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Decided by: President: Evelio Fernandez Arevalos;
First Vice-President: Paulo Sergio Pinheiro;
Second Vice-President: Florentin Melendez;
Commissioners: Freddy Gutierrez, Paolo G. Carozza, Victor Abramovich.
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Represented by: APPLICANT: Oscar Fernandez Chagin
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I. SUMMARY

1. On November 15, 2005, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition lodged by Mr. Oscar Fernández Chagín (the “petitioner”) wherein he alleges that members of paramilitary groups, with the acquiescence and participation of agents of the Republic of Colombia (hereinafter the “State” or the “Colombian State”), perpetrated the disappearance of Gustavo Rafael Yépez Conrado, Nicolás Manuel Insignares García (or Nicolás Insignares García), Jorge Luís Nieto Álvarez, Erasmo Antonio De la Cruz Manjares, Edwin José Cruz Romero, Armando Antonio Acosta Suárez, Gerardo Antonio Escorcia Caballero, Emigdio Rafael Manga Mejía, Malfred Rafael Gutiérrez Pacheco, Fair Eugenio Miranda Niebles, Amado Rafael Mejía Mendoza, Joaquín Modesto Álvarez Charris, Milton Javier Gómez Barrios, Néstor Iván Acosta Suárez, Senen Antonio González Mejía, Orlando César Ayala Niebles, Ever Julio Rodríguez Mejía, Edwin Alfonso Galero Castillo, Néstor Julio Ayala Suárez, Roque Jacinto Parejo Esquea, Javier Enrique Caballero Vergel, Pedro Erasmo Suárez Borrero, Bacilo Antonio De la Cruz Rodríguez, Juan Jesús de la Hoz Martínez, José Darío Moreno Retamozo, Iván Roque González Ferrer, Hugo Luís Escorza Santiago, Efraín Miguel Bantham Escorcia (or Efraín Miguel Belta Escorcia), Wilmer Enrique Mejía Mejía, José Asunción Marín Rodríguez, Eder Jovanys Lodoño González, Rafael Ángel Mendoza Martínez, Jorge Eliécer Altamar López (or Jorge Altamar López), Manuel Octavio Rodríguez Ayala, Martín Rafael Rodríguez Ayala and José Francisco Álvarez Rolong (hereinafter “the victims”) during an armed incursion carried out on November 22, 2000, in the town of Nueva Venecia, Municipality of Sitio Nuevo, department of Magdalena.

2. The petitioner alleges that the State is responsible for violation of the right to life, the right to humane treatment, the right to have one’s dignity respected and the right to judicial

protection, protected under the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”). The State asks that the Commission declare the petition inadmissible on the grounds of a failure to exhaust the remedies under domestic law, required under Article 46.1.a of the American Convention. The petitioner, for his part, invokes the exceptions allowed under Article 46.2 of the American Convention to the rule requiring prior exhaustion of domestic remedies.

3. After examining the parties’ positions and the compliance with the requirements stipulated in articles 46 and 47 of the American Convention, the Commission has decided to declare the case admissible, to notify the parties and to order its publication.

II. PROCESSING WITH THE COMMISSION

4. The IACHR registered the petition under number P1306-05 and after, doing a preliminary analysis of its content, forwarded a copy of the pertinent parts to the State, giving the latter two months in which to present information, pursuant to Article 30.2 of the Commission’s Rules of Procedure. On March 6, 2006, the State requested that the Commission grant it a 30-day extension to present its response, which was duly granted. The State presented its observations on May 3, 2006, which were forwarded to the petitioner on May 24, 2006.

5. On June 13, 2006, the petitioner presented his observations on the State’s response. The pertinent parts of this communication were forwarded to the State on June 16, 2006, which had 30 days in which to submit its observations. The State presented its observations on July 20, 2006.

III. THE PARTIES’ POSITIONS

A. The petitioner

6. The petition states that Nueva Venecia is located some 50 minutes from the municipality of Ciénaga, in the department of Magdalena. Its population of some 4,000 engages mostly in fishing. The only way to get to the community is by water.

