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Title/Style of Cause: Walter Gonzalo Huacon Bidal and Mercedes Eugenia Salazar Cueva v. Ecuador
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Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez, Florentin Melendez.
Dated: 26 February 2004
Citation: Huacon Bidal v. Ecuador, Petition 4409/02, Inter-Am. C.H.R., Report No. 9/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANT: Jose Ricardo Villagran
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I. SUMMARY

1. On October 28, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a complaint filed by Dr. Jose Ricardo Villagran on behalf of the relatives of the purported victims, Walter Gonzalo Huacón Bidal and Mercedes Eugenia Salazar Cueva (hereinafter “the petitioners”) against the Republic of Ecuador (hereinafter “the State” or “Ecuador”), for the alleged police killing of the two victims and for the failure of the domestic judicial system to investigate, try and punish the individuals responsible and for the failure to provide reparations for the families of the victims for their loss. The petitioners claim violations of Articles 4 (right to life), 8 (fair trial) and 25 (access to a simple and prompt judicial recourse) of the American Convention on Human Rights (hereinafter, “the American Convention”), in breach of the international obligations of the State under the treaty, set forth in Article 1(1) thereof. The State requested that the Commission declare the petition inadmissible and proceed to archive it for failure to exhaust domestic remedies.

2. In this report, the Commission analyzes the information available in terms of the American Convention and concludes that Petition 4409/02 meets the admissibility requirements set forth in Article 46 of the American Convention. Consequently, the Commission decides to declare this case admissible, to notify the parties of the decision, and to continue with the analysis of the merits of the case with respect to the alleged violations of Articles 4, 8, 25 and 1(1) of the American Convention. At the same time, it decides to publish this report.

II. PROCESSING BY THE COMMISSION

3. The petition was received on October 28, 2002. On December 16, 2002 additional information was received from the petitioner. On April 9, 2003, the Commission began processing this petition as No. 4409/02 and forwarded the relevant parts to the Ecuadorian State, with a request that a response be presented within 60 days.

4. On June 19, 2003 the Commission received the reply of the State, dated June 17, 2003. On July 18, 2003 the Commission transmitted the pertinent parts of the State's reply to the petitioners and requested any further observations to be presented within one month from the date of this communication.

5. On July 28, 2003 the petitioners presented observations on the State's reply. These observations were transmitted to the State on January 21, 2004. No further information or observations have been received from either of the parties.

III. POSITIONS OF THE PARTIES REGARDING ADMISSIBILITY

A. Position of the petitioners

6. In Guayaquil, Ecuador, on Monday, March 31, 1997, a group of people gathered at the home of Walter Huacón Baidal and Mery Chancay de Huacón to celebrate. Walter and Wilson Huacón were brothers. Wilson had a headache and decided to go home with his two daughters, Karla y Kerlyy. His companion, Mercedes Salazar, remained at the request of her relatives. Thirty minutes later Mercedes, concerned about Wilson, decided to leave as well and her brother-in-law, Walter, offered to drive her home, borrowing a Datsun taxi from William Huacón, Walter and Wilson's first cousin.

7. According to the petition, Walter drove the taxi along the Perimetral Avenue, advancing some 200 meters, when, spotting a police check-point of the Transit Commission that was requesting documents, Walter, realizing that he did not have them with him, made a U turn to return to the house, going down the street the wrong way. The police, sirens blazing, gave chase because the taxi was going the wrong way down a one-way street.

8. Four more police officers, belonging to the motorized squadron of the National Police, joined in the chase on two motorcycles, and someone began to shoot and hit Mercedes, who was in the back seat, in the neck. Walter passed by his house and yelled at his wife to bring out the documents, and his wife, Mery, ran inside to get his papers. The policemen were later identified as José Carbo Bajiña and Carlos Mosquera, on one of the motorcycles and Victor Ramos and Julio Torres on the second motorcycle, and Pedro Espinoza and Bolivar Ramirez in the Transmit Commission patrol.

9. When the taxi was stopped, Walter got out of the taxi with his hands in the air and, according to the petitioners, police officer Carbo shot him in the leg and he fell back into the taxi. Then he pointed his gun through the back window of the car and shot two more times at the level of Mercedes' heart, killing her, although her body was inert and quite possibly she was already dead. When Mery came running with the documents she begged the police not to kill

Walter, that he wasn't a thief, but she was thrown to the ground by a swift push by police officer Carbo, who warned her to get out of the way or else she would be killed. Carbo then put the gun to Walter's chin and shot again, killing him. The police did not assist the victims and fled from the site. Not one of the armed agents of the State reported the incident to his superiors.

