

Institution: Inter-American Commission on Human Rights
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Title/Style of Cause: Benjamin Guerra Duarte v. Nicaragua
Doc. Type: Decision
Decided by: President: Clare K. Roberts;
First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated: 9 March 2005
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I. SUMMARY

1. On March 1, 1995, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition from Mr. Benjamin Guerra Duarte (hereinafter the “petitioner”), alleging that the State of Nicaragua (hereinafter, “Nicaragua” or “the State”), violated the right to private property, enshrined in Article 21 of the American Convention on Human Rights (hereinafter, “the Convention”), to the detriment of the petitioner.

2. The petitioner alleged that Nicaragua is responsible for violating the right to private property enshrined in Article 21 of the American Convention. As regards the admissibility of the petition, the petitioner claimed that the remedies under domestic law for protection of the violated guarantees had been exhausted.

3. The State responded that Mr. Benjamin Guerra Duarte did not exhaust the adequate domestic remedies to which he is entitled in accordance with Nicaraguan legislation. It went on to acknowledge that the right to private property had been violated, but that the property of the Guerra family is not liable for restitution or return, and that only compensation to the petitioner is in order.

4. In this report, the Commission examines the information presented in accordance with the Convention and concludes that the petition does not meet the requirements for admissibility established in Article 46 of the Convention. Specifically, the Commission concludes that the petitioner has not exhausted remedies under domestic law. Consequently, in accordance with Article 47(b) of the Convention, the Commission decides to declare the petition inadmissible, to notify the parties of this decision, and to publish the report in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. The complaint, dated March 2, 1995, was received in the Secretariat of the Commission on that date. On March 6, 1995, the Commission registered the petition as Number 11,433, and transmitted the relevant parts to the State of Nicaragua, granting it a period of 90 days to submit its observations.

6. The State responded on August 24, 1995, in a letter from the Nicaraguan Mission to the Organization of American States, with which it remitted communication MRE/95/03626 dated August 23, 1995, from the acting Director General of International Organizations, which alleged that the petitioner had not exhausted the domestic legal remedies.

7. On May 13, 1996, the Executive Secretary of the Commission requested the petitioner to send information on exhaustion of the remedies under domestic law and the decisions of the Office of the Attorney General for Property. The Commission held two meetings with the State regarding the matter. The first one took place during its 93rd Session in September 1996, and the second one was held on October 8, 1997, in the course of its 97th session. As agreed at the October 8, 1997 hearing, the Commission, on October 28, 1997, sent the State a list of cases involving property complaints received by it.

8. On March 27, 1998, the State sent a list of property cases reported to the Commission, including the case of Mr. Guerra Duarte. It indicated that the Office for Compensation Assessment [Oficina de Cuantificación de Indemnizaciones] (OCI) issued Resolution N° 398-02-97 on June 30, 1997, but that notification had not been given because the petitioner had not appeared in person at the OCI. The pertinent parts were sent to the petitioner on April 9, 1998.

9. On April 30, 1998, the Commission received a letter from the State in which it stated that the property in question had been appraised and that the case had been submitted to the Board of Directors, which decided to pay compensation in the amount of 825,588.96 cordobas, minus the debt still pending which the petitioner had with the National Financial System.

10. On May 12, 1998, the petitioner informed the Secretariat that he had responded to the OCI resolution and sent a copy of the correspondence in which he endeavored to show his efforts to exhaust domestic remedies in Nicaragua to resolve his case and requested a date for a hearing. The petitioner disagreed on the amounts authorized, claiming that they were neither accurate nor sufficient. He added that the incident had caused him to lose not only the rent for the house that he could have collected from the date of the appropriation, but also the furniture located on the property.

