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Title/Style of Cause: Luz Dary Ospina Bastidas and Family v. Colombia
Doc. Type: Decision
Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Evelio Fernandez Arevalos, Sir Clare K. Roberts, Paulo Sergio Pinheiro, Freddy Gutierrez.
Dated: 27 February 2007
Citation: Ospina Bastidas v. Colombia, Petition 1147-04, Inter-Am. C.H.R., Report No. 4/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: the Interdisciplinary Group for Human Rights
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I. SUMMARY

1. On October 25, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition wherein the Interdisciplinary Group for Human Rights (hereinafter “the petitioner”) alleged that members of paramilitary groups, with the acquiescence and involvement of agents of the State of Colombia (hereinafter “the State,” “the Colombian State” or “Colombia”) harassed, threatened, and detained Luz Dary Ospina Bastidas and her family, took over their property in Commune 13, Medellín, department of Antioquia for the period from November 2002 to June 2003 and ultimately destroyed it, with the result that she and her family were forced to move away.

2. The petitioner alleges that the State is responsible for violation of the right to humane treatment, the right to freedom of association, the right to freedom of movement and residence, the right to property, the right to participate in government, the right to a fair trial, the right to judicial protection, and the prohibition against suspension of guarantees, all established in the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”). The State asked the Commission to declare the case inadmissible on the grounds of noncompliance with the rule requiring prior exhaustion of domestic remedies, stipulated in Article 46(1)(a) of the American Convention. The petitioner, for its part, claimed the exceptions to the rule requiring exhaustion of domestic remedies that are allowed under Article 46(2) of the American Convention.

3. After examining the positions of the parties and the compliance with the requirements set forth in articles 46 and 47 of the American Commission, the Commission decided to declare the

present case admissible with regards to articles 5(1), 8(1), 16, 21(1), 21(2), 22(1) y 25 in conjunction with articles 1(1) y 27(1) of the American Convention, to notify the parties and to order publication of its decision.

II. PROCESSING WITH THE COMMISSION

4. The IACHR registered the petition as number P1147-04 and, after doing a preliminary review of its content, forwarded a copy of the pertinent parts to the State on November 23, 2004, requesting information and giving the State two months in which to present its response, in keeping with Article 30(2) of the Commission's Rules of Procedure. The State presented its response on December 12, 2006.

III. THE PARTIES' POSITIONS

A. The petitioner

5. The petitioner states that Commune 13 in the city of Medellín consists of 22 neighborhoods that are home to some 130,000 families, most of whom live below the minimum income level. The petition states that conditions in Commune 13 are breeding grounds for various kinds of outlaw groups, with the result that military operations are becoming increasingly frequent and more and more aggressive.

6. The petition states that a number of military operations were conducted in Medellín's Commune 13 in 2002. "Operation Orion" was conducted in October 2002, which combined members of the Fourth Army Brigade with members of the Public Force attached to the Antioquia Police Command, the Government Security Department, the Air Force, the Technical Investigations Corps (CTI) and the Office of the Prosecutor General. The petitioner states that between October 16 and 18, more than 350 people were detained; 170 of these were brought before the courts. The petitioner alleges that because of the threats and persecution that resulted from the operation, many civic organizations were forced to break up, one of them being the Asociación de Mujeres de las Independencias (AMI)[FN1] [Independencias Women's Association], whose Executive Director was Luz Dary Ospina Bastidas.

[FN1] The AMI is a group of women heads of household whose purpose is to win recognition of women in society. It is part of a broader network of women's organizations in Colombia, called the "Ruta Pacífica de las Mujeres" [Women's Path of Peace].

7. The petitioner alleges that on November 12, 2002, in the aftermath of a joint action conducted by the State Security forces word was spread among residents of the Independencia II neighborhood that paramilitary groups intended to put a finish to that organization. The petitioner states that Mrs. Ospina was told that her name was on the list of people that the paramilitary were planning to assassinate. She and her family left the neighborhood immediately,[FN2] to protect her safety. However, the petitioner alleges that the paramilitary

were taking over the houses vacated by those who had been threatened out of the neighborhood. For that reason, her husband and two children returned to protect the home.

