

REPORT N° 90/06¹
PETITION 731-03
ADMISSIBILITY
JOSE ADRIAN ROCHAC HERNANDEZ
EL SALVADOR
October 21, 2006

I. SUMMARY

1. On September 11, 2003, The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or "the IACHR") received a complaint filed by the Association for the Search of Missing Children (*Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos—Asociación Pro-Búsqueda*) (hereinafter "the petitioners"), claiming that the Republic of El Salvador (hereinafter "the State") bears international responsibility for the forced disappearance of the child José Adrián Rochac Hernández and for the subsequent failure to investigate, and make reparations for these alleged violations. The petitioners claim that the reported incident constitutes a violation of several rights enshrined in the American Convention on Human Rights (hereinafter "the Inter-American Convention"): the right to personal integrity (Article 5); the right to personal liberty (Article 7); the right to a fair trial (Article 8); the right to protect the family (Article 17); the right to a name (Article 18); the rights of the child (Article 19); and the right to judicial protection (Article 25), all in violation of the general duty to respect and guarantee rights (Article 1.1).

2. The complaint alleges that, on December 12, 1980, José Adrián Rochac Hernández, age five, was taken by military personnel belonging to El Salvador's Air Force and members of paramilitary groups from the zone of San Martín, during a raid in the canton of San José Segundo, district of San Martín, in the department of San Salvador. Since then, almost 25 years after the incident, the whereabouts of the child are unknown. All the steps taken with the authorities to shed light on the incident, including the filing of a criminal complaint and a motion for the issuance of a writ of habeas corpus, have been unsuccessful.

3. The State contends that remedies under domestic law have not been exhausted. The State points out that the Attorney General's Office started investigating the case and that this investigation is ongoing and must be delved into further to determine the circumstances of the case. The State also points out that the motion for a writ of habeas corpus was filed 20 years after the incident occurred and that it was dismissed for lack of background records proving disappearance. It also claims that, during the domestic armed conflict, there were opportunities to file a report on the disappearance to the Government Commission on Human Rights and the International Committee of the Red Cross, but that, regarding the child, this was never done. Therefore, it requests the IACHR to declare the petition inadmissible for failure to exhaust remedies under domestic law. Furthermore, the State points out that the IACHR lacks jurisdiction because the law applicable during the armed conflict was International Humanitarian Law and that the Inter-American Court of Human Rights lacks jurisdiction to hear the case because of the reservations made by the State of El Salvador when it accepted the Court's contentious jurisdiction.

4. Without prejudging the merits of the case, the IACHR concludes in this report that the case is admissible, since it meets the requirements set forth in Articles 46 and 47 of the American Convention. The Inter-American Commission decides to notify the parties of its decision

¹ Commissioner Florentín Meléndez, a national of El Salvador, did not participate in the deliberations or voting on the present case, in compliance with Article 17.2.a of the IACHR's Rules of Procedures.

and to continue the in-depth examination of the supposed violations of the American Convention, publish this decision and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING WITH THE COMMISSION

5. The Inter-American Commission assigned number 731-03 to the petition and, on December 24, 2003, requested information from the Salvadoran State about the parties involved in the complaint. The State responded on March 5, 2004. On April 22, 2004, the petitioners submitted their observations on the information from the State, and the State responded on February 15, 2005 by submitting further observations.

III. POSITIONS OF THE PARTIES

A. The petitioners

6. The complaint received by the IACHR alleges that José Adrián Rochac Hernández was the victim of a forced disappearance, presumably at the hands of members of the Armed Forces of El Salvador and members of paramilitary groups from the zone of San Martín. The petitioners claim that this case pertains to a pattern of disappearance of children during the armed conflict. Regarding the facts of the case, the petitioners state the following:

On December 12, 1980, at about nine o'clock in the morning, a military raid took place in the canton of San José Segundo of the Municipality of San Martín; the raid was comprised of paramilitary forces from the zone of San Martín and troops of the Armed Forces of El Salvador (FAES) under the command of General Rafael Bustillo. The Hernández Rochac family lived in the canton of San José Segundo. At that time, the household was comprised of Mrs. María Silverio Rochac, age 38, her six children, Sergio Antonio, age 12; María Juliana, age 10; María Del Tránsito, age 8; José Adrián Rochac, age 5; Ana Margarita, age 3; and a newborn child Nicolás Alfonso, age 6 days, all bearing the surname Rochac Hernández.

For their safety and in view of the raid that was taking place, the Rochac Hernández family decided to lock the doors of its house. The soldiers and paramilitary forces who were members of the raid reached the house of the Rochac Hernández family, broke down the doors and asked for weapons, they immediately hit Mrs. María Silverio and afterwards they took her out of the house, and the child Sergio Antonio, who was very attached to his mother, went outside with her. They were both taken at about 30 meters away from the house, where they were shot and killed instantly. Afterwards the military withdrew from the place, taking with them the child José Adrián, and the three sisters and six-day-old child were left alone. The soldiers and paramilitary troops went in the direction of San Bartolomé Perulapía; near Santa Elena, which is on the highway to Suchitoto, there were army trucks waiting for the soldiers.