7. The petitioner alleges that on November 22, 2000, at around 9:30 p.m., some 70 paramilitary from the Municipality of Fundación embarked at Caño Nuevo in six boats. The paramilitary were wearing uniforms that are used solely and exclusively by the military forces and were carrying long-range weapons. Before getting into the boats, they stabbed to death Efraín Miguel Belta Escorcia, Jorge Altamar López and Nicolás Insignares García.

8. The petitioner alleges that the paramilitary had precise information about the time of day when the fishermen left to take their fish to market. Taking advantage of the situation, they forced the vessels to return to Nueva Venecia. En route, they came upon the boat of Mr. Gerardo Antonio Escorcia Caballero, who was fishing in Caño Clarín with his nephew Edison De La Rosa Escorcia. They forced the two men to come with them to Nueva Venecia, where they killed Mr. Gerardo Antonio Escorcia Caballero.

9. The petition states that once the paramilitaries reached Nueva Venecia, they assembled the fishermen in the church. Reading from a list, they called out the names of persons they accused of collaborating with the National Liberation Army [Ejército de Liberación Nacional] (ELN); they also named known common criminals in the area. When they failed to find the persons named on the list, they took one of the assembled fishermen and told him to lead them through the town. A few moments later they arrived at the home of Mr. Roque Jacinto Parejo Esquea, 68, a provisions salesman and local lender, who was with one of his daughters at the time. After threatening him, they robbed him of his belongings and executed him at the doorway to his home; they also killed the person whom they had commandeered as a guide. The group continued searching homes, dragged some men from their homes and took them to the church. In an area adjacent to the church, they had some 15 fishermen assembled. At around 5:30, they told them to lie face down and then proceeded to shoot them indiscriminately. [FN1]

[FN1] Original petition received on November 15, 2006. The petitioner alleges that the manner in which the victims were killed is typical of a paramilitary action, as they were shot in the head at close range, by a bullet fired by a rifle. This type of shot causes the so-called “snow storm” effect. The bullet enters the head and moves upward in a spiral, causing total disfiguration of the victim’s face, detachment of the skull and facial destruction. This is the modus operandi of paramilitary groups and is intended to instill terror, despair and silence in the population. Most of the victims were very difficult to identify; identification was mainly by the clothes they were wearing on the day of the massacre.

10. While the paramilitaries were still in Nueva Venecia, some of the townspeople called by mobile phone to report the terrible situation. They allege that Vergara Battalion, based in Malambo (Atlántico), the Army’s Second Brigade, the Army’s Unified Action Groups for Personal Liberty (GAULA) and the National Police at Atlántico and Magdalena all received the complaint, but not a single authority appeared on the scene and no operation was conducted to neutralize the paramilitaries. The Army finally arrived on the scene on Thursday, November 23, 2000, at around 3:30 p.m., in a helicopter carrying six members of the Army. However, they stayed only five minutes. The petitioner alleges that it was five days after the events occurred that the National Army finally arrived on the scene, despite the fact that the Municipality of Malambo is home to one of the Colombian Army’s most important bases. The Marine infantry based in Magangué arrived on November 27, 2000.

11. The petitioner notes that the court authorities who came to the scene of the events had requested military support. However, General Freddy Padilla de León, Commander of the Army’s Second Brigade, did not guarantee the safety of the Judicial Commission, which was unable to make headway with the initial judicial inquiries.

12. The petitioner alleges that the massacre was carried out in coordination with agents of the State and that the latter failed to provide the town with protection and security. The forces of law and order were not in the vicinity of the banks of the Magdalena River either on the day the events occurred or the day before, and did not respond to the calls for help they received while the paramilitary incursion was in progress. The petitioner alleges that when the Army helicopter

arrived on the scene, eleven hours after the fact, the six Army personnel on board were told that the authors of the massacre had fled in the direction of Santa Rita, whereupon the helicopter took off headed in the opposite direction.[FN2]

[FN2] Brief of observations, received on June 16, 2006.

