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Title/Style of Cause: Francisco Guarcas Cipriano v. Guatemala
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Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Dated: 2 March 1998
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I. BACKGROUND

The Facts Alleged

1. On March 7, 1994, the Inter-American Commission on Human Rights (hereinafter "Commission") received a communication denouncing the October 19, 1993 disappearance of Francisco Guarcas Cipriano, a member of the Grupo de Apoyo Mutuo (GAM) and a native of the Canton Semejá in Chichicastenango. A member of the GAM reported having seen Mr. Guarcas that day, at approximately 20:00 hours, near the bus terminal in Zone 4 of Guatemala City, accompanied by four men -- Civil Self-defense Patrol (PAC) collaborators and members of the G-2 branch of army intelligence. The petitioners alleged that the men had tricked Mr. Guarcas into going with them by inviting him to a party. He has neither been seen nor heard from since that time. At the time of his disappearance, Mr. Guarcas was 38 years old and the father of seven children.

2. The petitioners reported that, some days prior to his disappearance, Mr. Guarcas had decided to renounce his service in the Civil Self-Defense Patrols (PAC's). Thereafter, he had received numerous threats. Additionally members of the armed forces had visited various members of the local community to pressure them to return to PAC service. The petitioners allege that Mr. Guarcas was kidnapped by Miguel Xiloj Mejia, a member of the PACs and the G-2 intelligence service of the armed forces, who operated in the Canton of Semejá controlling the local population and obliging them to perform PAC service.

3. Family members searched for Mr. Guarcas in hospitals and in various detention centers, without any success. The petitioners attached copies of: a writ of exhibición personal (a form of habeas corpus), dated October 29, 1993, filed on behalf of Mr. Guarcas before the First Court of First Instance, Criminal Branch, by the Grupo de Apoyo Mutuo, registered as received by the

Secretariat of the Supreme Court of Justice; a writ of habeas corpus, dated November 3, 1993, filed before the Second Judge of First Criminal Instance, and registered as received; and a complaint dated November 4, 1993, filed by the victim's son with the Office of the Ombudsman for Human Rights.

II. PROCESSING BEFORE THE COMMISSION

4. The Commission opened Case 11.275 on March 18, 1994, and transmitted the pertinent parts of the petition to the Government of Guatemala by means of a note of that date, with a response requested within 90 days.

5. By means of a note dated August 5, 1994, the Commission reiterated its request for information, noting that it would otherwise have to consider applying Article 42 of its Regulations, which allows for certain factual presumptions to be made absent any response from the State concerned.

6. On August 22, 1994, the State presented a brief response to the Commission's request for information, indicating that the results of its investigations coincided with the petition received. The State indicated that the GAM had filed a writ of habeas corpus before the Second Court of First Criminal Instance of Sentencing in the Department of Guatemala, dated November 3, 1993, which had failed to produce positive results. On February 22, 1994, the Auxiliary Agent of the Public Ministry in the Department of El Quiché had informed the pertinent authorities that the records in his jurisdiction disclosed no pending criminal process concerning the disappearance of Francisco Guarcas Cipriano. This information was transmitted to the petitioners on September 16, 1994, with any observations in response requested within 45 days.

7. On January 6, 1995, the Commission received a communication from the petitioners to the effect that another non-governmental human rights organization would henceforth be acting as co-petitioner in the case.

8. On January 31, 1995, the Commission directed a letter to the Government requesting specific information as to what if any measures of investigation had been initiated in the matter, what if any declarations and testimony had been taken, and what if any measures had been taken in response to the filing of certain actions by the petitioners.

9. The petitioners' observations on the Government's response were received on May 11, 1995, indicating that the relevant domestic remedy in the case of a disappearance, namely habeas corpus, had been invoked. However, neither the writ interposed on October 29, 1993, nor that filed on November 3, 1993 had been resolved. Family members had then filed a criminal complaint before the First Court of First Criminal Instance of Sentencing on June 20, 1994, registered as case C-486-94. On June 27, 1994, Judge Emilio Noriega Estrada had ordered the Director of the National Police to investigate the disappearance and possible murder of Mr. Guarcas. Family members had again denounced the disappearance before the Public Ministry on September 12, 1994. The petitioners reported that these measures had produced no positive results. They also provided information concerning the links between the Guatemalan armed forces and the PAC's, and the reported role of the latter in pressuring individuals to perform PAC

service and intimidating those who wished to renounce it. The petitioners alleged that the facts denounced constituted violations of Articles 4, 5, 7, 25 and 1.1 of the American Convention on Human Rights (hereinafter "American Convention"). These observations were transmitted to the State in a note of May 16, 1995, with any information in response requested within 30 days.