11. With regard to the rent of 203 months (May 1982 to April 1998), which he stopped collecting when the property was appropriated, the State noted that, in accordance with the Article 31, paragraph b of Law 278, "Law on Reformed Urban and Agrarian Property," if it should be impossible to return the property, the State shall provide compensation in the form of indemnity payment bonds. In no case may damages and losses, lost profits, or physical damage

to personal property be indemnified. Consequently, the State is not authorized to include the value of the rent that was not collected.

12. On May 18, 1998, the Commission received a response from the petitioner of the same date, in which the petitioner advised the Commission of the administrative measures he had been taking in favor of his request. On June 2, 1998, the Commission sent that information to the State.

13. On October 7, 1998, a hearing was convened by the Commission, which was attended by the representatives of the State and the petitioner. At that hearing, the Commission proposed that procedures for a friendly settlement be initiated, but this was not accepted by the petitioner. The State representatives indicated that Mr. Guerra Duarte had actively participated in the compensation process, proposing a new updated real estate value for his property. The State indicated that the petitioner had not sought recourse with the Nicaraguan courts of justice.

14. On December 11, 1998, the complainant requested the Commission to initiate procedures for a friendly settlement, in accordance with the provisions of the Convention. This request was repeated on October 29, 1999.

15. On April 6, 2000, another hearing was held in the office of the Commission's Executive Secretariat, with the complainant and the Ambassador and Permanent Representative of Nicaragua to the OAS, in which the petitioner set out his conditions for settlement of the complaint. The State responded in its reports dated April 14 and May 5, 2000, reiterating its position on failure to exhaust domestic remedies. In a final attempt to settle the complaint by friendly means, on January 5, 2001, the petitioner sent a communication to the Commission's Executive Secretariat giving a final position on the conditions to which he would agree in order to settle the dispute. The State's response on March 9, 2001 rejected the petitioner's offer and insisted on the petitioner's failure to exhaust domestic remedies. The State's response was transmitted to the petitioners on March 15, 2001, requesting that any new or supplementary information be sent within 30 days; the petitioner presented no further information.

16. On August 11, 2000, the petitioner presented his final observations, to which the State made a final response on March 9, 2001 (*supra*). In its various responses, the State has reiterated its request that the Commission find the petition inadmissible, because of failure to exhaust domestic remedies. Throughout the process, the petitioner has requested that the case be referred to the Inter-American Court of Human Rights.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

17. Mr. Benjamin Guerra Duarte alleges that on July 27, 1979, he was detained by the Nicaraguan Government in power at the time, without charges or legal procedures. He was held incommunicado for seven months, without ever being charged with a crime and in extremely deficient conditions. After eight months he was released in a seriously weakened physical and

psychological state. A few days after being freed, he had an accident and had to leave the country for medical treatment.

18. Mr. Guerra rented his only real property to Maria Bedoya Cárdenas, a Peruvian national, in order to obtain a minimum income to enable him to cover his medical expenses. On April 7, 1981, Mrs. Bedoya signed a lease, through a relative of the owners of the appropriated property by the name of Esther Morales. The petitioner only managed to collect one month's rent (equivalent to 3,000.00 cordobas), because the tenant became the beneficiary of the procedure for appropriation of the property of Benjamin Guerra Duarte on May 16, 1981, by application of the confiscatory legislation (Decrees N°s 3 and 38) adopted by the State. Mrs. Maria Bedoya notified the wife of the petitioner that said property had been assigned to CONIBIR. In view of this situation, they approached the Ministry of Justice to declare "abuse of a foreigner." Subsequently, further procedures were pursued through Dr. Roger Guevara Mena, an attorney, to recover the seized property. While these procedures were taking place, they found out that the property had been sold to Maria Bedoya, under the protection of Law 85 of March 31, 1990.

19. The petitioner further states that on being deprived of his property, as has been acknowledged by the State itself, and in view of the unsuccessful measures pursued, he presented the petition to the Inter-American Commission on Human Rights, on the basis of Article 21(2) of the Convention. In August 1990, he filed another appeal with Dr. Dulio Baltodano, Attorney General of the Republic, requesting restitution of the property (case file N° 1899).