13. In response to the State's contention that the forces of law and order had acted with diligence (see below, Position of the State, paragraph 17), the petitioner alleges that the judicial investigation has indicted three members of the Army for the crime of conspiracy to commit crime. He contends that five years after the massacre, these State agents had still not been brought to justice.[FN3]

[FN3] The petitioner alleges that on July 6, 2004, an order was issued to take Army Sergeant Sergio Salazar Soto into custody, without possibility of release, charged with the crime of conspiracy to commit crime. He was arrested at the facilities of the GAULA. The petitioner also attaches an order dated July 19, 2006, wherein the National Human Rights Unit of the Attorney General's Office resolves to order the preventive detention of Army personnel Alberto de Jesús García Rendón and Ramiro Antonio Alarcón Guerra, as co-authors of the crime of conspiracy to commit crime.

14. The petitioner further alleges that the delay in the investigation and identification of the responsible State agents has prevented the victims' next of kin from turning to the administrative litigious courts to seek reparations for material damages within the time period allowed by law to file claims of this type.

15. Given these factors, the petitioner is asking that the State be found responsible for violations of the right to life, the right to humane treatment, the right to have one's dignity respected and the right to judicial protection, established in the American Convention, to the detriment of the 36 individuals who died and their next of kin.

16. As for the admissibility of the petition, the petitioner asserts that paramilitary groups have threatened the massacre victims' next of kin, which prevented them from filing complaints with the competent authorities. The petitioner asserts that the investigation that the Prosecutor General's Office undertook ex officio is still in the examining phase, and has gone on for more than the two years allowed by law. As a result, the petitioner alleges, any further proceedings in the case may be cancelled and the evidence may disappear. He argues, therefore, that the remedies under domestic law have been ineffective, which is grounds for the exception that Article 46.2 of the American Convention allows to the rule requiring exhaustion of local remedies.

B. The State

17. In its response, the State argues that the facts alleged in the complaint are attributable to civilians, not members of the Armed Forces. The State asserts that the Armed Forces acted diligently, going to the scene as soon as the facts were learned and conducting operations to counteract another action on the part of the self-defense brigades in the area. The State reasons, therefore, that it bears no responsibility in this matter.[FN4] It notes that at 3:00 p.m. on November 22, 2000, Lieutenant Colonel Juan Carlos Mosquera flew by helicopter to the scene. The State contends that the Army was not at the scene immediately because it did not have the proper waterborne transportation. In all events, the State contends, the Army had acted diligently. The State reports that on November 22, 2000, the Army clashed with the Campesino Self-Defense Groups from Córdoba and Urabá and on November 25, 2000, a lightning strike was launched to get those responsible for the massacre. The State goes on to report that the judicial authorities received immediate support from the Armed Forces and on November 27, 2000, the Commander of Infantry Battalion No. 5 Córdoba, reported what had happened to the Attorney General of the Nation.[FN5]

[FN4] Communication from the Ministry of Foreign Affairs of the Republic of Colombia, N° DDH GOI 20.338/950, April 28, 2006.

[FN5] Communication from the Ministry of Foreign Affairs of the Republic of Colombia, N° DDH GOI 20.338/950, April 28, 2006.

18. The State also alleges that the petition does not fulfill the requirement of prior exhaustion of local remedies and should be declared inadmissible on that basis. The State argues that the criminal inquiry is in full progress, to achieve the result it was intended to accomplish. It points out that the criminal inquiry into these events is now in the examining phase; that 19 persons have been implicated; that arrest warrants have been issued for 18, and that eight are in custody.[FN6] The State reports that on March 22 and 23, 2006, a signed statement was received and “statements were taken from six people initially implicated in the investigation as absent persons.”[FN7] On April 18, 2006, an indictment was handed down against nine people, accused of the crimes of conspiracy to commit crime, murder and forced displacement. The Prosecutor on the case has allegedly decided to reopen the criminal investigation to include six more people.[FN8]

[FN6] In its May 3, 2006 communication, the State reports that 26 persons are implicated in the investigation. Communication from the Ministry of Foreign Affairs of the Republic of Colombia, N° DDH GOI 20.338/950 received May 3, 2006. However, in its observations of July 20, 2006, it reports that the investigation has implicated 19 people. Communication from the Ministry of Foreign Affairs of the Republic of Colombia N° DDH GOI 35.224/1723, July 19, 2006.

