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Caballero Delgado and Santana: A Problematic Application of the American Convention on Human Rights

by Claudia Martín and Diego Rodríguez*

On several recent occasions, the Inter-American Court on Human Rights (Court) has addressed the practice of forced disappearance in light of the standards established in the American Convention on Human Rights (Convention). In *Velásquez Rodríguez*, its most important decision to date, the Court stated, "The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obliged to respect and guarantee." Some of the rights affected by this multiple violation, according to the Court, are the rights to life, to humane treatment, to personal liberty, and to the necessary fair trial guarantees when brought before a judge. This list of rights reflects similar language in the UN Declaration on the Protection of Persons from Enforced Disappearances and the Inter-American Convention on Forced Disappearance of Persons.

On December 8, 1995, the Court issued a decision in *Caballero Delgado and Santana*, the first case ever decided by that body against Colombia. The case involved the disappearance on February 7, 1989, of Isidro Caballero Delgado and María del Carmen Santana at the hands of

the Colombian military and a paramilitary group. Both victims were linked to the M-19 guerrilla group. Several witnesses were able to learn about their detention by the military and their subsequent mistreatment. Judicial efforts to determine their whereabouts, establish the criminal responsibility of the perpetrators, and seek compensation were ineffective.

During the late 1980s and early 1990s, human rights abuses ravaged Colombian society. According to a 1992 report issued by Human Rights Watch/Americas, forced disappearances, torture, extrajudicial executions, and arbitrary detentions were common in many regions of the country, and were particularly related to the repression of suspected guerrilla members, political dissidents, union leaders, human rights activists and civilians caught in conflict zones. During 1989, official Colombian figures recorded 312 forced disappearances.

In its discussion of the merits of the case, the Court established that the perpetrators of the disappearance were State agents (members of the military exercising their official powers), as well as civilian members of paramilitary groups tolerated by and collaborating with Colombian authorities. The violations thus were imputable to Colombia in accordance with Article 1.1 of the Convention, which imposes on States parties the generic obligation to respect the rights of persons under its jurisdiction.

The Court further found that Colombia was responsible for violating Articles
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WCL Clinic Files Landmark Asylum Case

by Sidney Lebowitz

The International Human Rights Clinic at the Washington College of Law (WCL) recently filed an appeal before the United States Board of Immigration Appeals (BIA) on behalf of a young Togolese woman fleeing forced

The case may establish a precedent in U.S. asylum law, which heretofore has not recognized fear of infliction of FGM as grounds for a grant of asylum.

polygamous marriage and imminent infliction of female genital mutilation (FGM). The case may establish a precedent in U.S. asylum law, which heretofore has not

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U.S. Asylum Law

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4 (right to life) and 7 (right to personal liberty) of the American Convention. The Court, however, declared that the forced

The *Caballero* decision raises several troubling issues. One of its primary flaws is lack of in-depth legal analysis to provide guidance on the proper interpretation of human rights standards in the hemisphere.

disappearance of the two people did not imply the violation of Article 5 (right not to be tortured) or of Articles 25 and 8 (the right to judicial protection and to fair trial).

The *Caballero* decision raises several troubling issues. One of its primary flaws is lack of in-depth legal analysis to provide guidance on the proper interpretation of human rights standards in the hemisphere.

The Right Not to Be Tortured

The Court noted that only the imprecise account of two witnesses indicated torture and cruel treatment, and that this testimony was not confirmed by the other witnesses. In reaching this conclusion, the Court appears to have forgotten that the claim of torture in this case must be considered in the context of a forced disappearance. The international understanding of the multiple character of this violation implies a right of humane treatment. The Court itself has confirmed this international consensus on the multiple violation effect of the forced disappearance of persons in *Velásquez Rodríguez*. In

It is unreasonable to require applicants to prove not only a forced disappearance by agents of the State but also each of the potential violations that a forced disappearance implies.

that case, the Court ruled that the prolonged isolation and deprivation of communication of a kidnapped person constitute a violation of Article 5 of the American Convention.