20. Later on, the same property appears to have been sold to Mirna Fernández García (a domestic employee of Mrs. Bedoya Cárdenas). This transaction annulled the earlier sale to Maria Bedoya Cárdenas. The relationship between Mrs. Fernández and Mrs. Bedoya was established when the Office of the Attorney General drew up a certificate of inspection of the house in question. Following that, another contract of sale was concluded whereby Mirna Fernandez García transferred said property to Maria Bedoya Cárdenas, thereby demonstrating that Mrs. Bedoya is the party interested in acquiring the property and the bad intentions she had from the outset, when she went to CONIBIR to request the property.

21. Finally, on July 24, 1992, the wife of Mr. Benjamin Guerra submitted his complaint to the Land Planning Department, but did not receive a positive response.

22. In response to the State's allegation regarding exhaustion of domestic remedies, the petitioner notes that all judicial proceedings for violations of property rights have been suspended in Nicaragua since February 16, 1997. Consequently, the petitioner contends that the exception of Article 46(2)(b) is fully applicable, because the State, through its legislation, has prevented the injured party from using domestic remedies, and, as a result, "pursuit of those remedies has become a meaningless exercise."

23. According to the petitioner, it has now been more than twenty years that the petitioner has not been able to recover his property, and the persons who acquired it illegally have benefited from the usufruct and the rent that they are now collecting, since the property is currently rented to an Italian NGO. The petitioner contends that the State never complied with the obligation established in Article 21(2) of the Convention to pay just compensation. The

petitioner alleges that the State of Nicaragua is internationally liable for violation of the following articles of the Convention: 1(1), Obligation of respect and guarantee; 2, Duty to adopt domestic legislative measures; 5, Right to humane treatment; 7, Right to personal liberty; 8(1), Right to judicial guarantees; 21, Right to private property; 24, Right to equality before the law; and 25, Right to due judicial protection, all to the detriment of Benjamin Guerra Duarte and his next of kin.

B. Position of the State

24. During the Administration that came into power after the Sandinista revolution, the property of Mr. Benjamin Guerra Duarte was appropriated, by application of Confiscatory Decrees No. 38 y No. 282. With this measure, the State assumed ownership and authority to dispose of the property, which it assigned to the Nicaraguan Housing Bank (Banco de la Vivienda de Nicaragua "BAVINIC"), an autonomous entity of the commercial domain of the State.

25. The State indicated that the referenced property was placed under the ownership and disposition of the State, which assigned it to the Nicaraguan Housing Bank (BAVINIC), an autonomous entity of the commercial domain of the State which finances and sells housing in the country, among other functions.

26. It was in these circumstances that a person by the name of Mirna Fernández García signed a purchase contract with BAVINIC, thereby acquiring pure and simple ownership of the property in question, which she then sold to Maria Bedoya Cárdenas, the present owner.

27. In 1990, without prejudice to the value and effect of common law, a legal framework was created, together with certain transformations and corresponding regulations in the matter of property, including the following Executive Decrees: No. 11-90 Decree Law for Review of Appropriations; No. 35-92, Creation and operation of the Land Planning Office; No. 46-92, Reform of the Organic Law of the Office of the Attorney General; No. 51-92, creation of the Office for Compensation Assessment. All of this legislation, according to the State, was established with a view to offering an expeditious settlement to the immense number of persons who had suffered property losses. The settlement was to be part of a strictly administrative procedure designed to reconstitute what had been unjustly infringed or to concede, as appropriate, the value of the appropriated property to its former owners, if it were not possible to return it.

28. The State notes that the petitioner filed a claim for his property in August 1990, thereby bringing his case before the administrative jurisdiction. It was identified as case No. 1189, and the referenced claim was processed in accordance with the provisions of Decree 11-90 and its amendments. A decision was rendered by the National Committee for Review of Appropriations in Resolution No. 0828-93 of October 4, 1993, in which compensation was determined for the claimant, since restitution of the property was impossible.

