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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 101/06; Petition 298-05
Session: Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause: Arturo Garcia Bran, Norman Petersen Lind, Klaus Alois Herold and Erasmo Sanchez Arce v. Guatemala
Doc. Type: Decision
Decided by: President: Evelio Fernandez Arevalos;
First Vice-President: Paulo Sergio Pinheiro;
Second Vice-President: Florentin Melendez;
Commissioners: Freddy Gutierrez, Paolo Carozza, Victor Abramovich.
Dated: 21 October 2006
Citation: Garcia Bran v. Guatemala, Petition 298-05, Inter-Am. C.H.R., Report No. 101/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
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I. SUMMARY

1. On March 17, 2005, The Inter-American Commission on Human Rights (hereinafter the “Commission,” the “Inter-American Commission,” or the “IACHR”) received a petition lodged by Hilda Marina García Juárez and others[FN1] (hereinafter “the petitioners”) against the State of Guatemala (hereinafter “the State,” Guatemala,” or the “Guatemalan State”) for the violation of Articles 1.1, 8 and 25 of the American Convention on Human Rights (hereinafter the “American Convention,” or the “Convention,” with prejudice to Norman Petersen Lind, Klaus Alois Herold, Erasmo Sánchez Arce, Arturo García Bran and their next of kin (hereinafter the “alleged victims”).

[FN1] The petitioners are: NEXT OF KIN OF ARTURO GARCIA BRAN: Concha Marina Juárez Baldetti de García, Hilda Marina García Juárez, Lilian García Juárez de Díaz, Lesbia Judith García Juárez de Fajardo, Arturo García Juárez, and Zayda Mara García Juárez de Lizama. NEXT OF KIN OF ERASMO SANCHEZ ARCE: Flor de María Ruiz Bolaños de Sánchez, Erasmo Sánchez Ruiz, and Alexandra Sánchez Ruiz. NEXT OF KIN OF NORMAN LIND: Berit Elise Sverdrup de Lind, Karen Elise Lind Sverdrup de Mulet, Ingrid Margaret Lind Sverdrup de Herold, and Silvia Constante Lind Sverdrup. NEXT OF KIN OF KLAUS NIKOLAUS ALOIS HEROLD: Rosa de Herold, Ingrid Margaret Lind Sverdrup de Herold, Carmen Andrea Herold Lind, and Norman Alexander Herold Lind.

2. On October 23, 1985, the Consul General of Norway to the State of Guatemala, Norman Petersen Lind, his son in law, agronomist Klaus Alois Herold, agronomist Erasmo Sánchez Arce,

and the aircraft pilot Captain Arturo García Bran were traveling in a light aircraft towards a farm with the name of Panama, located in the Departamento [Province] of Suchitupéquez. Moments after landing, the plane hit an explosive, blowing to bits, and causing the death of the four persons on board.

3. The petitioners claim that their petition is admissible, and invoke the exception to the exhaustion of domestic remedies provided for by Article 46.2.c of the Convention. In this regard, they argue that the court record of the criminal proceeding initiated in response to the events of 1985 was lost by the court. Hence, more than twenty years since legal action for the investigation and trial of those responsible was begun, there have been no results; they therefore allege that their rights to a fair trial and to judicial access, provided for by the American Convention, have been violated.

4. The State, in turn, argues that the complaint is inadmissible because the petitioners have not exhausted domestic legal remedies: although they had at their disposal a number of domestic remedies, they did not make use of them. Moreover, the State alleges that it was not until recently, in 2004, 19 years after the events occurred, that the petitioners requested the record of the criminal investigation from the Court with jurisdiction. The State further affirms that it is more than willing to seek that the judicial organs carry out an exhaustive investigation of the instant case, in order to find those responsible of this crime, and sentence them accordingly.

5. Following an analysis of the positions of the petitioners and the State, the Commission has decided that, in accordance with the provisions of Articles 46 and 47 of the American Convention, the case is inadmissible. Finally, the Commission has decided to publish this report in its Annual Report to the General Assembly of the OAS and to notify both parties.