[FN7] Communication from the Ministry of Foreign Affairs of the Republic of Colombia N° DDH GOI 35.224/1723, July 19, 2006.

[FN8] Communication from the Ministry of Foreign Affairs of the Republic of Colombia N° DDH GOI 35.224/1723, July 19, 2006.

19. The State argues that the Article 46.2 exception does not apply, because a recourse is in place that is suitable for solving the massacre and prosecuting those responsible. It adds that the victims' next of kin have been established as procedural subjects in the preliminary investigation so that they are able to request and supply evidence and challenge decisions when necessary. The State considers that the exception allowed for unwarranted delay does not apply in the instant case, given that the time taken is within reason for such a complex case and given the conduct of the judicial authorities. It makes the point that the death toll in the case is high, that the events occurred in a remote region of the country accessible only by water, and that the Attorney General's Office has been diligent throughout the case.[FN9]

[FN9] Communication from the Ministry of Foreign Affairs of the Republic of Colombia, N° DDH GOI 20.338/950, April 28, 2006.

20. As for the remedies available to obtain redress, the State explains that under Colombian law, the criminal procedure system protects victims' rights by allowing them to intervene in a criminal proceeding. The State argues that the petitioner can intervene in a criminal proceeding at any point in the case. It reasons that just because the liable parties are those convicted of the crime –not the State- does not mean that the alleged victims have no means of obtaining redress. The State observes that another means of obtaining redress is by filing a suit for direct reparations with the administrative litigious courts. It observes that the petitioner had this recourse available to him for two years after the events in question. However, the State contends, it is unlikely now that such an action can be successfully brought, since the period for filing it has expired without the petitioner taking any action.[FN10]

[FN10] Communication from the Ministry of Foreign Affairs of the Republic of Colombia N° DDH GOI 35.224/1723, July 19, 2006.

IV. ANALYSIS OF JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

21. Under Article 44 of the American Convention, in principle the petitioner has standing to lodge petitions with the Commission. The alleged victims named in the petition are natural persons whose Convention-protected rights and guarantees the Colombian State undertook to respect and ensure. As for the State, Colombia has been a State party to the American Convention since July 31, 1973, the date on which it deposited its instrument of ratification. Therefore, the Commission has jurisdiction *ratione personae* to examine the petition.

22. The Commission also has jurisdiction *ratione loci* inasmuch as the violations of Convention-protected rights were alleged to have occurred within the territory of Colombia, which is a State Party to that treaty. The Commission has jurisdiction *ratione temporis* since the obligation to respect and ensure the rights protected under the American Convention was already

binding upon Colombia on the date the facts alleged in the petition were said to have occurred. Finally, the Commission has jurisdiction *ratione materiae* because the petition denounces possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of local remedies and time period for lodging the petition

23. Article 46.1.a of the American Convention provides that in order for petitions alleging violation of the American Convention to be admissible, the available remedies under domestic law must first be pursued and exhausted in accordance with generally recognized principles of international law.

24. Article 46.2 of the Convention provides that the local remedies rule shall not apply when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The Inter-American Court has written that whenever a State alleges that the petitioner failed to exhaust local remedies, it is up to the State to demonstrate that remedies remain to be exhausted that are “adequate,” in other words suitable to address the infringement of the allegedly violated right. In other words, the function of these remedies within the domestic legal system is suitable to address an infringement of a legal right.[FN11]

[FN11] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

25. In the present case, the State is alleging that the petition does not satisfy the requirement of exhausting remedies within the domestic legal system, as stipulated in Article 46.1.a of the American Convention, because a criminal case is pending that concerns the very facts that are the subject of the petition.[FN12] The petitioner, for his part, argues that the rule requiring exhaustion of local remedies does not apply to the present case on the grounds of the exception allowed under Article 46.2.c, i.e., because of the delay and ineffectiveness of the criminal investigation conducted on the domestic front.