29. The Office for Compensation Assessment in Report No. 0311, evaluated the claim presented by the petitioners in 1997. The structures and land were valued at C\$ 825,588.96, minus the amount of C\$ 54,304.19 for debts owed to the Real Estate Bank, resulting in a total of

C\$ 771,300.00 to be paid. The indemnification was never paid because prior to receiving the payment the petitioner was required to present the following documents to the OCI:

1. Title deed or certificate from the real estate registry in lieu thereof
2. Proof of no encumbrance on property
3. Bank certifications from BANIC and BND Casa Matriz regarding balance pending at the moment of the confiscation.

The OCI report indicated that they did not have the petitioner's address and consequently had not been able to notify him of this determination.

30. The State, in its response dated March 25, 1998, provided information regarding complaints filed by 19 persons with the OCI regarding confiscated property. The 19 individuals are mentioned by name, including Mr. Guerra, and most of the individuals received indemnification, a few failed to file a claim, some disputed the amount of assessment, and as regards Mr. Guerra it is stated:

This case's Acta Resolutiva [Record of Decision] No. 398-02-97, of June 30, 1997, has not been notified because the claimant has not appeared before the OCI.

31. In April 2000, the State notes that the petitioner demanded compensation of US\$160,000.00, and in his allegation dated August 11 of that same year, the amount went up to US\$484,000.00. The State notes that in April 2000, the petitioner voiced his intention to accept compensation only in cash and in dollars.

32. The State reported that the compensation was only payable through the bonds and on the basis of the current unitary property values, after deducting liabilities existing at the time of appropriation, and with the value maintained in relation to the US dollar, as established by the law.

33. According to the State, on January 5, 2001, the petitioner communicated to the Commission his desire to settle the dispute and his willingness to accept compensation in the amount of US \$100,000.00 in cash and \$60,000.00 in government bonds.

34. In a communication dated January 25, 2001, the Property Management Office indicated that the property was valued at 909,600.00 cordobas, pursuant to Resolution N° 642-03-99 of October 11, 1999, which had not been notified as of that date.

35. With regard to the arguments of Mr. Guerra, the State informed the Commission that if it were to accept the petitioner's proposal, it would be in violation of the law and Article 183 of the Constitution, and so it would have to be rejected.

36. The State underscores that it has not violated the petitioner's rights, since he was free to choose compensation or application of the common law, if he wanted to bring action in the courts. According to the State, Article 876 in fine of the Civil Code stipulates: "The right to claim appropriated property is not subject to prescription." According to the State, the petitioner

did not expressly choose either of these options, but decided instead to petition the Commission, which is obliged to consider the petition inadmissible in accordance with Article 37 of its Rules of Procedure.

37. Finally, the State recommends to the petitioner that he avail himself of his rights in the appropriate manner and place, and exhaust the remedies available under Nicaraguan legislation.

IV. ANALYSIS ON ADMISSIBILITY

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

38. The petitioner is authorized by Article 44 of the American Convention to lodge complaints with the IACHR. The petition states that the alleged victim is an individual person in respect of whom Nicaragua undertook to respect and guarantee the rights enshrined in the American Convention.

39. As regards the State, the Commission notes that Nicaragua has been a state party to the Convention since September 25, 1979, the date on which it deposited the relevant instrument of ratification. Therefore, the Commission has jurisdiction in *personam* to examine the petition.

40. The Commission has jurisdiction *ratione loci* to consider the petition, because it alleges that violations of the rights protected by the American Convention took place within the territory of a state party to that instrument.

41. The Commission has jurisdiction *ratione temporis*, since the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date on which the property in question was appropriated by the State [May 16, 1981].

42. Finally, the Commission has subject matter jurisdiction, because the petition reports violations of human rights protected by the American Convention.