II. PROCESSING BEFORE THE INTER-AMERICAN COMMISSION

6. The Commission received the petition on March 17, 2005, and assigned it the case number 298-05. On May 12, 2005, it requested the petitioners to provide information to complete the study provided for by Article 26 of the Commission's Rules of Procedure. On June 2, 2005, the Commission received additional information from the petitioners. In a January 6, 2006 communication, the Commission forwarded to the State the relevant parts of the petition, and requested that within two months it submit its response to the complaint, pursuant to Article 30.3 of the Rules of Procedure of the Commission. On March 8, 2006, the State requested a two-month extension to submit its observations, and was granted a one month extension, on March 10, 2006. On April 7, 2006, the State submitted its observations, which were forwarded to the petitioners on April 20, 2006. On May 26, 2006, the observations which had been submitted by the petitioners on May 18, 2006, were transmitted to the State. On July 10, 2006, the State submitted additional information, which was forwarded to the petitioners on July 20 of that year. On August 21, 2006, the petitioners submitted additional information, which was transmitted to the State on August 28, 2006.

III. POSITIONS OF THE PARTIES

A. The Petitioners

7. In their complaint, the petitioners state that on October 23, 1985, Norman Petersen Lind, Klaus Alois Herold, Erasmo Sánchez Arce, and Arturo García Bran were traveling in the light aircraft with identification number TG-CET. The airplane took off at approximately 7:00 a.m. from La Aurora airport and headed towards the Panamá Farm, in the Jurisdiction of the Santa Bárbara Municipality, Departamento [Province] of Suchitepéquez. They affirm that after landing the plane hit an explosive, possibly a Claymore mine, and exploded to bits, causing the death of the four persons on board. At this moment in time the Municipality of Santa Bárbara was occupied by guerrilla cells of the Organización del Pueblo en Armas (ORPA) [Organization of the People in Arms] since the night of Friday, October 18, 1985. The rebels later gathered in the complex of farms of which the Santa Adelaida and Panamá farms were a part. After the explosion of the aircraft, they contend, the incumbent Director of Civil Aeronautics arrived to the site using the helicopter number TG-MAT to investigate. The bodies were later removed by workers of neighboring farms and volunteer firefighters and taken by helicopter to the Guatemala City morgue.

8. They report that on November 29, 1985, the ORPA published a communication taking responsibility for the attack. They also state that in his book *Insurgentes: Guatemala, la paz arrancada*, Sergio Santa Cruz Mendoza acknowledges ORPA's responsibility for the attack, and expresses that the operation had been carried out to kill the owner of the Panamá Farm and not the alleged victims. The author further states in the book that "this was a lamentable error that faced me with the distressing fact of witnessing how an operation of punishment, perfectly valid in war time, turned into a tragic and unexpected event. A communiqué from the Organization expressed its condolences to the Nordic government and the family of the diplomat [Norman Petersen Lind]."[FN2] The petitioners also state that the case was included as number 15506 in the Report of the Comisión para el Esclarecimiento Histórico (CEH) [Commission for Historical Clarification].

[FN2] See: *Insurgentes: Guatemala, la paz arrancada*, by Sergio Santa Cruz Mendoza, p. 108.

9. The petitioners state, with respect to the requirements for admissibility, that the events gave rise to legal proceedings (No. 1,206-85) before the Peace Court of the Municipality of Santa Bárbara. The court record was forwarded by communication No. 179-85 to the Juzgado Primero de Primera Instancia [First Court of the First Instance] of the Departamento [Province] of Suchitepéquez, renamed Tribunal de Sentencia Penal, Narcoactividad y delitos contra el Ambiente [Court for Criminal Sentencing, Narco-activity and Crimes against the Environment]. The petitioners contend that twenty years after the facts, no investigation has been made, no experts were called, nobody has been arrested and nobody has been put on trial in Guatemala, in spite of the fact that the crimes typified in the Guatemalan Criminal Code by Article 287 – "Manufacture or possession of explosives" and Article 319 – "Terrorism," had been committed, and that there were media reports clearly identifying those responsible for the murder.