Additionally, in a case of forced disappearance, it is unreasonable to require applicants to prove not only a forced dis-

appearance by agents of the State but also each of the potential violations that a forced disappearance implies (right to life, right to humane treatment, right to personal liberty, right to judicial protection, etc.) The evidentiary issue is particularly relevant because the forced disappearance of a person is generally part of an effort by the State to conceal and destroy evidence. Despite such obstacles, in *Caballero*, the petitioners and the Inter-American Commission were able to prove both the existence of the forced disappearance and its perpetrators. Once the disappearance has been established, the burden of proof should then shift to the State to disprove the additional implied violations. In this case, Colombia was unable to present evidence indicating that the two persons abducted and disappeared by Colombian military personnel were treated humanely.

The petitioners also presented evi-

Once the disappearance has been established, the burden of proof should then shift to the State to disprove the additional implied violations.

dence that the two victims were treated inhumanely. Although not all of the witnesses were able to corroborate this claim, the evidence was more than enough to establish any *prima facie* claim of torture. If the Court had any doubt and was interested in corroborating the allegations of torture, there were several sources that it could have consulted by exercising its investigatory powers. The UN's human rights mechanisms could have been an important source of information in determining the usual pattern of forced disappearances in Colombia. Other available sources include the Inter-American Commission on Human Rights as well as regional and local NGOs which constantly compile and provide information on human rights in Colombia. Such methodology is not new for the Inter-American Court. In *Velásquez Rodríguez* and *Godínez Cruz*, the Court requested information on the human rights situation in Honduras and on the pattern of forced disappearances of persons. This mechanism was used by the

Court after recognizing the inherent problems that victims' relatives usually have in proving a forced disappearance.

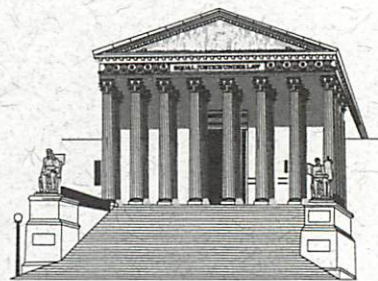
In addition, international bodies have recognized that the suffering of the relatives of a disappeared person amounts to torture, and, consequently, the State must

International bodies have recognized that the suffering of the relatives of a disappeared person amounts to torture, and, consequently, the State must remedy any wrongdoing.

remedy any wrongdoing. For example, in *M.C. Almeida de Quinteros v. Uruguay*, the UN Human Rights Committee stated: "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and the continuing uncertainty concerning her fate and whereabouts. The mother has a right to know what has happened to her daughter. In these respects, she too is a victim of the violation suffered by her daughter in particular, of Article 7 [the right not to be tortured under the International Covenant on Civil and Political Rights]." In *Caballero*, however, the Inter-American Court found that the rights of the relatives of the two victims were not violated, despite the fact that the forced disappearance was properly established.

The Right of Access to a Court of Law

The Court appears to have held Colombia responsible for the violation of Article 7.1 of the Convention because official agents were involved in the illegal abduction of the victims. The Court, however, failed to analyze other paragraphs of Article 7 and specifically overlooked the right of access to a court granted by paragraph 5. This analytical oversight is especially troubling



in light of the Court's position in recent cases that a violation of the first paragraph of Article 7 makes analysis of the other paragraphs unnecessary. In *Gan-garam Panday*, for example, the Court, after establishing that the victim was illegally detained, pointed out that "[i]t is,

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therefore, not necessary for the Court to express an opinion about the reported arbitrariness of that measure or the fact that he was not brought promptly before a competent judicial authority."

Article 7, however, is not limited to

The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

protections against illegal detention. This provision also grants any detainee the right to be brought promptly before a court or any officer authorized by law to exercise judicial power (7.5) and the right to recourse before a court that determines the lawfulness of the detention (7.6). The finding of a violation of one paragraph of the Article, therefore, does not imply that the Court must refrain from analyzing the other paragraphs. In fact, the European Commission and Court on Human Rights have long held that Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is substantially the same as Article 7 of the American Convention, includes separate provisions that require independent review.

