

REPORT No. 44/13
PETITION 55-00
ADMISSIBILITY
GUSTAVO WASHINGTON HIDALGO
ECUADOR
July 11, 2013

I. SUMMARY

1. On February 14, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition filed by Luz Esperanza Hidalgo and Alcivar & Associates, Attorneys-at-Law (hereinafter "the petitioners") alleging that the Republic of Ecuador (hereinafter "the State") is responsible for the death of Gustavo Washington Hidalgo (hereinafter "the alleged victim"), said to have occurred when he was arrested and beaten by National Police agents; they also claim that the State failed to observe judicial guarantees and to afford judicial protection in the investigation, prosecution and punishment of those responsible for the events.

2. The petitioners claim that the State is responsible for violation of the rights to life, to humane treatment, to judicial guarantees and to judicial protection, recognized in Articles 4, 5, 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), all in conjunction with the general obligation under its Article 1(1), which is the duty to respect and ensure the Convention-protected rights. For its part, the State alleges that the petition is inadmissible on the grounds that the remedies under domestic law were not pursued and exhausted, as required under Article 46(1)(a) of the Convention.

3. After examining the positions of the parties in light of the admissibility requirements set forth in Articles 46 and 47 of the American Convention, the Commission concludes that it is competent to take up the petition, which is admissible with respect to the alleged violation of the rights protected under Articles 4 and 5 of the American Convention, read in conjunction with its Article 1(1), to the detriment of Gustavo Washington Hidalgo, and with respect to Articles 5, 8 and 25 to the detriment of his next of kin. In the merits phase, the Commission will also examine the possible violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. It therefore orders that the parties be notified of this report and that it be published in the Commission's Annual Report to the OAS General Assembly.

II. PROCESSING WITH THE IACHR

4. The Commission registered the petition as number 55-00. Following a preliminary analysis, the relevant parts of the petition were forwarded to the State for its observations. On March 31, 2003, the State presented its response, which on August 9, 2005 was sent to the petitioners for their observations. The petitioners filed their response on September 8, 2005; its attachments were sent on September 14, 2005. The response and its attachments were sent to the State for its observations. On January 9, 2006, the State requested an extension of the time period for submitting its observations; the IACHR acceded to the State's request. The State's response was received on April 18, 2006 and forwarded to the petitioners for their observations.

5. The petitioners presented their response on June 1, 2006, which was forwarded to the State for its observations. On May 1, 2009, the IACHR requested updated information from both parties. The State presented its response on August 3, 2009, in which it repeated the arguments made in its previous communications. The State's response was forwarded to the petitioners, who were reminded of the Commission's request asking for updated information. On May 20 and September 1, 2009, the petitioners requested a hearing, which was not granted.

6. On March 25, 2011, the IACHR again requested updated information from the petitioner and indicated that if that information was not received within one month, the IACHR could decide to close the record on the petition. On May 23, 2011, the petitioners replied that the grounds for the petition still existed; that information was sent to the State.

III. THE POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioners contend that on the night of December 8, 1992, Gustavo Washington Hidalgo was inebriated when he attempted to enter a public dance at the "Las Palmas" venue. He was stopped by the dance organizers, who summoned a policeman and a scuffle ensued. They asserted that amid all the commotion, four more police officers were summoned, who beat the alleged victim and then dragged him 400 meters to the National Police detention facility. The petitioners contend that the police threw several buckets of water on the alleged victim to revive him and then put him in a cell, where they hurled insults at him and "savagely and brutally beat and kicked him to death."

8. The petitioners assert that when he learnt about the detention, the alleged victim's brother, Vicente Alonso Lucas Hidalgo, went to arrange his release and allegedly paid a sum of money to compensate for a police officer's broken watchband, which his brother had damaged. The petitioners allege that when his brother entered the cell he found the alleged victim lying "face down and bleeding; because he was a photographer and had his camera with him, the alleged victim's brother managed to take a photograph of his brother." The alleged victim's brother reportedly summoned a physician, who went to examine the body and told him that his brother was dead. When he exited the cell, the alleged victim's brother confronted the police who had allegedly killed his brother; the individuals who had accompanied him created a commotion, removed the body and "public outrage erupted against the police for the cowardly murder; they set fire to the detention facility; the police ran off and the army moved into the city to restore order."