10. The petitioners annexed a letter from the Sentencing Court of Suchitepéquez, dated November 5, 2004, certifying that proceeding number 1206-85 is in the book of registered

proceedings, but that due to time elapsed there was no specific record available and “although there has been a search for the case file, it has not been found, because the Court has moved several times from one building to another.”[FN3] They also annex communication IASV 01-05, dated March 1, 2005 and signed by the manager of the Departamento de Investigación de Accidentes y Seguridad de Vuelo of the Dirección General de Aeronáutica Civil [Department of Accident Investigation and Flight Safety of the Office of the National Director for Civil Aeronautics]. This document states that “in the 1985 accidents record there is an entry regarding a Cessna Skylane airplane, model 182P, identification number TG-CET, which was destroyed in an accident on October 23, 1995 at Panamá Farm, in Suchitepéquez; in said airplane’s file there is no document describing the craft; there is only a request to cancel its registration.”[FN4]

[FN3] In letter from the Sentencing Court of Suchitepéquez, dated November 5, 2004, in the petition file.

[FN4] In communication IASV 01-05, dated March 1, 2005, signed by the manager of the Departamento de Investigación de Accidentes y Seguridad de Vuelo [Department of Accident Investigation and Flight Safety of the Office of the National Director for Civil Aeronautics].

11. The petitioners contend that they did not initiate legal action in order to promote the criminal investigation of the case, because “over the 30 years of internal war, during which the murder occurred, [Guatemala] was immersed in the chaos of repression, anguish, and fear. As can be seen from the Report of the Commission on Historical Clarification (CEH), there were many cases in which, after a violent event, the next of kin of the victims were threatened and even subjected to forced disappearance if anybody dared to investigate. There was great fear of retaliation from any group accused; therefore most of the victims remained silent. Even today there is a certain degree of fear since some of the abettors of this murder remain free.”[FN5] For these reasons, they say, they have lodged this complaint against the State of Guatemala 20 years later.

[FN5] In communication received from the petitioners on June 2, 2005, p. 2.

12. Finally, they argue that it is the obligation of the State, in accordance with its own domestic legislation, to prompt ex officio investigations, especially by the Office of the Attorney General, but that the Government never had the intention of investigating the murder, despite the existence of evidence clearly identifying those responsible.

B. The State

13. The State, in turn, contends that among the documents provided along with the petition, there is a communication from the petitioners stating that they did not resort to legal recourse to promote a criminal investigation; the petitioners also argue that despite their efforts to pursue the case domestically, remedies were ineffective. The State holds that the arguments of the petitioners are contradictory and that they did not use available remedies provided by

Guatemalan legislation to obtain criminal prosecution and punishment of those responsible for the crimes.

14. The State notes that the petitioners requested the record from the Sentencing Court of Suchitepéquez and that the Court informed them in writing that due to diverse circumstances the file could not be found. This could not be considered an obstacle keeping them from continuing with domestic proceedings, given that the request of the petitioners was made in 2004, 19 years after the events. The State contends that Article 161 on “Replacement of Records” of the Judicial Branch Act provides that lost records must be replaced at the expense of the party responsible for their loss, who must also pay damages, and who shall be subjected to the provisions of the Criminal Code should the act be a crime. It further states that the replacement of records is processed as an incidental motion and that the judgment on the motion should determine: a) the legal basis of the replacement, b) the proceedings and documents replaced, c) the stage at which the proceedings should continue, and d) the determination of the proceedings already undertaken that could not be replaced. Should the latter be the case, pursuant to the appropriate laws on procedure, a court order shall be issued to replace them within no more than 15 days, unless they are documents coming from abroad, in which case the judge can decide to extend the deadline. The State argues that this remedy is available to the petitioners to request a replacement of the record, in order to continue with the criminal proceeding at its proper stage.