[FN12] Communication from the Ministry of Foreign Affairs of the Republic of Colombia, N° DDH GOI 20.338/950, April 28, 2006.

26. The Commission notes that according to the facts alleged in the petition, some 70 civilians were said to be involved as direct perpetrators of the massacre. Of these, the investigation conducted by the State –which six years after the events was still in the examining phase- had implicated only 19. Of the persons implicated in the investigation, only eight were under some form of custody, although 18 arrest warrants were said to have been issued.

27. Here the Commission notes that as a general rule, a criminal investigation must be conducted rapidly, in order to protect the victims' interests, preserve the evidence and even safeguard the rights of any person who becomes a suspect in the course of the investigation. As the Inter-American Court has written, while every criminal investigation has to comply with a number of legal requirements, the rule of prior exhaustion of local remedies must never lead to a halt or delay that would render international action in support of a defenseless victim ineffective.[FN13]

[FN13] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 93.

28. Therefore, given the characteristics of this case and the time that has transpired since the events alleged in the petition were said to have occurred, the Commission believes that the exception allowed under Article 46.2.c of the American Convention regarding an unwarranted delay in the domestic judicial proceedings applies, which means that the rule requiring prior exhaustion of local remedies does not.

29. Invoking the exceptions allowed under Article 46.2 to the rule requiring exhaustion of local remedies is closely connected to the determination of possible violations of certain rights contained in the Convention, such as the guarantees of access to justice. However, Article 46.2 of the Convention, by its nature and purpose, has a content that is independent of the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the local remedies rule apply to the case in question must be made prior to and separate from the examination of the merits, since it hinges on a standard of assessment different from the one used to determine the violation of Articles 8 and 25 of the Convention. The factors that prevented exhaustion of local remedies and their effects will be examined in the report the Commission adopts on the merits of the case, in order to determine whether they constitute violations of the American Convention.

2. Timeliness of the petition

30. The American Convention provides that for a petition to be admissible, it must be presented within six months of the date on which the party alleging violation of rights was notified of the final judgment. In the petition under examination, the IACHR has established that the exception allowed under Article 46.2.c of the American Convention applies. Article 32 of the Commission's Rules of Procedure states that when the exceptions to the rule requiring prior exhaustion of local remedies apply, the petition is to be presented within what the Commission

deems to be a reasonable period. The Commission must therefore consider the date on which the alleged violation of rights was filed and the circumstances of each case.

31. In the instant case, the petition was lodged on November 15, 2005, and the facts alleged in the complaint were said to have occurred on November 22, 2000. Given the context and characteristics of the present case, and the fact that the preliminary inquiry is still pending, the Commission considers that the petition was lodged within a reasonable period and the admissibility requirement concerning the time period for lodging a petition is deemed to have been satisfied.

3. Duplication of international proceedings and res judicata

32. Nothing in the file of this petition suggests that the subject matter of the petition is pending decision in another international proceeding for settlement or that it replicates a petition or communication it previously examined. The Commission therefore concludes that the requirements established in Articles 46.1.c and 47.d of the Convention have been met.

4. Characterization of the facts alleged

33. The Commission considers that the facts the petitioner is reporting regarding the alleged violation of the right to life, the right to humane treatment, the right to a fair trial and the right to judicial guarantees could tend to establish violations of the rights protected under articles 4, 5, 8.1 and 25 of the American Convention, in combination with Article 1.1 thereof. It does not find that the petition is manifestly groundless or out of order, and therefore deems that the requirements established in article 47.b and c of the Convention have been met.

V. CONCLUSIONS

34. The Commission concludes that it has jurisdiction to examine the petition lodged by the petitioner and alleging violation of articles 4, 5, 8.1 and 25 of the American Convention, in combination with Article 1.1 thereof, and that the petition is admissible under the requirements established in articles 46 and 47 of the American Convention.

35. Based on the foregoing considerations of fact and of law and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible in relation to articles 4, 5, 8.1, 25 and 1.1 of the American Convention.
2. To notify the Colombian State and the petitioner of this decision.
3. To proceed with the analysis of 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 in the city of 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 G. Carozza and Víctor
Abramovich, Commissioners.