10. Neither Walter nor Mercedes had a criminal record. Walter was a small businessman, and a volunteer in the Civil Defense forces, while Mercedes was a housewife. None of the armed agents reported the crime to any authority. In addition, the four men later met and washed the residue of powder off their weapons, pretending that the assassination of Walter Huacón and Mercedes Salazar never occurred.

11. Proceedings were initiated immediately in the ordinary criminal courts, but were transferred to the special police court. On March 16, 2000, the Second Court of the IV District of the National Police, outside the ordinary criminal justice system, dismissed the charges of simple homicide set forth in Article 224 of the Penal Code of the National Police against five of the police officers implicated in the crime, and only the charges against José Carbo Bajaña were affirmed and his case recommended for trial. The charges against the other police officers were provisionally dismissed. The petitioners charges that Article 451 of the Criminal Code should have been applied to all six police officers who were implicated in the crime and that they should have been tried before an ordinary criminal court and not before a special police court. Article 451 of the Criminal Code provides that "when two or more persons participate in a robbery or other crime, all will be responsible for the assassination that may be committed; unless it is proven who committed the crime and that the others had no part in it and could not prevent it." On November 30, 2000 the Second District Police Court on appeal, confirmed the decision of the lower court to dismiss the charges against the other police officers and on November 9, 2001, on appeal, the same Court, confirmed the decision of the lower court to recommend for trial José Carbo Bajaña. José Carbo deserted and is currently a fugitive; as a consequence, the criminal proceedings are suspended. The statute of limitations on civil actions tolls four years after the date of the occurrence of the crime.

12. As regards civil actions, in order to claim compensation, since State agents were responsible for the crime, independent proceedings were initiated on behalf of each victim in April 2000. The case of Walter Huacón is in the 5th Civil Court in Guayaquil, with the number 368-B-00; and the case of Mercedes Salazar is in the 7th Civil Court in Guayaquil, with the number 246-00.

13. As regards the criminal proceedings, there will be no judgment as long as the only person charged with the crime continues to be a fugitive. The petitioners allege that José Carbo is a fugitive with the complicity of his colleagues, who did not detain him (the charges against three were dismissed and the other two weren't even charged). As regards the civil proceedings, the only way to claim reparations is by means of judicial proceeding for moral damages, which follows the ordinary proceedings, and is the slowest of all. Such proceedings may last for 10 years or more. The petitioners argue that this violates Article 25 of the Convention, which provides that "every person has the right to a simple and prompt recourse." The State, in opposing any indemnification, has maintained that there is no final judgment that establishes the State's responsibility; thereby creating a vicious circle, to the sole detriment of the victims of the

violations. According to Ecuadorian law, Article 41 of the Code of Criminal Procedure provides that a civil action for indemnification cannot be initiated until there is a criminal conviction of the person responsible for the crime. The only civil actions that may be instituted without the requirement of a prior criminal conviction are actions for moral damages, which are independent of criminal proceedings.

14. As regards the civil action, the Attorney General's office has maintained since the beginning of the proceedings that in order to have access to the administration of justice in order to claim indemnification for the damages, the plaintiffs must pay US\$ 80,000 in judicial taxes. This renders it impossible for persons of meager economic resources to have access to the judicial system, and converts the civil proceedings for damages into a privilege reserved to the rich, rendering the only civil remedy available for the compensation of the victims, inaccessible. The petitioner points out that the annual salary of a worker in Ecuador is less than US \$1,250. Dr. Socrates Vera Castillo, of the Attorney General's office in Guayas in a document dated February 4, 2002, insinuated to the 7th Civil Judge the possibility that he would be removed from his post if he did not order the payment of the US\$ 40,000 judicial tax. In the case of Mercedes Salazar, the 7th Civil Judge ruled that the judicial taxes (US \$40,000) had to be paid pursuant to the operative rules of the year 2002 despite the fact that the proceedings were initiated in 2000 and the judicial tax was paid at that time. The judge of the 5th Civil Court, in the case of Walter Huacón, also ordered that the judicial tax of US \$40,000 be paid, but later he retracted that order.

15. Both civil proceedings began in April 2000, and are currently in the discovery stage. By law, the discovery stage ought to last for ten working days. In the civil proceedings involving Mercedes Salazar, this period began in November 2001 and could not proceed to the issuance of a judgment due to the negligence of the Judge. Both the civil proceedings in the cases of Mercedes Salazar and Walter Huacón are effectively paralyzed.

16. The Technical Judicial Police did carry out an investigation and concluded that José Carbo Bajaña was responsible for the death of Walter Huacón because it was proven by means of the ballistics examination that the bullets found in the body of Huacón came from his weapon.