9. The petitioners allege that the investigation got underway on December 10, 1992, with the order instituting an inquiry, issued by the National Police Chief of the canton of Tosagua, whom the petitioners regard as a biased examining judge. The petitioners allege that after the autopsy was conducted on December 11, 1992, the next of kin were threatened not to bring any legal action.

10. The petitioners state that on October 27, 2000, the Manabí Second Criminal Court took the case; they also claim that despite the 70-day deadline that the law prescribes, the investigation did not move beyond the inquiry phase for 10 years.

11. The petitioners note that on July 10, 2001, they filed a petition seeking a writ of constitutional *amparo* for violation of human rights. The petition was filed with the Portoviejo Administrative Contentious Court, which denied it on August 3, 2001 on the grounds that that a petition of constitutional *amparo* could not be used to challenge court rulings, which the Constitution does not allow, as the Constitutional Court allegedly confirmed on October 31, 2001. The petitioners state that on February 25, 2003, criminal action was declared time-barred.¹

12. The petitioners allege that they do not have funds to pay for attorneys. They further allege that when the order instituting the proceedings (which never materialized) was issued, they could have become private plaintiffs but were under no legal obligation to become parties to the proceedings, since it was the criminal court judge's responsibility to set the criminal process in motion and move it forward. Therefore, as they were not party to the proceedings, they were unable to exhaust the domestic remedies.

13. The petitioners contend that justice has been denied by the State's failure to conduct a thorough and impartial investigation on its own initiative. They further maintain that the due process guarantees were not observed and that the complex judicial proceedings that the State claims to have conducted (see *infra* III.B) never happened. They are claiming the exception to the rule requiring exhaustion of domestic remedies set forth in Article 46(2)(c) of the American Convention, which is an unwarranted delay in the investigation.

14. They maintain that the State is responsible for violation of the rights to life, to humane treatment, to judicial guarantees and to judicial protection, recognized in Articles 4, 5, 8 and 25 of the Convention, read in conjunction with Article 1(1) thereof, and are therefore requesting reparations for the alleged victim's next of kin.²

B. The State's position

15. In response to the petitioners' complaint, the State maintains that the petition is inadmissible on the grounds that the remedies under domestic law were not pursued and exhausted, as Article 46(1)(a) of the American Convention requires.

16. The State points to the set of facts described in the petition and states that on December 10, 1992, the Tosaga National Police Chief issued the order to institute an inquiry into the murder of Washington Hidalgo.

17. The State contends that it has conducted complex judicial inquiries in the investigations to identify the authors of the facts at issue in the petition. To support its contention, the State sent copies of the forensic examination of the body, the testimony given by the alleged victim's mother and brother, and the December 2000 testimony of a civilian witness; it also sent a copy of the Prosecutor's June 2001 request to the Chief of Manabí Police Command No. 4 asking for the names of the police

¹ From the information provided, it was learned that the order declaring criminal action time-barred was apparently confirmed on December 5, 2003, and that the court-appointed defense attorney was allegedly notified on December 25, 2003.

² The petitioners list the alleged victim's next of kin as: Luz Esperanza Hidalgo Subiaga (mother) and his grandchildren: Maryury Monserrate and Washington Miguel Hidalgo Pacheco, María Alejandra and Gustavo Adolfo Hidalgo Bravo.

officers who were on duty at the detention facility on the day of the events, so that they might give testimony.

18. It maintains that after a number of years, the author(s) of the alleged crime was still not identified, so that on December 20, 2002, the criminal examining judge declared criminal action time-barred ten years after the event, in accordance with Article 101 of the Criminal Code. It indicates that the order declaring criminal action time barred went to the Portoviejo Superior Court, which confirmed it on February 25, 2003. The State alleges that when the petition was filed, the domestic remedies had still not been exhausted.