10. The Government of Guatemala submitted its response to the petitioners' observations on June 19, 1995. The Government indicated that domestic remedies had not been exhausted, and that the relevant authorities were carrying out all the measures of investigation available under the law. Family members of the victim had exercised their right to invoke domestic remedies without hindrance, and the nature of the outcome as negative or positive did not discount the validity of the process itself. They reported that writ of habeas corpus interposed before the Supreme Court had been transmitted to the Fifth Court of First Instance, where it had been dismissed. A writ interposed by the Office of the Ombudsman for Human Rights before the Court of Peace on Duty on January 20, 1994 had been transmitted to the Fifth Court of First Criminal Instance, where the result was negative. The authorities had processed the writs as required, and received the necessary collaboration from the functionaries concerned. The State asserted that the case should not be admitted by the Commission because the domestic investigation had not been exhausted. This response was submitted to the petitioners in a note of July 19, 1995, with observations in response requested within 45 days.

11. The petitioners submitted observations on the above response on September 25, 1995, reiterating that the appropriate domestic remedy had been invoked to no avail. They linked the disappearance of Mr. Guarcas to disappearances carried out in Guatemala during the time period in question, and specifically to reported threats and reprisals by PAC members against individuals who renounced service in the patrols. These observations were transmitted to the Government of Guatemala on October 17, 1995, with any response requested within 30 days.

12. On November 7, 1995, the Government submitted additional observations. The Government indicated that domestic law provided for a special recourse of *averiguación* when habeas corpus proceedings had failed to uncover the whereabouts of an individual, and provided for applicable criminal remedies as well. A criminal action had been initiated pursuant to the complaint filed by the victim's son, known as cause 486-93. The matter, identified as file 868-95, was being investigated by the designated Auxiliary Prosecutor of the Public Ministry. On October 25, 1995, the latter had reiterated a request to the National Police to designate agents to investigate the matter. The accused had provided a declaration denying the charges. The State indicated that the criminal action was in the investigation stage, that the appropriate measures were being taken, and that applicable domestic remedies had not been exhausted. This information was transmitted to the petitioners on November 28, 1995, with any response requested within 45 days.

13. The petitioners responded on January 16, 1996, recounting that a total of three writs of habeas corpus had been interposed in favor of Mr. Guarcas (two by the petitioners and one by the Office of the Ombudsman for Human Rights), as well as the denunciation filed before the Public Ministry and the criminal complaint filed before the First Court of First Criminal Instance of Sentencing. They asserted that none had produced a positive result. They indicated that the remedy of *averiguación* to which the Government had referred was of an optional nature. This

response was transmitted to the Government on January 24, 1996, with all observations and information requested within 30 days.

14. On February 23, 1996, the Government provided an additional report on the case, indicating that the recourse of averiguación was provided for as a matter of domestic law and was not "optional." With respect to the criminal process, the Government indicated that the family members of the victim had failed to provide declarations, and failed to collaborate with the authorities, which presented a serious obstacle to the investigation. The accused had denied the charges in his declaration of October 25, 1995. The complainant had been cited to appear before the Metropolitan Prosecutor's Office on November 14, 1995, but had failed to do so. That same day, the First Court of First Criminal Instance of the Department of Guatemala had requested that the National Police provide the results of their investigation. This information was transmitted to the petitioners on March 22, 1996, with any response requested within 45 days.

15. On May 14, 1996, the petitioners requested an additional period of time to provide a response. An extension of 30 days was granted by note of May 15, 1996.

16. On June 13, 1996, the petitioners provided their observations to the foregoing response of the Government, reiterating their previously stated position with respect to the exhaustion of domestic remedies. They emphasized that, by law, the Public Ministry is required to pursue the criminal action initiated pursuant to the complaint filed by the victim's family. In addition to the violations of the American Convention alleged above, the petitioners asserted that the facts constitute a violation of Article 8 as well. This submission was transmitted to the Government on June 20, 1996, with any response requested within 30 days.

17. On July 18, 1996, the Government informed the Commission that the Attorney General of Guatemala had been requested to provide information, which would be forwarded as soon as it had been presented. By note of July 29, 1996, the Commission indicated that it had granted a 30 day extension for the receipt of that information.

18. On August 26, 1996, the Government submitted a report on the case, referring to investigation 868-95 before the Public Ministry. The Government noted that the cause under investigation had been initiated pursuant to the criminal complaint filed by the victim's son in February of 1994, assigned cause number 486-93, and had been somewhat "interrupted" due to the entry into force of the new Code of Criminal Procedure. The most recent measures taken included: March 22, 1996, Tomás Guarcas Pérez had appeared before the Metropolitan Prosecutor's Office to sustain his accusation; April 11, 1996, the declarations of two witnesses were taken, to the effect that they had not seen the individuals who had taken Mr. Guarcas; on April 11, 1996, Manuel Guarcas Cipriano appeared before the Metropolitan Prosecutor's Office to declare that the accused had offered the victim's father Q. 15,000.00 to drop his efforts to investigate his son's disappearance; on May 13, 1996, Tomás Guarcas Xiloj provided a similar declaration, specifying that the accused had made the offer on March 16, 1996. The declarants had offered to provide the Prosecutor with the addresses of those accused. This information was transmitted to the petitioners for their observations on September 9, 1996, with a response requested within 45 days.