17. A serious presumption of the responsibility of the police officer Carlos Mosquera Cachaguay, Sgt. Pedro Espinoza Ramírez and the guard Bolívar Ramirez, for the death of Mercedes Salazar, arises since they shot at the car while in hot pursuit. In addition, a bullet from José Carbo's weapon was found in the chest of the dead woman. In spite of the fact that an investigation was conducted, the only person who faces trial is José Carbo, who has been a fugitive since the day of the crime. The criminal proceedings cannot be finalized as long as Mr. José Carbo Bajaña is a fugitive. Since almost all the other police officers either had the charges against them dismissed or were never charged, they could still be implicated, but this would depend upon the criteria employed by the judges of the special police court. According to the petitioners, this is a trick since the internal remedies, they argue, will not end until the statute of limitations for the crime has expired.

B. Position of the State

18. The State's response was dated May 21, 2003 and was signed by Attorney General Dr. José María Borja Gallegos. The communication was transmitted to the Commission on June 17, 2003 and received on June 19, 2003.

19. The State requested the Commission to declare the petition inadmissible and to file the case, arguing that the petitioners had failed to exhaust available domestic remedies. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] 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.

20. The State reports that the petitioners never filed a complaint informing the authorities of the events that had transpired which impeded the State from complying with its obligations to prevent, investigate and sanction the persons responsible for the violations that allegedly occurred. The State submits that the Commission should wait until the relatives file a complaint with the State authorities or against the individual or individuals whom they consider responsible for the assassination of the persons who were allegedly killed, so that the appropriate judicial proceedings may be carried out. From the information presented to the State it cannot be deduced that any legal actions were undertaken before any tribunals or competent Ecuadorian authorities. Consequently, the State submits that available domestic remedies not only were not exhausted but they were never even instituted.

21. In summary, throughout its presentation, the State indicated that the petition should be declared inadmissible for failure to exhaust domestic remedies. Furthermore, the State argued that the petitioners did not even attempt to exhaust their domestic remedies and therefore, the State cannot be held responsible for events that it was not even aware of.

IV. ANALYSIS

A. Competence of the Commission *Ratione Personae*, *Ratione Loci*, and *Ratione Temporis*

22. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. The petition names the alleged victims as being Mr. Walter Huacón and Mercedes Salazar, both of whom are "persons" under the terms of Article 1(2) of the American Convention. The respondent State, the Republic of Ecuador, ratified the American Convention on December 28, 1977. The Commission, therefore, has competence *ratione personae* to examine the petition.

23. As regards the Commission's competence *ratione loci*, the Commission has such competence given that all the alleged violations were committed within the jurisdiction of the Republic of Ecuador.

24. With respect to the Commission's competence *ratione temporis*, the Commission has such competence given that the alleged violations were committed after Ecuador's ratification of the American Convention on December 28, 1977.

25. Finally, the Commission has competence *ratione materiae* because the petition alleges violations of human rights set forth in, and protected by, the American Convention.

B. Other Requirements for Admissibility

a. Exhaustion of Domestic Remedies

26. The exhaustion of domestic remedies is a requisite for the admissibility of any petition brought before the Inter-American Commission. This requisite, however, is subject to a number of denial of justice exceptions, set forth in Article 46(2) of the American Convention, which provide that domestic remedies need not be exhausted if the legislation of the State concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment.

27. The State correctly notes that the exception to the rule of exhaustion of domestic remedies must be raised in the first stages of the proceedings before the Commission. The State raised the issue in its first response to the petitioner's complaint. The State has argued, however, that domestic remedies were not exhausted in this case because the petitioners failed to denounce the events to the authorities and consequently the State had no information about which it could have conducted an investigation and no information that such events had taken place. The State notes that it has no information that the petitioners attempted to exhaust their domestic remedies before the Ecuadorian authorities, or that they even attempted to initiate any such remedy by filing a criminal accusation against any of the individuals whom they considered responsible for the events.

28. The petitioners responded to the State's reply by pointing out that the individual, under Ecuadorian law, is not required to initiate criminal proceedings by filing an accusation against the persons putatively responsible for the crime. When a crime is committed, the State authorities are, by law, obliged to try the persons responsible and to punish them, whether there is an accusation against any particular individual or not. This is particularly true in cases involving violence in which the National Police and the Transit Commission of Guayas (special police) were reportedly involved. The State cannot claim ignorance of the facts when they were widely disseminated in the Ecuadorian press.

29. Furthermore, the petitioners point out that they filed a claim before the Ecuadorian Courts: the proceedings were given the number 91-97 and were initiated before the 13th Criminal Court in Guayas. The petitioners presented a timely accusation against the persons they considered responsible for the assassinations, as part of the above-cited proceedings. Mery Chancay Quimís, Walter Huacón's widow, filed a criminal accusation against José Carbo. In the same proceedings, the police officer José Mosquera was charged, as well as the transit police officers (members of the Transit Commission of Guayas) Pedro Espinoza and Victor Ramírez. The other two police officers, Victor Ramos and Carlos Torres were not even indicted. After having filed the criminal accusation, Mery Chancay began to receive constant threats, both by letters and by anonymous telephone calls, and even police patrols began to circle her house in a continuous manner. Because of this constant intimidation, Mery decided to leave the country.