15. The State further adds that, under the commitments of the Peace Accords signed in Guatemala, it is up to the State to effectively guarantee the right that civil victims and their next of kin have to reparations for violations of their human rights and for crimes against humanity committed during the internal armed conflict. To implement the foregoing, the Programa Nacional de Resarcimiento [National Program for Reparations] was created on May 7, 2003 by Executive Decree 258-2003, which has begun to make payments to the victims of the internal armed conflict. The State affirms that the Reparations Program was specifically created to hear cases of violations that occurred during the internal armed conflict, and the instant case should be addressed by this program, so that the next of kin of the victims can receive restitution according to its established criteria.

16. The State requests that the petition be declared inadmissible since, according to the provisions of Article 46 of the American Convention and of Articles 31 and 32 of the Commission’s Rules of Procedure, the petitioners have not exhausted domestic remedies.

17. Finally, the State affirms that it assumes the responsibility of promoting and protecting human rights, and making them effective. Therefore, it declares to the Inter-American Commission that it is more than ready to prompt “an exhaustive investigation of the instant case, in order to find those responsible of the crime and punish them accordingly”[FN6] by the judiciary. It further adds that, for this purpose, the petitioners should join the proceedings that are begun, pursuant to Articles 116 and 118 of the Code of Criminal Procedure, which state that the injured party can either initiate criminal proceedings or can join those initiated, before the Office of the Attorney General requests a trial or a dismissal of charges. This in turn would assist the investigative work of the Attorney General’s Office, since the next of kin of the victims are the ones who have the background information on the case.

[FN6] In communication received from the State on July 10, 2006.

18. Regarding restitution, the State reiterates its position that, since there is a National Program for Reparations, specifically created to hear cases of human rights violations during the armed conflict, the instant case should be addressed by this program so that the next of kin of the victims can be compensated in accordance with its established criteria.

IV. ANALYSIS

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

19. The petitioners are authorized by Article 44 of the American Convention to lodge complaints before the IACHR. The petition identifies individuals as the alleged victims, whose rights, provided for by the American Convention and other international instruments, the Guatemalan State was committed to respect and guarantee. Moreover, the Commission notes that Guatemala ratified the American Convention on May 25, 1978, and thus has competence *ratione personae* to examine the petition.

20. The Commission has competence *ratione loci* to hear the petition, because in it claims are made pertaining to violations of rights protected by the American Convention which had allegedly taken place within the territory of a state party to said treaty. The IACHR is competent *ratione temporis* because the duty to respect and guarantee rights protected by the American Convention was already in force for the State at the time in which allegedly the facts occurred. Finally, the Commission is competent *ratione materiae*, because the petition contains complaints of violations of human rights protected by the American Convention.

B. Other admissibility requirements for the petition

1. Exhaustion of domestic remedies

21. Article 46.1.a of the American Convention provides that for a complaint presented before the Inter-American Commission to be admissible in accordance with Article 44 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow domestic authorities to take cognizance of the alleged violation of a protected right and, if appropriate, to provide a solution before the complaint is heard in an international venue.

22. The requirement of prior exhaustion of domestic remedies is applicable when in the national system there is recourse effectively available, which is appropriate and effective to remedy the alleged violation. In this respect, Article 46.2 specifies that the requirement is not applicable if the domestic legislation of the state concerned does not afford due process of law for the protection of the right allegedly violated; if the alleged victim did not have access to the

remedies under domestic law, or if there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. Under the provisions of Article 31 of the Commission's Rules of Procedure, when the petitioner invokes one of these exceptions to the rule, it shall be up to the state concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