[FN2] Her family consists of her husband, Oscar Tulio Hoyos Oquendo, her children Edid Yazmín, Oscar Darío and Migdalia Andrea Hoyos Ospina and her son-in-law Fabio Alberto Rodríguez Buriticá. Original petition received by the Commission on October 27, 2004, p. 3.

8. The petitioner states that on March 3, 2003, members of the forces of law and order, five civilians without identification but claiming to be from the Prosecutor General's Office, and three men in hoods searched the house of the Hoyos Ospina family without a search warrant. The petition alleges that these people searched the house and tied up Mr. Hoyos, threatening him that he would be locked up for three years. They then untied him and forced him to dig in the floor. They were looking for weapons and left when they found nothing.

9. The petitioner states that a group of armed civilians was digging holes in the backyard of the house on March 6, 2003. On March 11, 2003, another group of armed men, wearing armbands that identified them as members of the Special Anti-terrorist Command of the Public Force, repeated the operation searching for weapons. The petitioner states that in the face of this harassment, Mr. Hoyos and his children decided to leave the house, rent it out and store their furniture in one room.

10. The petitioner asserts that on June 26, 2003, a group of armed men came to the house and threatened the tenant that they would break the door down if she didn't let them in. They allege that once inside, they asked for Mrs. Ospina and her family and proceeded to take the furniture of the Hoyos Ospina family. The following day, they came back to finish looting the property. The armed men also threatened the tenant, saying that if she reported this to the Public Prosecutor she'd lose her head. They told her that the house had to be vacated and had her give a message to Mrs. Ospina and her husband that they needed to speak with them and that they "should go to the Public Prosecutor to find out what would happen to them." [FN3] The petitioner states that the tenant vacated the premises and on July 8, 2003, the paramilitary took over the property. The petitioner states that the property was virtually dismantled: the windows, doors, the bathroom and kitchen appliances and fittings and the bricks were hauled away.

[FN3] The petitioners allege that those who agree "to speak" with the paramilitary commanders never come back alive. Original petition received by the Commission on October 27, 2004, p. 4.

11. The petitioner reports that in August 2003 Luz Dary Ospina and her family moved to Bogotá. In October 2003, they asked the Solidarity Network to list them in the Register of Displaced Persons. That request was denied on December 2, 2003. This decision was later reversed by a December 13, 2004 order to enter these names into the Register of Displaced Persons. [FN4] At the present time Luz Dary Ospina and her family are living outside Colombia.

[FN4] Resolution No. 11001-12791R of February 13, 2004. Affixed to the original petition, received by the IACHR on October 27.

12. The petitioner states that Mrs. Ospina filed a complaint with the Office of the Public Prosecutor of the Department of Antioquia, with the Ombudsman's Office,[FN5] and with the national government.[FN6] The petitioner states that the Office of the Public Prosecutor for the Department of Antioquia launched an investigation into the matter and referred the complaint to the Office of the Special Prosecutor for Human Rights in Bogotá. The petitioner alleges that Luz Dary Ospina did not report the violations directly to the Public Prosecutor's Office because she was afraid, since the facts involved agents of the Public Force and that it also rendered internal resources ineffective.

[FN5].Complaint filed with the Ombudsman's Office on July 18, 2003, claiming the intra-urban displacement and security of Luz Dary Ospina B. and her family (Barrio Independencia II, Commune 13). Affixed to the original petition received by the IACHR on October 27, 2004.

[FN6] The complaints filed with the national government were made during the meetings with the Directors of Human Rights with the Ministry of Foreign Affairs, the National Police, the Office of the Vice President and the Minister of the Interior. The petitioner points out that Luz Dary Ospina stated the following: "The community is afraid of filing complaints because it has seen unmistakable proof of the connivance between the paramilitary, the Army and the police. Repeated complaints have been filed about this, but to no effect [...]. Faced with this risk and lack of security, which affected our entire family, and given the risk of losing our legally built home, we turn to you to take the necessary protective measures to safeguard the lives, good name and property of all citizens, as our Constitution provides." Original petition received by the IACHR on October 27, 2004, p. 5.

13. The petitioner alleges that these facts constitute violations to the rights to humane treatment, fair trial, freedom of association, right to property, freedom of movement and prohibition of displacement, political rights, right to judicial protection and the restrictions to the suspension of guarantees, protected under articles 5, 8, 16, 21, 22, 23, 25 and 27 of the American Convention, to the detriment of Luz Dary Ospina Bastidas and her family.

14. The petitioner reports that at the time of these events, Luz Dary Ospina was a respected and recognized leader of the AMI and that the purpose of the persecution and threats made against her and her family was to break up the organization, which is why the petitioner alleges that Mrs. Ospina was denied her right to freedom of association. The petitioner also alleges that their political rights had been violated without specifying the grounding for that allegation. The petitioner further reports that Mrs. Ospina lost her household furnishings and home, which was torn down. She cannot possibly contemplate rebuilding or even using the vacant lot, because of the danger that she and her family would face were they to return to their community. The petitioner argues that the arbitrary dispossession of the house and the family's forcible eviction inflicted serious psychological and moral harm upon the Ospina Hoyos family and its right to property and their freedom of movement and residence. They also allege that the internal

resources have not rendered to be effective to clarify the facts and in redressing the violations of Mrs. Ospina and her family's rights.

15. The petitioner also contends that by the operations it is conducting in Commune 13, the State is violating its obligation to ensure protection and guarantee the right to life and the right to humane treatment, as well as the principles of proportionality and distinction –principles of international humanitarian law- since the fight against organized crime would not justify the means being used.[FN7] The petitioner argues further that at the time the events in question occurred the national territory was under state of internal commotion, declared on August 11, 2002 by the President of the Republic. They allege that this situation was not attended respecting the minimum standards of legality and that the Army and the Police was allowed to exercise judicial police functions not authorized by law which led to a systematic practice of illegal searches, killings, forced disappearances and forced displacements, in an area with presence of the State security forces.

[FN7] The petitioner points out that during the first half of 2002, the murder rate in the neighborhoods of Commune 13 was up 120% over 2001, a period during which no military operations of this kind were conducted. In 2001 there were 123 deaths; but in 2002, just in the period from January 1, to June 30, the death toll was 269. Statistics from the Citizen Relations Unit of the Medellin Municipal Government Secretariat and from the Rapid Response Unit, Office of the Prosecutor General of the Nation. Original Petition received by the IACHR on October 27, 2004, p. 7.

16. The petitioner contends that these are grounds for the exception allowed under Article 46.2.c of the Convention given that Luz Dary Ospina and her family were afraid to report the violations directly to the Public Prosecutor's Office and given that the Office of the Departmental Attorney failed to advise the Public Prosecutor's Office because they involved members of the State security forces: members of the Army, Police, Prosecution, CTI who threatened to detain her even when there was no arrest warrant against her.[FN8] The petitioner indicates that the Office of the Departmental Attorney of Antioquia initiated investigations and sent the investigation to the Office of the Departmental Attorney of Bogota. It also states that although two years have passed since the events in question occurred; no criminal inquiry has been conducted.[FN9]

[FN8] Original petition received by the IACHR on October 27, 2004, p. 5.

[FN9] Original petition received by the IACHR on October 27, 2004, p. 8.

B. The State

17. The State contends that the violations alleged are not the work of its agents and that it is fulfilling its duty to investigate the facts and has taken steps to stop the violations of the human rights of the residents of Commune 13, in keeping with its obligation to protect and ensure.

18. The State alleges that the petitioner's complaint does not comply with the rule requiring exhaustion of domestic remedies and should therefore be declared inadmissible. The State reports that the Office of Medellin Special Prosecutor 107 is conducting the criminal investigation into the threats alleged to have been made against Mrs. Ospina and her displacement. The investigation is classified as number 7155209, and is in the preliminary phase. Evidence is being taken to shed light on the facts and identify the authors of the alleged crimes. The State also reports judicial inspections were conducted, the scene of the events was visited, intelligence work was done in the area, the victim was located for amplification of her complaint, sworn statements were taken and the CTI was assigned specific functions. The Office of the Special Prosecutor for Human Rights sent copies to the appropriate authorities to decide whether an investigation should be undertaken. The State is of the view that it may be possible to establish the blame for Luz Dary Ospina Bastidas' alleged displacement once the investigations have been completed. As regards the crime of intimidation, the State points out that its investigation is highly complex owing to the anonymity with which the delinquents involved operate, and since the supposed victim found out by way of rumor it is difficult to establish the evidence that would lead to the identification of those responsible.

19. The State alleges that the exception based on an unwarranted delay in rendering justice does not apply because the time taken thus far is reasonable given the complexity of the case and the measures taken by the judicial authorities. It adds that despite the difficulty, the judicial authorities have been diligent in pursuing this case and that the judicial proceedings have been conducted by law, carried out in sequence, and suitable for what the investigation requires.

20. The State points out that the Commune 13 situation has been a complicated one and that despite the State's efforts to restore normalcy and its full authority in Commune 13, the job has always been difficult; it adds that the crimes that take the greatest toll in the area are murders,[FN10] terrorism, kidnapping, extortion and seizure of properties. Because of the situation in the area, the State had to step up its police operations in order to restore law and order in the commune. One such operation was "Operation Orion," which was carried out in strict compliance with its duty to provide security and protection.

[FN10] Between January and mid 2002, 437 murders were recorded in Commune 13. The State's observations, DDH.GOI/60162/2802, received at the Commission on December 12, 2006.

21. The State therefore requests that the IACHR find that there are no grounds for the exceptions allowed under Article 46 (2) and that the petition is therefore inadmissible.

IV. COMPETENCE AND ADMISSIBILITY

A. Competence

22. In principle, under Article 44 of the American Convention the petitioner is authorized to lodge petitions with the Commission. The alleged victims named in the petition are persons

whose Convention-protected rights the Colombian State undertook to respect and guarantee. As for the respondent 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 is competent *ratione personae* to examine this petition.

23. The Commission is also competent *ratione loci* to take up the petition, inasmuch as it alleges violations of Convention-protected rights said to have occurred within the territory of Colombia, a State party to the Convention. The Commission is competent *ratione temporis*, since the obligation to respect and ensure the rights protected under the American Convention was already in effect for Colombia on the date the facts alleged were said to have occurred. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of rights protected under the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies and timeliness of the petition

24. Article 46(1)(a) of the American Convention requires that for petitions to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

25. Article 46(2) of the Convention states that the rule requiring exhaustion of local remedies 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.

As the Inter-American Court of Human Rights has written, when a State alleges a petitioner's failure to exhaust the remedies under domestic law, it bears the burden of showing that remedies remain that are "suitable" to address an infringement of a legal right; in other words, the function of the remedies within the domestic legal system is suitable to protect the violated right. [FN11]

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

26. In the present case, the State is arguing that the petition does not satisfy the rule of prior exhaustion of domestic remedies, stipulated in Article 46(1)(a) of the American Convention, since a criminal case on the subject matter of the complaint is pending.[FN12] The petitioner, for its part, is alleging that the exception provided for in Article 46(2)(c) to the rule requiring

exhaustion of local remedies applies in this case because of the unwarranted delay and ineffectiveness of the criminal investigation at the domestic level.

[FN12] The State's brief of observations, DDH.GOI/60162/2802, received at the IACHR on December 12, 2006.