B. Other Admissibility Requirements

1. Exhaustion of domestic remedies

43. Article 46(1) of the Convention establishes as a requirement for admissibility of a petition the prior exhaustion of the remedies available under the domestic law of the State. The State of Nicaragua argued that domestic remedies have not been exhausted, while the petitioner has contended on repeated occasions that the domestic remedies to recover the property which was illegally appropriated by the Nicaraguan State proved to be ineffective and illusory. The Commission reiterates that the rule of prior exhaustion of domestic remedies allows the State to resolve a problem according to its domestic law before becoming implicated in an international proceeding.

44. The Commission noted the fact that the instant case was referred to the Office of the Attorney General on August 12, 1990. Later, the National Committee for Review of Appropriations issued Resolution N° 0828-93 on October 4, 1993, which provided for compensation for the petitioner, since it was no longer feasible to return the property because it had been transferred to private parties. Subsequently, in accordance with Decree N° 51-92, the Office for Compensation Assessment decided, by Resolution N° 398-02-97 dated June 30, 1997, to pay compensation in the amount of 825,588.96 córdobas, an amount that was not acceptable to the petitioner. The debt held with the Real Estate Bank was deducted from that amount, which left a net payment of compensation of 771,300.00 córdobas.

45. At the hearing convened by the Commission on October 7, 1998, the petitioner stated that he had contacted the OCI, by a letter dated April 16, 1998, requesting that the value assigned to the property be reviewed and further requesting payment of the amount he had foregone as rent and payment for the furniture and furnishings of the house. The OCI responded on 21 April, 1998, to the effect that Nicaraguan law prohibited payment of lost profits and physical damages on personal property for economic reasons, and the petitioner replied to that communication on May 1, 1998. It is noted that the petitioner had an ongoing communication with the government authorities to resolve this petition, and this situation was corroborated by the State representatives at said hearing.

46. It is appropriate to note that the petitioner did not agree to initiate friendly settlement procedures as proposed by the Commission at that hearing. Nor did he agree to the proposal of the State's representatives to pay US\$81,000, on the basis of the current property value.

47. Moreover, the Commission takes into account the information sent by the State on March 27, 1998, pertaining to other property cases in which the OCI has been involved, where the applicable administrative procedure for contesting the OCI resolution is indicated, providing for appeals for review by the OCI under Decree 51-92, and later on appeals for review by the Ministry of Finance. For these purposes, a period of ten days is allowed to file both appeals. Moreover, as an alternative to administrative appeals, claimants may make use of arbitration procedures. It is therefore clear that the petitioner has other administrative and judicial remedies available to protect his rights.

48. From reading the case records at the Secretariat and the reports of the State representatives, it is apparent that the petitioner has not pursued the administrative or judicial remedies provided under domestic law to recover his property right to the property claimed, in the event he should not be satisfied with the decision made by the administrative authority.

49. The State, in its final response, dated March 9, 2001, reiterated its argument that the petitioner had not exhausted domestic remedies; emphasizing that if the petitioner had exhausted his administrative remedies and sought to contest them, then he could have pursued subsequent judicial remedies, pursuant to Law 278 of December 12, 1997 "Law on Urban and Agrarian reformed property", published in the Official Gazette, N° 239 on December 16, 1997 and the Rules on Arbitration, published in the Official Gazette N° 114, on June 16, 2000, which establishes the possibility of impugning an administrative decision by judicial means in those cases where the petitioner is not satisfied with the results of the administrative decision.

50. According to the State, the aforementioned law regulates the exercise of any recourse on the part of the prior owners to claim the restitution of the property or the payment of appropriate compensation. It establishes the arbitral procedure to follow in the event that prior owners, having appealed before the National Commission for the Review of Confiscations, obtain an unfavorable decision or that, having obtained a favorable decision, have not agreed to the amount provided for compensation.