23. From the principles of international law, which have been reflected by the precedents established by the Commission and the Inter-American Court, it can be inferred first, that the defendant state may expressly or tacitly waive invocation of this rule.[FN7] Second, in order to be considered timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding before the Commission; otherwise, it will be presumed that the interested state has waived its use.[FN8] Third, in accordance with the burden of proof applicable to this matter, the state that alleges non-exhaustion of domestic remedies must indicate which remedies should be exhausted and provide evidence of their effectiveness.[FN9]

[FN7] Cfr. IACHR, Report No. 69/05, Petition 960/03, Admissibility, Iván Eladio Torres, Argentina, October 13, 2005, para. 42; IACHR, I/A Court H.R., Case of Ximenes-Lopez, Preliminary Objections. Judgment of November 30, 2005, Series C No. 139, para. 5; I/A Court H.R., Case of Moiwana Village. Judgment of June 15, 2005. Series C No. 124, para. 49, and I/A Court H.R., Case of the Serrano-Cruz Sister. Preliminary Objections, Judgment of November 23, 2004, Series C No. 118, para. 135.

[FN8] Cfr. I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community, Preliminary Objections, Judgment of February 1, 2000, Series C No. 66, para. 53; Castillo Petruzzi et al. Case, Preliminary Objections, Judgment of September 4, 1998. Series C No. 41, para. 56; and I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C No. 25, para. 40. The Commission and the Court have established 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 [...]." See, for example, IACHR, Report No. 71/05, Petition 543/04, Admissibility, Ever de Jesús Montero Mindiola, Colombia, October 13, 2005, citing I/A Court H.R., Case of Herrera Ulloa, Judgment of July 2, 2004, Series C No. 107, para. 81.

[FN9] Cfr. IACHR, Report No. 32/05, Petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral et al., (Persons Living with HIV/AIDS), Guatemala, March 7, 2005, para. 33-35; I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community, Preliminary Objections, supra note 8, para. 53; Durand and Ugarte Case, Preliminary Objections, Judgment of May 28, 1999, Series C No. 50, para. 33; and Cantoral Benavides Case, Preliminary Objections, Judgment of September 3, 1998, Series C No. 40, para. 31.

24. In the instant case, the petitioners claim the exception provided for by Article 46.2.b of the American Convention, i.e., the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them. The basis of their allegation is that over the 30 years of internal war, during which the murder occurred, Guatemala

was immersed in the chaos of repression, anguish, and fear. There was great fear of retaliation from any group accused; therefore most of the victims remained silent. Even today there is a certain degree of fear since some of the abettors of this murder remain free. They further contend that it is the obligation of the State, according to its own domestic legislation, to encourage ex officio investigations, especially by the Office of the Attorney General, but that the Government never had the intention of investigating the murder, despite the existence of evidence clearly identifying those responsible.

25. The State, in turn, has lodged the objection of lack of exhaustion of domestic remedies by the petitioners, and presented its arguments regarding the possible remedies that the petitioners could have exhausted before lodging a complaint before the IACHR. The petitioners could have, in accordance with Article 161 on the “Replacement of Records” of the Judiciary Branch Act, requested the replacement of the lost criminal record. The petitioners, the State further argues, did not request the record of the criminal investigation from the Court with jurisdiction until 2004, 19 years after the facts. Regarding restitution, the petitioners could request it from the National Reparations Program, specifically created to hear cases stemming from human rights violations during the armed conflict.

26. From the documents submitted by the petitioners it is evident that on November 5, 2004, the clerk of the Sentencing Court of Suchitepéquez certified that “in the book of registered proceedings of this court (then the Court of First Instance of the Departamento [Province] of Suchitepéquez), opened on July 2, 1979, on the front of leaf No. 28, there is an entry of a proceeding under the number 1206-85, regarding the investigation of the death of Mr. NICOLÁS ALYSIS HERALD AND COMPANIONS, but due to time elapsed, there is no specific record available and although there has been a search for the case file, it has not been found, because the Court has moved several times from one building to another.”[FN10]

[FN10] This letter can be found in an annex to the complaint of the petitioners that was received on March 17, 2005.

