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File Number(s):	Report No. 71/05; Petition 543/04
Session:	Hundred Twenty-Third Regular Session (11 – 28 October 2005)
Title/Style of Cause:	Ever de Jesus Montero Mindiola v. Colombia
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:	13 October 2005
Citation:	Montero Mindiola v. Colombia, Petition 543/04, Inter-Am. C.H.R., Report No. 71/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: "Jose Alvear Restrepo" Legal Aid Corporation
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## I. SUMMARY

1. On June 14, 2004, the Inter-American Commission on Human Rights (hereinafter the "Commission," the "Inter-American Commission" or the "IACHR") received a petition from the "José Alvear Restrepo" Legal Aid Corporation ["Corporación Colectiva de Abogados José Alvear Restrepo"] (hereinafter the "applicants") alleging the responsibility of agents of the Republic of Colombia (hereinafter "the State" or "the Colombian State") in the death of Ever de Jesús Montero Mindiola, a member of the Kankuamo indigenous people inhabiting the Sierra Nevada de Santa Marta.

2. The applicants allege that the State is responsible for violation of the right to life, judicial guarantees and judicial protection prescribed in Articles 4, 8 and 25 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in the case of Ever de Jesús Montero Mindiola, in conjunction with the violation of its guarantee obligation under article 1(1) of the Convention. The State filed no comments in response to the requests for information made by the Commission on the matter of admissibility of this petition.

3. Based on the available facts and legal grounds, the Commission examined the petition's compliance with the formal admissibility requirements of Articles 46 and 47 of the American Convention. It concluded that the application was admissible and that the Commission's decision should be made public.

## II. PROCEDURE BEFORE THE COMMISSION

4. On July 27, 2004, the IACHR began hearing this petition under the number 543/04 and conveyed to the State the relevant portions of the application, giving it two months to file comments and information on the events. On September 29, 2004, the State requested an extension of 30 days "to file an answer in case P-543-04, Ever de Jesús Montero Mindiola." On October 8, 2004, the Commission advised the parties that the extension had been granted.

5. On November 9, 2004, the State requested another 30-day extension. That same day the Commission advised the parties that, in line with Article 30(3) of its Rules, which provides that the Executive Secretary "shall not grant extensions that exceed three months from the date of the first request for information sent to the State," the requested extension could not be granted. To this day the State has not filed the comments requested by the Commission on July 27, 2005.

### III. POSITION OF THE PARTIES

#### A. Position of the petitioners

6. The petitioners allege that on August 29, 2003, the Kankuamo native Ever de Jesús Montero Mindiola was taken off a bus he had boarded in the city of Valledupar by three unknown men. That same day, the petitioners indicate, his body was found with his face mutilated and his body dressed in camouflage clothing. They point out that the national army announced to the media that he was a member of the National Liberation Army (hereinafter the "ELN," for its Spanish acronym), a casualty of combat with the Colombian United Self-Defense Units (hereinafter the "AUC," for its Spanish acronym).

7. As for the criminal investigation of the death of Mr. Montero Mindiola, the petitioners contend that it was conducted by the 14th Sectional Prosecuting Office of Valledupar, presumably to look into the possible responsibility of government security personnel. The petitioners say that the 90th Military Criminal Lower Court of Valledupar reported that the proceedings were in the investigative stage.

8. They point out that, within the framework of measures taken by the IACHR to protect the indigenous Kankuamo people on September 24, 2003,[FN1] the National Prosecuting Unit for Human Rights of the Attorney General's Office undertook to open ten investigations into crimes perpetrated against members of the Kankuamo ethnic group, including the death of Mr. Montero Mindiola. They allege, however, that the 90th Military Criminal Lower Court of Valledupar refused to transfer the case to the regular courts and, as a result, the investigation is still pending in the military jurisdiction.

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[FN1] On September 24, 2003, the Commission issued protective measures in favor of the indigenous Kankuamo people living in the Sierra Nevada de Santa Marta. The available information indicates that 44 Kankuamo natives were murdered in the first half of 2003. On August 11, 2003, Andrés Ariza Mendiola was murdered by the AUC during a paramilitary incursion into his rural property; on August 18, 2003, Alcides Arias Maestre and Robinson Villazón were murdered by the AUC in a military incursion into the Los Haticos area ["corregimiento"]; and on August 29, 2003, the lifeless body of Ever de Jesús Montero was

found, his face disfigured, the body dressed in camouflage clothing, and was presented to the media as a member of the National Liberation Army, a casualty of combat with Colombian United Self-Defense units (AUC). In addition, displacement of the indigenous population took place as a result of constant acts of violence against the community. In view of this situation, the IACHR asked the Colombian State: to take the necessary measures to preserve the life and safety of the Kankuamo people, respecting their cultural identity and protecting their special relationship to their land; to provide emergency care for the victims of forced displacement; and to take the necessary steps to investigate through the judiciary the acts of violence and threats against the community. On October 30, 2003, the IACHR issued a press release in which it voiced its grave concern over the situation of the Kankuamo people. The Commission has continued to receive information about the situation of persons under protection. See the 2003 IACHR Annual Report, Chapter III, para. 27. In view of the continued acts of violence against members of the indigenous Kankuamo people, the IACHR forwarded the matter to the Inter-American Court under Article 63 (2) of the American Convention, and on July 5, 2004, the Court ordered provisional measures to protect the Kankuamo.

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9. As to the admissibility of the petition, the applicants argue for applying to the failure to exhaust domestic remedies the exception provided by Article 46 (2) (b) of the American Convention. In their view, the military court assigned to investigate the events is not an appropriate forum for investigating, prosecuting and punishing violations of human rights protected by the American Convention. They add that transferring to the military jurisdiction the case against military personnel involved in the extrajudicial execution of Mr. Montero Mindiola means that the victim's family has been denied access to an adequate remedy for investigating, prosecuting and punishing the perpetrators.