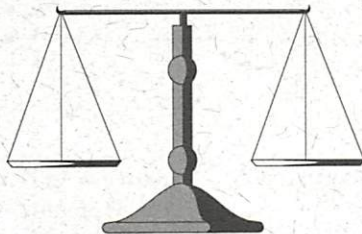
The European bodies base their interpretation on the fact that, even if a person is legally arrested, he still has the right to be brought promptly before a magistrate or other authorized official and to have the legality of the detention established by a court. In the American Convention, the right to access to a court is protected by both Article 7.5 and Article 8.1, which ensures the right to a fair trial. According to the object and purpose of the Convention, which is to promote respect for the rule of law in a democratic society, the right of access to a court is an essential due process guarantee and a necessary predicate to the right to a fair trial. As stated by the European Court in the *Golder* case "[i]t is inconceivable . . . that Article 6 (1) [of the European Convention, which is substantially the same as Article 8.1 of the American Convention] should describe in

detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."

Furthermore, the Inter-American Court ruled in *Velásquez Rodríguez* that forced disappearance is a multiple and continuous violation of many rights granted by the American Convention. Specifically, the Court stated that kidnapping of a person involves, *inter alia*, "... an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the

The Court stated that kidnapping of a person involves, *inter alia*, "... an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge.

appropriate procedures to review the legality of the arrest. . ." (emphasis added)



In the *Caballero* case, which also involves a forced disappearance, the Court failed to follow the *Velásquez* precedent. Thus, the court ignored the right of access to a court and did not find a violation of Article 7.5.

The Court also refused to apply other articles of the Convention to *Caballero*. In one startling statement, it asserted that "due to the short time that elapsed between the detention of the victims and their presumable killing, the Court considers that the due process guarantees ensured in Article 8 do not apply; therefore, the Court finds no violation of this article." Taken to its logical conclusion, this statement implies that in the *Caballero* case, Colombia had no obligation to respect and to ensure the right to judicial guarantees. This assertion, however, is contrary to the essential due process guarantee of access to a court which is integral to the proper exercise of the right to a fair trial. If the intention of the Court was to imply that Article 8 by itself was not applicable to the facts of this case, it should have enunciated the reason in its decision. Furthermore, since the victims

were not brought before a court, the Court should have found at least that the State violated Article 7.5 of the Convention.

The application of Article 8 in cases such as *Caballero* raises issues that must be addressed by the Court in future decisions involving forced disappearances. Article 8 refers to the right to be heard by a court "in the substantiation of any accusation of a criminal nature." In *Caballero*, the victims were abducted because they were presumed to be "subversives" or "terrorists" belonging to the M-19 armed group. They were accused of committing an act of a "criminal nature" and they apparently were executed as punishment. They should, at a minimum, have had the right to be heard by a court of law convened to substantiate these charges.

The Right to an Effective Remedy

According to the standards created by the Court, a remedy must be appropriate and effective, that is, it must be "capable of producing the results for which it was designed," in order to meet the requirements of the American Convention. In keeping with these standards, the Court has stated that, in cases of forced disappearances, habeas corpus (as understood in Latin American legal systems) is the appropriate remedy to establish the whereabouts of the victims, to ascertain the legality of their deprivation of liberty, and, when the detention is unlawful, to order their release. In *Neira Alegría*, the Court ruled that the right to habeas corpus was protected by Article 7.6 of the

In cases of forced disappearances, habeas corpus (as understood in Latin American legal systems) is the appropriate remedy to establish the whereabouts of the victims, to ascertain the legality of their deprivation of liberty, and, when the detention is unlawful, to order their release.

Convention. The Court further held that the ineffectiveness of the remedy for the victims comprised a violation of that article.

Instead of applying these precedents, the Court in *Caballero* turned to Article 25.1, a broad provision which applies to

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the violation of any right protected by the Constitution and domestic laws of the State concerned, as well as to rights ensured by the Convention, rather than the specific provisions of Article 7.6. It seems that a more feasible interpretation of the standards laid down by the Convention would be to apply Article 7.6, in relation to the general protection of Article 25.1. In any case, in view of ensuring consistency in its case law, the Court should follow its own decisions or it should spell out the reasons why it decides to make a different application of the law.