19. The State argues that the petitioners could have challenged the judge for the delay they are alleging. Alternatively, they could have filed an appeal challenging the order declaring criminal action time-barred, which might have been an effective and appropriate remedy. The State contends that due process was observed, that the petitioners were free to avail themselves of the remedies available under domestic law, and that it had guaranteed them a fair and legal process.

20. The State further contends that the petitioners declined to avail themselves of the domestic remedies, and acknowledge that they could have become private plaintiffs in the case; therefore, they can hardly claim the exceptions to the rule requiring exhaustion of domestic remedies.

21. The State adds that it has settled this case within a reasonable time period given the type of trial involved and within the means that the State has available to it. It contends that "inasmuch as the time that the State took to wrap up the internal proceedings are within the reasonable limits required by the Court and the Commission, it cannot be accused of having violated the guarantee established in Article 8(1)" of the Convention.

22. Based on the foregoing arguments, the State is asking the Commission to declare the petition inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. The Commission's competence *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*

23. The petitioners are, in principle, authorized to file petitions with the Commission under Article 44 of the American Convention. The alleged victims named in the petition are natural persons whose rights under the American Convention the Ecuadorean State undertook to respect and ensure. As for the State, the Commission notes that Ecuador has been a State party to the Convention since December 28, 1977, the date on which it deposited its instrument of ratification. Hence, the Commission has competence *ratione personae* to examine the petition. The Commission also has competence *ratione loci* to take up the petition, as the latter alleges violations of human rights said to have occurred within the territory of Ecuador, a State Party to the Convention.

24. The Commission has competence *ratione temporis* because the obligation to respect and ensure the rights protected under the American Convention was already in effect for the State on the date when the facts alleged in the petition were said to have occurred. Likewise, the Inter-American Convention to Prevent and Punish Torture entered into force for Ecuador on November 9, 1999, which was subsequent to the date on which the facts in this complaint were alleged to have occurred. The

foregoing notwithstanding, the Commission has competence *ratione temporis* to apply the Inter-American Convention to Prevent and Punish Torture as it relates to the obligation to investigate and punish the alleged acts of torture and the alleged denial of justice that the facts that occurred subsequent to its ratification constitute.

25. Finally, the Commission has competence *ratione materiae* because the petition denounces possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention requires that for a petition alleging a violation of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2) of the Convention provides that the rule requiring prior exhaustion of domestic remedies shall not apply when (i) 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; (ii) 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 (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

27. As the Commission's Rules of Procedure provide and as the Inter-American Court has held, whenever a State alleges a petitioner's failure to exhaust domestic remedies, it bears the burden of identifying what remedies remain to be exhausted and of demonstrating that the remedies that have not been exhausted are "adequate" for correcting the alleged violation, *i.e.*, that they are suitable to address an infringement of a legal right.³

28. In the present petition, the State maintains that the petitioners did not avail themselves of the opportunity to challenge the judge and that they could have filed an appeal against the order declaring criminal action time-barred. For their part, the petitioners contend that they did not have the money to hire an attorney and did not have a legal obligation to become a private plaintiff in the criminal case. They also argue that the exception provided in Article 46(2)(c) of the American Convention applies owing to the unwarranted delay of the criminal case which the State should have moved forward on its own initiative.

29. From the arguments made by the parties, the first order of business is to establish what domestic remedies the petitioners should have exhausted. The precedents established by the Commission are that whenever the facts at issue are events involving a possible violation of basic rights that, under domestic law, are to be prosecuted by the State, it has an obligation to set the criminal process in motion and move it forward;⁴ in such cases, this is the suitable avenue to investigate the

³ Article 31(3) of the Commission's Rules of Procedure. See also I/A Court H.R., *Case of Velásquez Rodríguez*, Judgment of July 29, 1988, paragraph 64.