27. The Commission notes that more than four years have passed since the events that are the subject of the complaint occurred, yet the investigation instituted by the prosecutor's office into the crimes of forced displacement and threats are still only in the preliminary phase and the authors of the crimes have not been identified. The Commission observes that as a general rule, a criminal investigation should be conducted swiftly in order to protect the victims' interests, preserve the evidence and even protect the rights of those persons who become suspects during the course of the investigation. As the Inter-American Court has written, while every criminal investigation must meet certain legal requirements, the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.[FN13] Further, the information supplied by the State does not say whether investigations have been launched into the allegations of illegal searches, invasion of home and destruction of property.

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

28. Therefore, given the characteristics of the present case and the period of time that has passed since the facts in the petition were alleged to have occurred, the Commission finds that the exception allowed under Article 46(2)(c) of the American Convention does apply because of the unwarranted delay in domestic judicial proceedings. Hence, the rule requiring exhaustion of local remedies does not apply.

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 and separate from the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the domestic 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 establish the violation of Articles 8 and 25 of the Convention. The factors that prevented exhaustion of domestic 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 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 his or her rights was notified of the final judgment by the domestic courts. In the case under examination, the IACHR has established that the Article 46(2)(c) exception to the rule requiring exhaustion of local remedies applies. In such cases, Article 32(2) of the Commission's Rules of Procedure provides that "the petition shall be presented within a reasonable period of time, as determined by the Commission." To that end, the Commission must consider the date on which the alleged violation of rights occurred and the circumstances of each case.

31. In the present case, the petition was lodged on October 27, 2004, and the facts alleged therein were said to have occurred between November 2002 and June 2003. Given the context and characteristics of this case, and the fact that the investigation is still in its preliminary phase, the Commission finds that the petition was presented within a reasonable period of time and the admissibility requirement that concerns the timing of the complaint is therefore satisfied

3. Duplication of proceedings and res judicata

32. Nothing in the case file suggests that the subject matter of the petition is pending with another international proceeding for settlement or that it is substantially the same as one already examined by this or some other international body. Therefore, the requirements established in articles 46(1)(c) and 47(d) of the Convention have been satisfied.

4. Characterization of the facts alleged

33. The petitioner's allegations regarding the alleged violation of the right to humane treatment, the right to freedom of association, the right freedom of movement and residence, the right to property, the right to a fair trial and the right judicial protection, state facts that could tend to establish a violation of the rights protected under articles 5(1), 8(1) 16, 21(1), 21(2), 22(1) and 25 of the American Convention, in combination with Article 1(1) thereof. The petition does not appear to be either manifestly groundless or obviously out of order. The Commission therefore finds that the requirements established in articles 47(b) and (c) of the American Convention have been satisfied.

34. Furthermore, the petition makes reference to the state of internal commotion decreed by the President at the time the events in question occurred, and alleges that the limitations to the prohibition of suspension of guarantees by the State, set forth in Article 27 of the Convention, was violated.[FN14] During the merits phase of this case the IACHR will determine whether the State's international obligations under Article 27 of the American Convention need to be examined.

[FN14] See paragraph 16.

35. In the present case, the petitioner's allegations regarding the alleged violations of Luz Dary Ospina Bastidas' political rights under Article 23 have not been properly substantiated and cannot be declared admissible.

V. CONCLUSIONS

36. The Commission concludes that it is competent to examine the claims made by the petition with regard to the alleged violation of articles 5(1), 8(1) 16, 21(1), 21(2), 22(1) and 25 of the Convention, in conjunction with Article 1(1) thereof, and that they meet the admissibility requirements set forth in articles 46 and 47 of the American Convention.

37. Based on the arguments of fact and of law made herein and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible with regard to articles 5(1), 8(1) 16, 21(1), 21(2), 22(1) and 25 and 27 of the American Convention, in conjunction with Article 1(1) thereof.
2. To declare the petition inadmissible with respect to Article 23 of the American Convention.
3. To notify the Colombian State and the petitioner of this decision.
4. To proceed with the analysis of the merits of the case.
5. To publish this decision and include it in the IACHR's Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 27th day of the month of February, 2007. (Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Freddy Gutiérrez, Commissioners.