51. The State explained that the Arbitral Courts are distributed across the country, in the Departments of Managua, León and Matagalpa, each with its own geographical jurisdiction. The Arbitral Courts have been working since May 18, 2000, when they began to hear cases. A judgment made by an Arbitral Court may be appealed before the Property Chamber of the Court of Appeals. The latter judgment shall be final and no appeal for nullification by the Supreme Court is permitted.

52. The State attached to its March 9, 2001 reply, the following Decrees and Laws to support its contentions: Decree No. 51-92, "Establishment of the Office for Compensation Assessment", published in the Official Gazette No. 17, September 30, 1992; Decree No. 56-92, "System for Compensation", published in the Official Gazette No. 198, October 16, 1992; Law No. 180, "Special Law on Increasing the Value of Compensation Payment Bonds", published in the Official Gazette No. 141 of July 28, 1994; Ministerial Decision No. 21-98 of the Ministry of Finance, "Establishment of a Compensation Payment Bond", published in the Official Gazette, June 9, 1998; Law No. 278, "Reformed Law on Urban and Agrarian Property", published in the Official Gazette No. 329 of December 16, 1997; and "Rules of Procedure for Arbitration", published in the Official Gazette No. 114, on June 16, 2000.

53. These Decrees and Laws provide a detailed procedure for resolving claims such as the instant one. Decree No. 51-92 provides that the Office of Compensation Assessment shall have as its "primary objective the valuation and assessment of the property claimed by individual citizens before the Office of the Attorney General (...) when the restitution of the property is not possible." "The OCI shall determine in each case the value of the properties affected, as well as the assessment of the obligations which the claimant may have pending with the State, its Institutions and the banks (...)." The decisions of the OCI are administrative; a final decision by OCI shall serve the interested party as the basis to appear before the General Treasury to be compensated. Should the interested party not agree with the decision, he may, within ten days, lodge an appeal for reversal before the OCI and an appeal for review before the Minister of Finance. The Minister shall have 30 days to decide.

54. Pursuant to this Decree, alternatively to the administrative recourse through the OCI, the claimant may resort to an arbitration procedure within 30 days of the OCI's notification. The use of the arbitral procedure entails the waiver of any other available judicial recourse. The arbitral procedure, in compliance with the proceedings provided for by the Code of Civil Procedure, shall serve to settle the dispute on the amount of the compensation.

55. The facts indicate that the petitioner ceased to participate in the search for a domestic remedy because the State refused to grant him compensation in the amount he considered

appropriate. The petitioner did not respond to the State's observations regarding the domestic remedies at his disposal, nor did he explain why he did not agree to submit to arbitration to decide the amount of compensation. The claims of the petitioner, which fluctuated from US\$160,000.00 to US\$484,000.00 during negotiations that took place in 2000 and 2001, were rejected by the State and, instead of accepting the services of a mediator or a court of arbitration, the petitioner decided to end domestic proceedings, with the hope of obtaining a more generous decision at the international level.

56. It is the opinion of the Commission that Mr. Benjamín Guerra Duarte has not duly exhausted domestic remedies. Mr. Guerra Duarte was awarded an indemnity, with which he did not agree, and that further administrative recourse was available, as was a judicial recourse, to vindicate his property right. Therefore, it is the opinion of the Commission that the petitioner did not exhaust available domestic remedies, and the petition must be declared inadmissible in this respect, due to the lack of exhaustion of domestic remedies.

V. CONCLUSION

57. In examining this petition, the Commission concludes that it has jurisdiction to take cognizance of it, but that the petitioner failed to exhaust domestic remedies, as stipulated in Article 46(1) of the Convention, and that therefore the petition must be found to be inadmissible, in accordance with Article 47(a) of the Convention.

58. On the grounds of the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible;
2. To notify the parties of this decision;
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed by the Inter-American Commission on Human Rights on March 9, 2005.
(Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners: Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez.