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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 87/06; Petition 668-05
Session: Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause: Carlos Alberto Valbuena Castro and Luis Alfonso Hamburger Diazgranados v. Colombia
Doc. Type: Decision
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.
Dated: 21 October 2006
Citation: Valbuena Castro v. Colombia, Petition 668-05, Inter-Am. C.H.R., Report No. 87/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by: APPLICANT: Ibeth Lucia Pio Delgado Echenoa
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I. SUMMARY

1. On June 10, 2005, the Inter-American Commission on Human Rights (hereinafter the "Commission," or the "IACHR") received a petition from Luis Francisco Valbuena Castro and Ibeth Lucía Pío Delgado Echenoa (hereinafter the "petitioners") alleging that members of paramilitary groups, with the acquiescence of agents of the Republic of Colombia (hereinafter "the State," "the Colombian State" or "Colombia") were responsible for the disappearance of Carlos Alberto Valbuena Castro and Luis Alfonso Hamburger Diazgranados on May 8, 2001, on the road from Puerto Libertador to Palmar, in the Department of Córdoba.

2. The petitioners alleged that the State is liable for violating its duty to protect the right to life and personal integrity, personal freedom, due process safeguards and judicial protection established in the American Convention on Human Rights (hereinafter "the American Convention"). The State, in turn, argued that the claim was inadmissible because domestic remedies had not been exhausted.

3. After reviewing the positions of the parties and the fulfillment of requirements in Articles 46 and 47 of the Convention, the Commission decided to rule the case admissible, notify the parties and order publication of the report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. The IACHR assigned the number P668-05 to the petition and, following a preliminary review of its contents, proceeded on August 25, 2005, to convey a copy of the relevant portions

to the State, giving it two months to file comments, as provided in Article 30.2 of the IACHR Rules of Procedure.

5. On April 5, 2006, the State filed its answer, which was duly transmitted to the petitioners. On July 27, 2006, they submitted their comments on the State's brief. On August 10, 2006, the relevant portions of the petitioners' brief was sent to the State so that it could comment within 30 days, but such comments have not been received to date by the Commission.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

6. The petitioners point out that on May 8, 2001, Carlos Alberto Valbuena Castro and Luis Hamburger Diazgranados, who were passing through the municipality of Puerto Libertador, Department of Córdoba, got into a private passenger vehicle to go to Palmar, a town near the municipality of Valencia. When they reached the river crossing, both got out of the vehicle to wait for the inter-municipal bus.[FN1]

[FN1] Original petition received on June 10, 2005.

7. On crossing the river, the petition indicates, they found a paramilitary roadblock of the United Self-defense Forces of Colombia (AUC) under the command of a man known as "Gavilán" ("Hawk") or "Pablo," his aliases. They carried shotguns and stopped the vehicle. Mr. Valbuena Castro and Mr. Hamburger Diazgranados were taken from the vehicle and carried off, and to this day their whereabouts remain unknown.

8. The petitioners say that on May 9, 2001, Mr. Luis Francisco Valbuena Castro, brother of Carlos Alberto Valbuena, went to the city of Montería and from there to Valencia to make inquiries. In addition, Antonio Miranda Camargo, acting on a request from Mrs. Delgado Echenoa (wife of Luis Alfonso Hamburger Diazgranados), traveled to Valencia for the same purpose. After making a series of inquiries about the detention and disappearance of the two persons and the involvement of paramilitary groups, they realized that their own lives were in danger, so they returned to Montería.[FN2]

[FN2] Comments from the petitioners received on July 27, 2006.

9. Concerning the investigation of the disappearance of Carlos Alberto Valbuena Castro, the petitioners indicate that on September 19, 2001, Luis Francisco Valbuena Castro filed with the National Prosecutor's Office a criminal complaint against unidentified members of the AUC over the abduction of his brother. They say that the investigation was assigned to the Life Unit 42 of the Prosecutor's Office, which, by Note 1069 of May 14, 2003, assigned the investigation to the office in Montería. This office, for its part, turned the investigation over to its Third Specialized

Prosecutor's Office on June 19, 2003. The petitioners contend that on December 4, 2003, following the elimination of the Specialized Prosecutor's Office by presidential decree, the case was assigned to Prosecuting Office 13 of Montería, which, in turn -- eleven days later -- sent it to Prosecuting Office 24 at the Montelíbano Precinct. On December 7, 2004, Prosecutor 24 issued a ruling declining to proceed and ordering the dossier on the abduction of Mr. Carlos Alberto Valbuena Castro filed away.[FN3]

[FN3] The petitioners also report that on February 28, 2002, Mrs. Ada Lía Ramos Doval filed with the Seventh Court of Barranquilla an application to have Mr. Carlos Alberto Valbuena declared missing, a first step towards a declaration of presumed death based on his disappearance. On February 14, 2006, the State, while the presumed death proceedings were in progress, found him guilty of failing to provide alimony.

10. As regards the disappearance of Luis Alfonso Hamburger Diazgranados, the petitioners point out that Mrs. Delgado Echenoa filed the relevant complaint with the National Prosecutor's Office. The investigation was assigned the number 13838 and filed away on August 26, 2003.[FN4]

[FN4] The petitioners also report that Mrs. Delgado Echenoa asked the Ministry of National Defense to record the forced disappearance of her husband and requested a declaration of presumed death because of his disappearance. Her application was assigned the number 660-2004 at the Fifth Family Court of the Barranquilla District and awaits a decision.

11. In light of these events, the petitioners ask that the State be held liable for violating its duty to protect the right to life and personal integrity, personal liberty, due process and judicial protection established in the American Convention. The paramilitaries responsible for the abduction, they argue, act with the acquiescence of the State, "hence the breach of its legal oversight duty and its obligation to protect the life, reputation and property of the inhabitants of that region of Colombia, where the actions of the AUC were public knowledge, which places the responsibility squarely on the State because it either failed to prevent or allowed the forced disappearance (...)"[FN5]

[FN5] Brief with comments from the petitioners, received on July 27, 2006.

12. They contend, in addition, that the State did not seriously investigate the events so as to prosecute and punish the perpetrators; the agencies responsible for administering justice declined to act one after the other, no evidence was collected and rulings were issued to file away the case. They claim, furthermore, that this negligence by the State caused deep suffering to the family members, which constitutes cruel, inhuman and degrading treatment.

13. As to the State argument that domestic remedies were not exhausted and the petition is therefore inadmissible (see *infra* Position of the State, paragraphs 17 and 18), the petitioners maintain that the "State may not place the burden of exhausting domestic remedies to clear up the case of forced disappearance (...) on the victims' family members, especially when it alleges that they should intervene in the criminal proceeding as *partie civile*, inasmuch as it is common knowledge that paramilitaries would murder relatives of victims who dared to insist that the Prosecutor's Office investigate the events." [FN6]

[FN6] Note DDH-GOI/21044/0983 of the Directorate of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs received on May 4, 2006.

14. Concerning the absence of delay after the investigations were reopened, which the State mentions (see *infra* Position of the State, paragraphs 17 and 18), the petitioners say: "it is unacceptable that five years after such grievous crimes as these forced disappearances (...) the statement should be made that the investigation has been reopened to clear up the matter--even though this is constitutionally and legally impossible in Colombia because there has been no identification of the perpetrators that would enable the case to move forward." [FN7]

[FN7] Note DDH-GOI/21044/0983 of the Directorate of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs received on May 4, 2006.

B. Position of the State

15. The events that give rise to this petition, argues the State, cannot be laid at the door of the State, and in any event the petitioners' complaint is inadmissible because domestic remedies have not been exhausted and the exceptions to that rule, established in Article 46.2 of the American Convention, do not apply. [FN8]

[FN8] Note DDH-GOI/21044/0983 of the Directorate of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs received on May 4, 2006.

16. Regarding State responsibility for the disappearances, the petition itself indicates that the perpetrators were illegal armed groups; the State is effectively discharging its duty to investigate, having ordered the reopening of investigations intended to arrive at the truth and prosecute the perpetrators. In any event, any assignment of responsibility to State agents must be based on such decisions as may eventually issue from domestic courts of law.

17. As to the exhaustion of domestic remedies, the investigations into the disappearance of Mr. Hamburger Diazgranados and Mr. Valbuena Castro, under case numbers 13838 and 44283, respectively, ended with rulings declining to proceed, even though the alleged victims had not

returned to their homes. On December 15, 2005, however, the Attorney General reopened and reassigned to the Human Rights Unit the investigation of the alleged disappearances. The case is now in the evidence-gathering stage. Thus, the subject matter of the petition is being investigated appropriately and the domestic remedies have not yet been exhausted as required by Article 46.1 of the American Convention.

18. As to possible application of the exceptions to the exhaustion of domestic remedies established in Article 46.2 of the American Convention, in this case the relatives of the victims have access to adequate remedies to pursue the case of the disappearances through courts of law. In addition, there is no unwarranted delay in rendering a final judgment, given the complexity of the matter that involves illegal self-defense groups and their *modus operandi*, which is to destroy evidence, and the diligence shown by the Sectional Director of Prosecuting Offices in requesting the reopening and reassignment of the investigations to the National Human Rights Units.

IV. JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

19. The petitioners are in principle authorized under Article 44 of the American Convention to file petitions with the Commission. The petition indicates as the alleged victims individuals whose rights under the American Convention the State undertook to respect and guarantee. The Commission notes that Colombia is a State party to the American Convention since July 31, 1973, when it deposited its instrument of ratification. Consequently, the IACHR has jurisdiction *ratione materiae* to examine the petition.

20. The Commission has jurisdiction *ratione loci* because the petition alleges violations of human rights protected by the American Convention that are said to have taken place in the territory of Colombia, a State party to that treaty. The IACHR has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected by the Convention was already in effect for the State when the events allegedly took place. Lastly, the Commission has jurisdiction *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

21. For complaints against violations of the American Convention to be admitted, Article 46.1.a of the American Convention requires prior exhaustion of remedies available in the domestic jurisdiction in accordance with generally recognized principles of international law.

22. Article 46.2 of the Convention stipulates that the requirement of prior exhaustion of domestic remedies shall not be applicable 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.

As the Inter-American Court has held, whenever a State alleges a petitioner's failure to exhaust domestic remedies, it must prove that the unexhausted remedies are "adequate" to redress the alleged violation; in other words, that the remedies in the domestic legal framework are sufficient to protect the violated rights.[FN9]

[FN9] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

23. In the present case the State contends that the petition does not meet the requirement of prior exhaustion of domestic remedies under Article 46.1.a of the American Convention, because an investigation is under way by the National Human Rights Unit of the National Prosecutor's Office. The petitioners argue that five years after the disappearances, the investigation is still pending because officials in the judiciary have repeatedly declined to act and have ordered the case to be filed away.

24. The parties' arguments show that the investigations numbered 13838 and 44283, on the alleged disappearance of Mr. Hamburger Diazgranados and Mr. Valbuena Castro, respectively, ended with resolutions declining to proceed and ordering the dossiers filed away, without establishing the whereabouts of the missing persons or prosecuting those responsible for their disappearance. The information provided by the State indicates that the investigation has been recently reopened by the Human Rights Unit and there are as yet no results; more than five years have gone by since the events took place.

25. The State argues that the delay in achieving results in the investigation is due to the complexity of the matter, which involves illegal self-defense groups and their evidence-destroying modus operandi. The IACHR notes that, as a general rule, a criminal investigation must be conducted promptly, so as to protect the interests of the victims, preserve the evidence and even safeguard the rights of any person regarded as a suspect in the investigation. In the present case the passage of time diminishes the prospects of an effective investigation.

26. The State also argues that the Prosecutor's Office properly ordered the case reopened and reassigned to the National Human Rights Unit. The IACHR appreciates the initiative of the National Prosecutor's Office in reopening the investigations that had been closed, but notes that the reopening took place more than two years since closing the investigation of Mr. Hamburger Diazgranados' disappearance, and one year since closing the case on Mr. Valbuena Castro, after the petition was filed with the IACHR. As the Inter-American Court has held, even though every criminal investigation must meet a series of legal requirements, the rule on prior exhaustion of domestic remedies must not stop or delay international remedies to help the victims, so that such

remedies become useless.[FN10] The IACHR also notes that, to date, the reopening of the investigations has produced no results.

[FN10] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Exceptions. Judgment of June 26, 1987. Series C No. 1, para. 93.

27. Consequently, in view of the characteristics and context of this case, the IACHR finds that it is proper to apply the exceptions set out in Article 46.2.c of the American Convention on unwarranted delay of judicial remedies. Accordingly, the American Convention requirements on exhaustion of domestic remedies are not applicable.

28. Application of the exceptions to the rule on exhaustion of domestic remedies under Article 46.2 of the Convention is closely linked to a determination of possible violations of certain rights protected therein, such as access to justice. Owing to its very nature and purpose, however, Article 46.2 has an autonomous content vis-à-vis the substantive provisions of the Convention. Consequently, whether the exceptions apply to a particular case is something that must be determined prior to and separately from an analysis of the merits of the case, inasmuch as the standard for this determination differs from the one used to establish a possible violation of Articles 8 and 25 of the Convention. The causes and effects that prevented exhaustion of domestic remedies will be analyzed in the IACHR report on the merits of this case, so as to determine whether they constitute violations of the American Convention.

2. Filing deadline

29. Under the American Convention, to be admitted by the Commission a petition must be filed within six months of the date on which the alleged victim was notified of the final decision. In the present case the IACHR finds that the exceptions to exhaustion of domestic remedies under Article 46.2.c of the American Convention are applicable. Article 32 of the IACHR Rules of Procedure stipulates that when such exceptions are applicable, the petition must be filed within a reasonable time, as determined by the Commission. The Commission must consider the date on which the alleged violation of rights protected by the American Convention took place, as well as the circumstances of each case.

30. In the present case the petition was filed on June 9, 2005, and the events complained of are said to have taken place as from May 8, 2001. Consequently, the Commission finds that the petition was filed within a reasonable time in light of the characteristics of the alleged events and the procedural activity of the State. Accordingly, this requirement must be regarded as having been met.

3. Duplication of proceedings and res iudicata

31. It does not appear from the case file that the subject of the petition is pending in other international settlement procedures or duplicates a petition already examined by this or another

international body. Consequently, the requirements of Articles 46.1.c and 47.d of the Convention must be regarded as having been met.

4. Characterization of the alleged events

32. The IACHR finds that the petitioner's allegations concerning violation of the duty to guarantee the right to life, physical integrity, personal liberty, due process and judicial protection may be characterized as a violation of rights protected in Articles 4, 5, 7, 8.1 and 25, in conjunction with Article 1.1, of the American Convention. Inasmuch as the petition does not appear to be groundless or inadmissible, the Commission finds that the requirements of Articles 47.b and c of the American Convention have been met.

V. CONCLUSIONS

33. The Commission concludes that it has jurisdiction to hear the petitioner's allegations concerning violations of Articles 4, 5, 7, 8.1 and 25, in conjunction with Article 1.1, of the American Convention and that the petition is admissible under Articles 46 and 47 of the Convention.

34. Based on the above factual and legal considerations and without thereby prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To find this petition admissible in regard to Articles 4, 5, 7, 8.1, 25 and 1.1 of the American Convention.
2. To notify this decision to Colombia and the petitioner.
3. To continue examining the merits of the case.
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

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.