⁴ IACHR, Report No. 99/09, Petition 12.335, Gustavo Giraldo Villamizar Durán v. Colombia, October 29, 2009, paragraph 33. See also, IACHR, Report No. 52/97, Case 11.218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paragraphs 96 and 97, and IACHR. Report No. 55/97, Case 11.137, Abella *et al.*, paragraph 392.

facts, prosecute those responsible and establish the penalties that the law prescribes; it also makes other pecuniary means of reparation possible.⁵

30. The Commission observes that with issuance of the order to begin an inquiry, dated December 10, 1992, a criminal investigation was reportedly instituted into the death of Gustavo Washington Hidalgo. Manabí's Second Criminal Court took up the case on October 27, 2000, and on February 5, 2003, the order declaring criminal action time-barred was allegedly confirmed.⁶

31. As for the challenge seeking removal of a judge, mentioned by the State,⁷ the Commission observes that such a challenge would not be adequate to remedy the situation denounced by the petitioners with regards to the investigation of the circumstances and a determination of criminal liability for the acts associated with the events that led to the death of Gustavo Washington Hidalgo.⁸ Therefore, this is not a remedy that must be exhausted for the petition to be admissible.

32. As for the remedy mentioned by the State through which a person files an appeal to challenge an order declaring criminal action time-barred, the Commission observes that under the Ecuadorean Criminal Code applicable to the petition under analysis, if not prosecuted within ten years from the date of their commission, prosecution of violations punishable by imprisonment shall be time-barred.⁹ In others words, under the circumstances specified in the law, the statute of limitations operated *de jure* on the basis of the passage of time. Furthermore, Article 398 of the Criminal Code provided that criminal court judges had to automatically refer decisions in which criminal prosecution by the State was time barred to a higher court for review.¹⁰ Therefore, the Commission considers that in this petition, an appeal challenging a decision declaring criminal prosecution time-barred would not have been a suitable remedy to reverse the decision.¹¹ Therefore, this remedy cannot be counted among those that must be exhausted for the petition to be admissible.

33. The Commission also notes that the petition was filed on February 14, 2000, almost ten years after the criminal investigation was instituted and while it was still in the summary phase. It also observes that criminal action was declared time-barred in February 2003, by virtue of the fact that the ten-year period prescribed by law had expired.

⁵ IACHR, Report No. 83/12 Petition No. 326-00, Hernando Rangel Moreno v. Colombia, November 8, 2012, paragraph 38.

⁶ The prosecutor was notified on February 25, 2003.

⁷ The State mentions the challenge seeking recusal of a judge, provided for in Article 871 of the Code of Civil Procedure. "A judge, whether of a court or tribunal, may be challenged by any of the parties and should withdraw from a case on any of the following grounds: 10. Failure to conduct the proceedings within three times the time period that the law prescribes."

⁸ Cf. IACHR, Report No. 89/09, TGGL, August 7, 2009, paragraph 26.

⁹ Art. 101 of the Ecuadoran Criminal Code. Official Record No. S-147, January 22, 1971.

¹⁰ Article 398 read as follows: "Criminal court judges are required to refer any dismissal decisions to the respective Superior Court.

Criminal courts and criminal law judges shall refer any decisions in which criminal prosecution by the State is declared time-barred to the Superior Court for confirmation."

¹¹ Cf. IACHR, Merits Report No. 75/11, Case 12.683, Melba del Carmen Suárez Peralta v. Ecuador, July 20, 2011, paragraph 76.

34. Therefore, given the circumstances, this petition is deemed to qualify for the exception allowed in a case of an unwarranted delay in rendering a final judgment in a criminal process, provided for in Article 46(2)(c) of the American Convention. Therefore, the rule requiring exhaustion of domestic remedies is not required.

35. Invocation of the exceptions to the rule requiring exhaustion of domestic remedies, provided for in Article 46(2) of the Convention, is closely linked to the determination of possible violations of certain Convention-protected rights, such as the guarantees of access to justice. However, given its nature and purpose, Article 46(2) stands separate and apart from the Convention's substantive provisions. Therefore, the determination as to whether the exceptions to the rule of prior exhaustion of domestic remedies apply to the case in point must be done prior to and separate from the analysis of the merits, because it relies on a standard of assessment that is different from the standard used to determine possible violations of Articles 8 and 25 of the Convention. It is worth noting that the causes and effects that prevented exhaustion of domestic remedies will be examined in the report that the Commission adopts on the merits, to determine whether violations of the American Convention have occurred.