Without explaining its legal reasoning, the Court held that Caballero Delgado and Santana had been provided an "effective" remedy under Article 25.1. The judge who substantiated the habeas corpus in *Caballero* requested information from different State agencies and personally visited the Fifth Brigade, where the victims' next of kin had asserted they were held. These authorities, which included those members of the armed forces who allegedly disappeared Mr. Caballero Delgado and Ms. Santana, denied the detention. Based on this denial, the tribunal declared the action unsubstantiated, because "it had not been proved that [the victims] had been deprived of liberty." Since the

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Court found that the habeas corpus judge had handled the matter "with great speed," it ruled that the right to an effective remedy had not been violated.

The Court's ruling ignores its own findings regarding other aspects of the case. The Court found Colombia responsible for the disappearances because there was proof that the victims were detained and presumably killed by State agents, specifically, members of the Fifth Brigade. When analyzing the effectiveness of the habeas corpus proceeding, however, the Court overlooked the intentional failure by those same agents to provide information to the habeas corpus judge. This omission is clear evidence that agents of Colombia precluded the habeas corpus proceeding from being the "effective" remedy required by the American Convention. Although the habeas corpus judge acted with due diligence, the victims' rights were not protected by this remedy because other agents of the State,

responsible for their abduction and killing, prevented the tribunal from ascertaining their whereabouts. It is important to remember that the Court as an international tribunal does not rule on the responsibility of the separate organs of the State but on the responsibility of the State itself. Under general international law, States are responsible not only for the acts of its agents but also for their omissions.

Conclusion

The role of the Inter-American Court in protecting the rights of individuals and, more importantly, in deterring the practice of forced disappearances, requires a consistent application of the proper legal standards and reasoning. *Caballero Delgado and Santana* raises serious questions about the current application of the Convention and calls for a careful reassessment of many issues. ☹

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response to the initial crisis, the resulting slaughter, and the danger of a similar crisis erupting in neighboring states, highlight the absence of workable mechanisms

The West's feeble response to the initial crisis, the resulting slaughter, and the danger of a similar crisis erupting in neighboring states, highlight the absence of workable mechanisms of conflict prevention.

of conflict prevention. Yet, Central Africa's history over the past thirty years points to one possible mechanism to prevent local conflicts and civil wars from gaining irreversible momentum.

Since the mid-1960s, Central Africa has been ravaged by countless conflicts. French troops have intervened at least thirty times during this period. While the interests of France were not always strictly humanitarian, the experience nevertheless

demonstrates that conflicts in Central Africa are not very difficult to diffuse, or at least to neutralize, for a certain time. This pattern should be used again now, and a new kind of humanitarian intervention should be advocated. Central Africa will not turn out to be another Somalia, because its under-equipped militia can be easily controlled. In addition, Central Africa could be the perfect testing ground for such intervention, especially now that Cold War has ended and the superpowers are no longer competing on its soil.

The rebuilding of nations shattered by ethnic conflict, such as Rwanda, should be among the international community's highest priorities. The UN Human Rights Commission has called for massive housing construction as well as the creation of security corridors to facilitate the safe return of the refugees. UNHCR estimates that around 500,000 houses are needed. Creating a safe climate for the return of refugees can be accomplished by setting up security checkpoints and safe routes, a process which should be supervised by the Rwandan Government as well as international organizations and NGOs. To pre-

vent reprisals and revenge attacks against the resettled Hutus, observers should be posted to guarantee a relatively safe environment.

Rwanda's judicial system also needs radical improvement. According to Amnesty International, overcrowded prisons have resulted in more than 2,300 deaths, in part because there are 43,000 detainees in prisons designed for 4,500. In May 1995, prisoners suffocated to death following a wave of arrests. Rwanda lacks the infrastructure and procedural guarantees necessary to try those in custody. The recent arrest of a key prosecutor who turned out to be a member of the infamous Hutu death squads tragically illustrates the failure of the Rwandan judicial system to deal with the genocide. As a result, fear reigns supreme within Rwanda, and the refugees in Zaire are unwilling to return home.

Despite the UN's conclusions, the world has taken little action. Perhaps Central Africa will have to suffer another nightmare, perhaps we will have to witness once again rivers red with blood and choked by corpses, before we find the courage to act. ☹