27. It is the opinion of the Commission that, in the instant case, domestic legal remedies have not achieved satisfactory results, since the case file was lost by the Court charged with the investigation of the facts reported. Based on the provisions of Article 46 of the Convention and Article 31 of the IACHR’s Rules of Procedure, the Commission concludes that the exception provided for by Article 46.2.c is applicable.

2. Timeliness of the petition

28. In conformity with Article 46.1.b, for a petition to be admitted, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment. The six-month rule ensures legal certitude and stability once a decision has been handed down.

29. Pursuant to Article 32.2 of the IACHR's Rules of Procedure, in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. According to this Article, in its analysis, the Commission "shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

30. The Commission has established that exception c) of Article 46.2 is applicable to the instant case, and therefore it must examine whether the petition was lodged within a reasonable time period under the specific circumstances of the matter submitted to the Commission for its consideration.

31. In this connection, the Commission notes the following: 1) the facts that gave rise to the complaint before the IACHR took place on October 23, 1985; the petition was lodged before the Commission on March 17, 2005. 2) The only legal action that the interested parties have proven to the Commission that they took in the domestic venue is the submission of a request, in the month of October, 2004, to obtain a copy of the proceedings to the court that had investigated the facts. In other words, the petition was lodged before the inter-American system of human rights 20 years after the facts occurred, and without the petitioners proving the existence of any domestic legal action on their part, even if only to learn of the procedural stage of the municipal investigation, which did not happen until they requested a copy of the criminal record in October, 2004.

32. In the instant case, the Commission notes that, although it indeed is the duty of the state to investigate, try, and punish those responsible for crimes committed with prejudice to individuals whose rights it is under the obligation to respect and guarantee, the petitioners also must prove that they engaged in some form of action or, in a credible manner, demonstrate that over the course of two decades there were reasons explaining why they did not lodge the petition before the Inter-American Court. Thus, for example, the Commission has considered crimes of a continuing nature, in particular forced disappearances, or developments in domestic legal proceedings and the actions taken by the petitioners, to determine whether the time period for the presentation of petitions regarding events that occurred several years or even decades ago, is reasonable.

33. Regarding the aforementioned, the petitioners allege that it was impossible for them to exhaust domestic remedies because during 30 years there was an internal war in Guatemala and they feared reprisals. In this respect it is the opinion of the Commission that reasonable fear could be a motive for not lodging a petition at a certain time. However, the IACHR notes that the signing of the Peace Accords and the ending of the armed conflict in Guatemala occurred in 1996. The petitioners did not provide an explanation as to why after the Peace Accords were reached they could not turn to the Guatemalan authorities or the IACHR. The mere request of a copy of the criminal record made in October, 2004, eight years after the signing of the Peace Accords cannot be considered as a valid action to claim that the time period for lodging the petition was reasonable. Consequently, bearing in mind the date in which the facts took place, it cannot be held that the petition was presented within a reasonable time period.

34. Therefore, by virtue of the particular circumstances of the instant petition, the Commission concludes that the complaint under study was not lodged within a reasonable time period.

3. Duplication of proceedings, international res judicata and characterization of the facts alleged

35. In the light of the foregoing analysis, the Commission will not emit an opinion regarding the duplication of proceedings, international res judicata and the characterization of the facts alleged.

V. CONCLUSION

36. Based on the aforementioned arguments in fact and in law, the Commission considers that the petition is inadmissible with respect to the requirement established by Article 47.a of the American Convention on Human Rights, because it does not meet the requirement of exhaustion of domestic remedies provided for by Article 46.1.a.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the instant petition inadmissible.
2. To notify the parties and the State of this decision.
3. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 21st day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President, Paulo Sérgio Pinheiro, First Vice-president; Florentín Meléndez, Second Vice-president, Freddy Gutiérrez, Paolo Carozza and Víctor Abramovich, Commissioners.