2. Deadline for filing the petition

36. Article 46(1)(b) of the American Convention provides that for the Commission to declare a petition admissible, the latter must be lodged within six months of the date on which the alleged aggrieved party was notified of the final decision in his or her case. In the petition under analysis, the Commission has established that the Article 46(2) exceptions to the rule requiring exhaustion of domestic remedies apply. Article 32 of the Commission's Rules of Procedure provides that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

37. The petition was received on February 14, 2000, and the events that are the subject of the petition were said to have started on December 8, 1992. By the date the petition was presented, the investigation had not moved beyond the inquiry phase and criminal action was time-barred in February 2003. In other words, at the time the petition was lodged the judicial inquiry and the alleged failure of the administration of justice to produce any results would not change over the course of time.¹² Therefore, given the context and characteristics of this petition, the Commission considers that it was lodged within a reasonable period of time and that the admissibility requirement regarding the deadline for filing the petition should be deemed to have been met.

3. Duplication of international proceedings

38. Nothing in the case file suggests that the subject of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission. Thus, the Commission considers that the requirements established in Articles 46(1)(d) and 47(d) of the Convention have been met.

¹² IACHR, Report No. 86/07, Petition 680-05, Elías Lindt López Pita and Luis Alberto Shinín Laso, Ecuador, October 17, 2007, paragraph 58.

4. Characterization of the facts alleged

39. In view of the arguments of fact and of law made by the parties and the nature of the matter brought to its attention, the IACHR considers that the petitioners' allegations could tend to establish possible violations of the rights to life, to humane treatment, to judicial guarantees and to judicial protection, to the detriment of Gustavo Washington Hidalgo, and the rights to judicial guarantees and judicial protection to the detriment of his next of kin, respectively, contained in Articles 4, 5, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof. Since the petition does state facts that tend to establish a violation of the rights guaranteed by the Convention and no statement made suggests that the petition is manifestly groundless or obviously out of order, the Commission considers that the conditions set out in Articles 47(b) and (c) of the Convention have been met.

40. Neither the American Convention nor the Commission's Rules of Procedure require a petition to identify the specific rights alleged to have been violated by the State in the matter brought to the Commission, although the petitioners are free to do so. It is up to the Commission, based on the jurisprudence of the system, to determine in its admissibility reports which provisions of the relevant inter-American instruments are applicable and their violation may be established if the facts as alleged are proven based on sufficient evidence and information. The Commission observes that the allegations made could tend to establish violations of the right to humane treatment to the detriment of Gustavo Washington Hidalgo's next of kin;¹³ therefore, in the merits phase the Commission will also consider alleged violations of Article 5 of the Convention, as previously indicated.

41. The Commission observes that the facts alleged in the petition with respect to the supposed acts of torture and the failure to investigate could, if proven, tend to establish violations of the State's obligation to conduct an investigation and to initiate the corresponding criminal process, as provided in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, since the alleged failure to investigate the facts reportedly continued even after the Convention entered into force.

V. CONCLUSIONS

42. The Commission concludes that it has competence to examine the arguments made by the petitioners alleging violation of Articles 4, 5, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and that these allegations are admissible as they meet the requirements established in Articles 46 and 47 of the American Convention.

43. Based on the arguments of fact and of law set forth above,

¹³ The alleged victim's next of kin are included based on the provisions of Article 35(1) of the Inter-American Court's Rules of Procedure and its case law. See I/A Court H.R., *Case of Radilla Pacheco v. Mexico*. Judgment of November 23, 2009, and I/A Court H.R., Order of January 19, 2009, *Case of González et al. (Cotton Field) v. Mexico*. Request to expand the number of alleged victims and the State's refusal to forward specific documentary evidence.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**DECIDES:**

1. To declare the present petition admissible with respect to Articles 4, 5, 8 and 25 of the American Convention, read in conjunction with Article 1(1) thereof, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.
2. To notify the Ecuadoran State and the petitioners of this decision.
3. To proceed with its analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 11 day of July 2013. (Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Dinah Shelton, Rodrigo Escobar Gil, Rose-Marie Antoine, Commissioners.