19. The petitioner's response was submitted on October 28, 1996, reiterating that domestic remedies had proven ineffective and unduly delayed. This response was transmitted to the Government on December 18, 1996, with any response requested within 30 days.

20. On March 7, 1997, the Government presented an additional report, reiterating that the investigation remained ongoing, but indicating that sufficient proof to identify the authors or prove the guilt of the accused had not been collected. This report was transmitted to the petitioners on April 1, 1997, with any response requested within 30 days.

21. On July 17, 1997, the petitioners submitted their final observations. They recounted that witnesses had testified to the fact that Francisco Guarcas Cipriano had been threatened by members of the PACs for having renounced patrol service and for his affiliation with the GAM, and that witnesses had affirmed that the victim was last seen in the company of PAC members. The petitioners alleged that the facts denounced gave rise to violations of Articles 1, 4, 7, 8, 16 and 25 of the American Convention. In addition to their previous arguments, the petitioners indicated that the kidnapping of Mr. Guarcas as a reprisal for his renunciation of PAC service violated his right to freedom of association. This submission was transmitted to the Government of Guatemala on August 26, 1997, with any response requested within 30 days.

22. By means of a note dated September 22, 1997, the Government requested a 30 day extension in order to provide information. The Commission granted this request by means of a note of October 1, 1997.

23. On October 16, 1997, the Government provided a brief submission of additional information, reporting that on September 10, 1996, the First Judge of First Criminal Instance, Narcoactivity and Crimes against the Environment had ordered accused Miguel Xiloj Mejia to appear to provide his declaration in cause 486-94, under the charge of the Fifth Official. However, the process had remained inactive from September 13, 1996 until September 23, 1997, when the matter was reactivated with another citation to the accused to appear on September 26, 1997. He did not appear. On September 25, 1997, the Presidency of the Judicial Organism ordered the Fifth Official to appear for an official hearing to establish responsibility for the period of inactivity. On October 3, 1997, the presiding judge issued an arrest warrant against accused Miguel Xiloj Mejia, which remained pending. This information was transmitted to the petitioners on November 26, 1997, with any response requested within 30 days.

24. The petitioners provided a brief additional response on January 8, 1997, reporting that, pursuant to the period of inactivity acknowledged by the State, on April 9, 1997, the Sixth Court of First Criminal Instance, Narcoactivity and Crimes against the Environment resolved that the investigation had produced insufficient proof to order any precautionary measures against those accused. The petitioners provided a copy of the resolution, which indicated a lack of merit in the case on the basis that, while the disappearance of the victim had been denounced, the declarants in the criminal process had not been precise. While they had stated that the victim had been taken in a car, they had not indicated the type of vehicle. The petitioners reported that a final writ of habeas corpus had been submitted on behalf of the victim on June 23, 1997.

III. THE POSITIONS OF THE PARTIES

The Position of the Petitioners

25. The petitioners maintain the State of Guatemala is responsible for the disappearance of Francisco Guarcas Cipriano, and for its failure to respond with appropriate measures to investigate and establish his whereabouts, and to submit those responsible to the corresponding measures of prosecution and punishment, in violation of Articles 4, 5, 7, 8, 16, 25 and 1.1 of the American Convention. Mr. Guarcas disappeared on October 19, 1993, and his whereabouts and fate remain unknown. The petitioners allege that he was disappeared shortly after renouncing service in the PACs. They note the role of the PACs during the time in question, and the reprisals suffered by those who opposed them. They indicate that witnesses had provided sworn statements attesting that the victim had been threatened by members of the PACs as a result of renouncing his service, and because of his affiliation with the GAM, and that he had last been seen in the company of PAC members. They indicate that one of those accused, Miguel Xiloj Mejía, was a PAC member and member of army intelligence.

26. The petitioners contend that the State failed to undertake an investigation designed to establish the whereabouts or fate of Mr. Guarcas. They contend that the remedy of habeas corpus was the principal recourse to be invoked in the case of a disappearance as a matter of domestic law, as well as for purposes of admissibility before the Commission. They assert that the habeas corpus writs filed on behalf of the victim, on October 29, 1993, November 3, 1993, and June 23, 1997 produced no positive results. They further indicate that the victim's family had denounced the disappearance before the First Court of First Instance of Criminal Sentencing on June 20, 1994, before the Public Ministry on September 12, 1994, and before the Ombudsman for Human Rights on November 4, 1993 and June 1, 1995, without having obtained any positive results. They maintain that, once the initial writ of habeas corpus had been unsuccessful, the Public Ministry and judiciary were charged with undertaking an investigation *de oficio*, a duty they had failed to discharge.