30. The petitioners reiterate that the criminal proceedings are not the only action that they initiated in the Ecuadorian courts. They also initiated two civil proceedings in which they claim indemnification on behalf of the relatives of Walter and Mercedes for the harm caused. Pursuant to Ecuadorian law, a criminal action can only be initiated following the filing of a complaint by an individual who has been harmed (Article 32 of the Code of Criminal Procedure provides that “the initiation of a cause of action by an individual will only proceed if there has been a prior complaint filed by the person affected”).

31. The Commission considers that the decisions of the special police courts and the civil courts, as well as the press clippings submitted by the petitioners, constitute sufficient notice to the State that these events took place, that judicial proceedings had been initiated and that State agents were allegedly implicated. Considering the facts of this petition, the Commission finds that there has been an unwarranted delay in resolving the proceedings, given that the events occurred in March 1997, and now, seven years later, they still have not been concluded. Furthermore, the State dismisses the implication that it has any responsibility in the matter for the investigation and prosecution of those responsible for the commission of a crime in Ecuador and inexplicably shifts the burden of initiating the criminal proceedings to the petitioners when the State clearly has an independent interest in the investigation and punishment of crime. The jurisprudence of the Inter-American Commission establishes that when a crime has been committed it is “incumbent on the State, particularly in light of its obligation to take punitive action, to institute, ex officio, proceedings to identify, prosecute, and punish all those responsible, diligently pursuing every stage of the proceedings to a conclusion.”[FN1] As in this earlier case, the Commission concludes that the time elapsed between the events and the date of the instant report was more than enough for the State to investigate the facts, initiate proceedings and punish those responsible in the domestic sphere. Consequently, the Commission finds that the instant petition is admissible by reason of the exceptions to rule on the exhaustion of domestic remedies provided in Article 46(2)(a) and (c) of the American Convention.

[FN1] Report N° 15/02, Admissibility, Petition 11.802, Ramon Hernandez Berrios et al., Honduras, February 27, 2002, at para. 25.

32. The Commission recalls its practice, that invoking the exceptions to the prior exhaustion requirement of Article 46(2) of the Convention is closely linked to the determination of the possible violation of certain rights set forth therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), by its nature and purpose, is a rule that stands autonomously from the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule of prior exhaustion of domestic remedies provided for at Article 46(2) are applicable to the case in question should be done prior to and separate from the analysis of the merits, since it depends on a different standard of appreciation from that used to determine violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have impeded the exhaustion of domestic remedies in the instant case will be analyzed, as relevant, in the report the Commission adopts on the merits of the dispute, to determine whether indeed violations of the American Convention have taken place.

b. Timeliness of the Petition

33. According to Article 46(1)(b) of the American Convention, the general rule is that a petition must be lodged within a period of six months “from the date on which the party alleging violation of his rights was notified of the final judgment.” Under Article 32(2) of the Commission’s Rules of Procedure, this deadline does not apply when exceptions to the prior exhaustion requirement are applicable. In such a situation, the Rules of Procedure stipulate that the petition must be lodged within a reasonable period of time, considering the date on which the alleged violation of rights occurred and the specific circumstances of the case.

34. The Commission notes that more than six years have passed since the special police court proceedings were initiated and that to date no final decision has been reached. Consequently, the Commission holds that the petition was submitted within a reasonable period of time.

c. Duplication of Proceedings and Res Judicata

35. The Commission understands that the substance of this petition is not pending in any other international proceeding for settlement, and that it is not substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) have also been met.

d. Characterization of the Alleged Facts

36. Article 47(b) of the American Convention provides that the Commission shall consider inadmissible any petition or communication that “does not state facts that tend to establish a violation of the rights guaranteed by the Convention.” The Commission considers that, prima facie, the allegations of unprovoked police violence resulting in the death of the two putative victims, alleged by the petitioners, if proven to be true and not otherwise contradicted, could tend to establish violations of the right to life, fair trial and judicial protection, set forth in Articles 4, 8 and 25 of the American Convention, in conjunction with the general obligation of the State to respect and ensure the aforesaid rights provided in Article 1(1) of the treaty.

V. CONCLUSIONS

37. Based on the foregoing considerations of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 1(1), 4, 8, and 25 of the American Convention.
2. To notify this decision to the petitioners and to the State.
3. To continue with its analysis of the merits of the case.

4. To publish this report and to include it in the Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 26 day of February, 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez.