered the proceeding.

3. Timeliness of the petition

24. In the petition under examination, the IACHR has already established that the Bolivian State tacitly waived its right to file an objection claiming failure to exhaust the remedies under domestic law. Hence, the requirement stipulated in Article 46(1)(b) of the American Convention does not apply. However, the Convention requirement regarding exhaustion of domestic remedies and the one requiring that the petition be filed within six months from the date of notification of the final judgment that exhausts the remedies under domestic law, are two separate requirements.

25. The Commission observes that the original communication was received on January 8, 2004. The final decision of Bolivia's Constitutional Court, which upheld the inadmissibility of the remedy seeking constitutional relief, is dated November 17, 2003. Therefore, the petition was filed within the required time frame.

4. Duplication of proceedings and res judicata

26. Nothing in the case file indicates that the subject of this petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. The requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have therefore been met.

5. Characterization of the facts alleged

27. The State's argument to the Commission is that the facts of the complaint do not tend to establish a violation of Mr. Díaz Bustos' human rights, as there are no domestic laws that make provision for conscientious objection and no international treaty to which Bolivia is party requires recognition of conscientious objection to military service. Therefore, the State argues that Mr. Díaz Bustos' right to equal protection of the law has not been violated because the exemption provided for in the Bolivian National Defense Service Act is a qualified release from

compulsory military service under the terms of an ecclesiastical military jurisdiction agreement with the Holy See.

28. The petitioner, on the other hand, argues that Mr. Díaz Bustos is a Jehovah's Witness whose right to conscientious objection the State has violated, thereby directly violating the alleged victim's freedom of conscience and religion and failing to comply with its obligation to respect and guarantee the rights set forth in the American Convention, to which Bolivia is a State party. The petitioner further alleges that the Bolivian State's international responsibility by its violation of his client's right to equal protection of the law. He contends that Mr. Bustos is the victim of discrimination because he is a Jehovah's Witness, since the National Defense Service Act establishes an inequality between Catholics and followers of other faiths: exemption from compulsory military service is possible for Catholics, but not for those who profess other faiths. The petitioner contends that the Bolivian State has violated the alleged victim's right to judicial protection as the Constitutional Court's final ruling held that matters pertaining to the right to conscientious objection to compulsory military service cannot be brought to the courts for adjudication; in other words, that courts cannot exercise jurisdiction in a case asserting violation of the right to freedom of conscience and religion on the grounds of compulsory military service because there is no domestic law that makes provision for conscientious objector status.

29. The Commission is of the view that the question of whether or not the American Convention was violated ought not to be examined at this stage of the proceedings. For admissibility purposes, the Commission must decide whether the petition states facts that tend to establish a violation of the of the rights guaranteed by the Convention, as Article 47(b) of the American Convention stipulates, and whether the petition "is manifestly groundless or obviously out of order", as provided in Article 47(c) of the Convention.

30. The standard for evaluating these requirements is different from the standard for deciding the merits of a petition. The Commission must conduct a prima facie evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation. This examination involves a summary analysis that does not imply a prejudgment of the merits or advance any opinion with regard thereto. By establishing two separate phases -one for admissibility and the other for the merits- the Commission's own Rules of Procedure make the distinction between the examination the Commission must make to determine whether a complaint is admissible and the examination required to determine whether a violation has in fact occurred.

31. In the case of the present complaint, the Commission believes that to settle the arguments presented by the State, the merits of the complaint must be examined. The Commission does not find that the petition is either "manifestly groundless" or "obviously out of order." It therefore considers that, prima facie, the petitioner has satisfied the requirements stipulated in Article 47(b) and (c).

32. The Commission considers that the petitioner's claims alleging violation of the right to freedom of conscience and religion, the State's failure to comply with its duty to respect and ensure the rights established in the Convention, and the alleged violation of the right to equal protection of the law, could tend to establish violations of the alleged victim's rights recognized

in Articles 1(1), 2, 12, 24 and 25 of the American Convention. Additionally, according to the general principle of international law *iura novit curia* international bodies have the power and even the duty to apply all pertinent legal provisions, even if these have not been invoked by the parties[FN8]. In light of this principle, the CIDH considers that the facts invoked by the petitioner might be characterized violations of Articles 13(1), 22, 23 of the American Convention on Human Rights.

[FN8] IACHR, Report N° 38/96, Case 10.506 – Argentina, 15 of October of 1996.

V. CONCLUSIONS

33. The Commission concludes that it is competent to examine the case presented by the petitioner concerning the Bolivian State's alleged violation of the rights claimed by the petitioner.

34. Based on the arguments of fact and of law set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES

1. To declare this petition admissible in relation to the alleged violation of the rights enshrined in Articles 1(1), 2, 12, 13.1, 22, 23, 24 and 25 of the American Convention
2. To notify the State and the petitioner of this decision.
3. To begin to examine the merits of the case.
4. To publish this decision and 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 the 13 th day of October 2004. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Paulo Sergio Pinheiro and Florentín Meléndez, Commissioners. Commissioner Evelio Fernández Arévalos and Commissioner Freddy Gutiérrez dissented from the decision of the majority.