The Position of the State

27. The State maintains that the petitioners have failed to exhaust available domestic remedies, and that the relevant authorities continue to effectuate the measures of investigation available under the law. The State reported that writ of habeas corpus interposed before the Supreme Court had been transmitted to the Fifth Court of First Instance, where it had been dismissed. They contend that family members of the victim had exercised their right to invoke domestic remedies without hindrance, and the nature of the outcome as negative or positive did not discount the validity of the process itself. A writ interposed by the Office of the Ombudsman for Human Rights before the Court of Peace on Duty on January 20, 1994 had been transmitted to the Fifth Court of First Criminal Instance, where the result was negative. The authorities had processed the writs as required, and received the necessary collaboration from the functionaries concerned. Further, the State argues that the petitioners should have invoked the recourse of *averiguación*.

28. The State acknowledges that cause 486-94 had been inactive from September 13, 1996 until September 23, 1997, when the matter was reactivated with a second citation to the accused

to appear before the court to provide his declaration. That had been addressed, the State contends, given that on September 25, 1997, the Presidency of the Judicial Organism had ordered the Fifth Official to appear for a hearing to establish responsibility for the period of inactivity. On October 3, 1997, the presiding judge had issued an arrest warrant against accused Miguel Xiloj Mejia, which remained pending as of the Government's last report. The State maintains that its judicial authorities remain seized of the criminal investigation.

IV. CONSIDERATIONS WITH RESPECT TO ADMISSIBILITY

29. The Commission is competent to examine the subject matter of this complaint, as it concerns alleged violations of Articles 1, 4, 5, 7, 8, 16 and 25 of the American Convention. The Republic of Guatemala deposited its ratification of the American Convention on May 25, 1978, and the Convention entered into force for all Parties on July 18, 1978.

30. The petition includes the information required by Article 32 of the Commission's Regulations, and meets the conditions set forth in Article 46.1.c of the American Convention and Article 39 of the Commission's Regulations, as it is neither pending settlement in another international inter-governmental proceeding, nor essentially duplicative of a petition pending or previously considered by the Commission. The petition was timely filed, as required by Article 46.1.b, given that the victim allegedly disappeared on October 19, 1993, and the case was filed on March 7, 1994.

31. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [shall] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework.

32. The petitioners contend that the remedy appropriate in the case of a forced disappearance, the writ of habeas corpus, was invoked and exhausted. To date, the Government has maintained that domestic remedies were invoked but not exhausted. The State contends that the writs of habeas corpus were processed and discharged according to law. Being obligations of means rather than results, the State asserts that the fact that they were not successful in locating the victim does not negate their efficacy as a remedy. Further, the State contends that the victim's family invoked, but failed to fully avail themselves of the remedy of a criminal investigation, as they failed to cooperate in the proceedings. The Commission observes that the submissions of the parties are in accord that more than one writ of habeas corpus was filed, and that none produced information as to the whereabouts or fate of the victim.

33. A writ of habeas corpus would normally be the effective "means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, Ser. C No. 17, para. 64, citing, Velásquez Rodríguez Case, Judgment of July 29, 1988 (Merits), Ser. C No. 4, para. 65; Godínez Cruz Case, Judgment of January 20, 1989 (Merits), Ser. C. No. 5, para. 68; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989 (Merits), Ser. C No. 6, para. 90. The applicable domestic law of exhibición personal provides that, if the person concerned is not located through that recourse,

"the court de oficio, will immediately order the investigation of the case, until it has been completely clarified." Accordingly, invocation of the remedy of averiguación would not be necessary. For the purposes of admissibility in the present case, the Commission finds that the petitioners invoked and exhausted the appropriate domestic remedy designed to correspond to an alleged forced disappearance. The Commission will turn to the substantive considerations with respect to the adequacy and timeliness of the measures of investigation undertaken in this case in its decision on the merits.

34. Taking into account the foregoing analysis and conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

- A. To declare the present case admissible.
- B. To transmit this report to the State of Guatemala and the petitioners.
- C. To place itself at the disposal of the parties for the purpose of reaching a settlement based on respect for the human rights protected in the American Convention; and invite the parties to indicate their disposition to initiate the procedure of friendly settlement within a period of 30 days, counted as of the date of transmission of the present report.
- D. To continue with the analysis of the merits of the case.
- E. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.