10. The applicants contend that the State is responsible for the violation of the right to life, protected by article 4(1) of the American Convention, of the Kankuamo native Ever de Jesús Montero Mindiola. They maintain as well that the State is liable for the violation of Articles 8 and 25 of the American Convention, inasmuch as the State is responsible for responding *sua sponte* by investigating, prosecuting and punishing the perpetrators and by establishing mechanisms to guarantee access to compensation. They reiterate that transferring to the military jurisdiction the case against military personnel involved in the events means that the victim's family has been deprived of its right to an adequate remedy to investigate, prosecute and punish the perpetrators.

#### B. Position of the State

11. The State filed no comments on the facts and law presented by the applicants or on their interpretation of the application of Articles 46 and 47 of the American Convention to this case.

### IV. JURISDICTION AND ADMISSIBILITY ANALYSIS

#### A. Jurisdiction

12. The applicants are, in principle, authorized under Article 44 of the American Convention to file petitions with the Commission. The petition identifies as the alleged victim a person whose rights under the American Convention the Colombian State undertook to respect and guarantee. Colombia is a State Party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. Consequently, the Commission is competent *ratione personae* to examine the petition.

13. The Commission is also competent *ratione loci* because the application alleges violations of rights protected by the American Convention that are said to have taken place within the jurisdiction of the State. The Commission is competent *ratione temporis* because the obligation to respect and guarantee rights protected by the American Convention was already in force for the State on the date the events complained of are said to have taken place. Finally, the Commission is competent *ratione materiae* because the application reports possible violations of human rights protected by the American Convention.

#### B. Admissibility requirements

##### 1. Exhaustion of internal remedies

14. A petition may be admitted under Article 46(1)(a) of the American Convention if "... the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Under the case law of the Inter-American Court, this is a mechanism that "allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights (...)"[FN2] The Court has also indicated that this rule may be expressly or implicitly waived by the State entitled to invoke it, as recognized by the Court in an earlier case.[FN3] In any event, to be timely, the argument that internal remedies have not been exhausted must be raised in the early stages of the procedure; otherwise, a tacit waiver of the argument on the part of the State may be presumed.[FN4] The Court has held that "early stages of the procedure" must be understood to mean "the admissibility stage of the procedure before the Commission, in other words, before any consideration of the merits (...)"[FN5]

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[FN2] Inter-American Court, Velásquez Rodríguez, Judgment of July 29, 1988, Series C No. 4, para. 61.

[FN3] Inter-American Court, Viviana Gallardo et al, Judgment of November 13, 1981, No. G 101/81, Series A, para. 26.

[FN4] Inter-American Court, Herrera Ulloa, Judgment of July 2, 2004, Series C No. 107, para. 81; Mayagna Community (Sumo) Awas Tigni, Preliminary Objections, Judgment of February 1, 2000, Series C No. 66, para. 53; Loayza Tamayo, Preliminary Objections, Judgment of January 31, 1996, Series C No. 25, para. 40; and Castillo Páez, Preliminary Objections, Judgment of January 30, 1996, Series C No. 24, para. 40; Velásquez Rodríguez, Judgment on Preliminary Objections, June 26, 1987, Series C No. 1, para. 88.

[FN5] Inter-American Court, Herrera Ulloa, Judgment of July 2, 2004, Series C No. 107, para. 81.

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15. In the present case the State filed no comments on the petitioners' arguments concerning the applicability of the exceptions to the rule on exhaustion of internal remedies. It is proper to conclude, therefore, that the State has tacitly waived any objection to the exhaustion of internal remedies in this case. Consequently, the Commission finds that the requirement of Article 46(1) of the American Convention has been met.

2. Deadline for lodging the petition

16. The IACHR has established the Colombian State's tacit waiver of its right to argue failure to exhaust internal remedies in this case in particular, thereby rendering inapplicable the requirement of Article 46(1)(b) of the Convention. However, the Convention's requirements on exhaustion of domestic remedies and on filing the petition within six months of notification of the judicial decision that marks the exhaustion of internal remedies under Article 46(1)(b) of the Convention, are independent. In these cases the IACHR must determine whether the petition was filed within a reasonable time.

17. The petition was filed on June 14, 2004, and the events that gave rise to it are said to have taken place on August 29, 2003. Consequently, the Commission finds that the petition was filed within a reasonable time and this admissibility requirement must consequently be regarded as having been met.

3. Duplication of procedures and international *res iudicata*

18. The dossier on this petition does not show that the matter is under consideration in another international settlement procedure or that it duplicates a petition already examined by this or another international body. Consequently, the requirements of Article 46(1)(c) and 47(d) of the American Convention have been met.

4. Characterization of the alleged facts

19. The Commission takes the view that the applicants' allegations of violation of the right to life, judicial guarantees and effective judicial protection may embody a violation of the rights guaranteed by Articles 4, 8 and 25, in conjunction with article 1(1), of the American Convention. Absent evidence of a lack of foundation or inadmissibility of the complaint, the Commission finds that the requirements of Articles 47(b) and (c) of the Convention have been met.

V. CONCLUSIONS

20. The Commission concludes that it is competent to examine the applicants' claims concerning the alleged violation of Articles 4, 8 and 25 in conjunction with 1(1) of the American Convention, and that such claims are admissible under the requirements of Articles 46 and 47 of the Convention.

21. Based on the above facts and law and without prejudging the merits,

## THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

### DECIDES:

1. To find this petition admissible under Articles 4, 8, 25 and 1(1) of the American Convention.
2. To notify this decision to the State and the petitioners.
3. To start examining the merits of the matter.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C. on October 13, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez, Commissioners.