At about five meters away from the house of the Rochac Hernández family, there was Mrs. Dolores López Beltrán, who saw the child José Adrián Rochac Hernández, who appeared distraught, taken away by the soldiers of the Salvadoran Armed Forces. Nearby, where the Army trucks were waiting, on the edge of the highway, Mrs. Jesús Beltrán (deceased) lived as a displaced person, and she saw the child; she knew him because he was a distant relative; she later saw him when he was lifted into one of the trucks. Since then, his whereabouts have been unknown. One of the persons involved both in the raid and in the accusations made against the Rochac Hernández family was Mr. Rodolfo López Miranda (deceased), who at that time was a member of the paramilitary corps of San Martín.

7. The petitioners allege that in El Salvador there are no effective remedies to find children reported missing during the armed conflict. They point out that, during the war, the relatives of the alleged victims did not resort to reporting violations because many families kept away from military raids and also for fear that, if they reported incidents, the authorities would suspect them of

collaborating with the guerrilla. Therefore, during this period, there were no viable remedies. Afterwards, the amnesty law enacted in 1993 made it impossible to enforce the recommendations of the Truth Commission regarding the investigation of human rights violations. Finally, they indicate that the writ of habeas corpus, which should be adequate for cases of forced disappearance, is not effective in El Salvador.

8. Despite the above, the petitioners point out that they have resorted to various proceedings, which have been ineffective and insufficient. On May 29, 1996, the child's father, Mr. Alfonso Hernández Herrera, went to the *Asociación Pro-Búsqueda*, and on May 31, 1996, turned to the Public Prosecutor's Office for the Defense of Human Rights. Likewise, on April 10, 2002, Mr. Alfonso Hernández Herrera, filed a formal request for the investigation of the whereabouts of his son José Adrián Rochac, with the Soyapango Subregional Office of the Attorney General's Office. Because he received no response, on October 16, 2002, Mr. Alfonso Hernández Herrera filed a motion for the issuance of a writ of habeas corpus with the Constitutional Law Chamber of the Supreme Court of Justice.

9. It is noted that it was not possible to file the report before 1996 because, as a result of the armed conflict prevailing at the time, there was fear that any person who showed up personally at military headquarters would be suspected of having ties with the guerrilla and would be the target of reprisals. Regarding this, the Truth Commission for El Salvador cautioned that many human rights violations were committed against the civilian population merely on the suspicion that they were collaborating with the guerrilla forces, as part of the campaign, especially during the early years of the conflict, aimed at "draining the pond to catch the fish." In this environment, the petitioners claim there was no trust in authorities, especially when the human rights violations were perpetrated by the Salvadoran Army. The petitioners further state that, in addition to fear, it was also physically impossible to go to the courts and that the authorities did not have the capacity to process the complaints.

10. The petitioners point out that the Attorney General's investigation, undertaken as a result of the report made on April 10, 2002, has not been effective. Since the report was filed, the petitioners note that the Attorney General's Office has only requested information about the case from *Pro-Búsqueda* and has inspected the site of the crime. The petitioners claim that they have not obtained any further information about the proceedings to date, despite the submittal of three requests. The petitioners claim that the Attorney General's Office has not made the necessary efforts to investigate the case as there are other steps that could be taken to gather further information on the facts, and these steps have not been taken. They also note that the respective injunction has not been filed with the competent Court.

11. The petitioners contend that the motion for the issuance of a writ of habeas corpus, filed on October 16, 2002, because of the ineffectiveness of the criminal investigation, has not been successful in finding José Adrián Rochac. Indeed, in the ruling of March 3, 2003, the Court dismissed the motion, claiming that the petitioners had failed to submit a minimum number of elements that might lead the Chamber to admit the likelihood of the alleged forced disappearance, without having conducted any kind of inquiry that it was authorized to do.

12. In short, the petitioners claim that, in El Salvador, there is no adequate or effective remedy to find children who had disappeared during the armed conflict in El Salvador. They point out that until not long ago, before the establishment of the Truth Commission, in El Salvador there was no chance for petitioners to gain access to any domestic judicial remedy. Since then, the petitioners claim that the domestic remedies available in El Salvador have been ineffectual in investigating the facts, determining the whereabouts of José Adrián Rochac Hernández or making reparations for the consequences of the alleged violations. In this regard, they argue that more than 10 years have elapsed since the case was reported for the first time, and in that time the State's response has been

grossly negligent and desultory, although the facts characterize the incident as a public crime. The petitioners therefore request application of the exception to the rule requiring exhaustion of domestic remedies as provided for in Article 46.2.b of the Convention.

13. Regarding applicable rules, the petitioners contend that the Salvadoran State ratified the American Convention on June 23, 1978 and is therefore held liable by the Convention for the harm done to José Adrián Rochac Hernández.

B. The State

14. The Salvadoran State states that, during the period of the armed conflict, there was no pattern of forced disappearance of persons, including children, but rather that the armed conflict itself engendered situations where families were involuntarily separated; therefore, in many cases, the consequences and scope of said separation were unknown. It adds that, during the conflict, there were certain territories controlled by the Farabundo Martí National Liberation Front (Frente Farabundo Martí para la Liberación Nacional—FMLN), where the latter depended on the “masses” or campesino population who lived with the guerrilla or contributed to its subsistence. The State further adds that the raids conducted by the Armed Forces were not intended to eliminate this civilian population who voluntarily went along with the guerrilla, but that it is logical that, in the clash with the guerrilla, regrettable fatalities would occur.

15. The Salvadoran State also adds that applicable international law in an armed conflict is International Humanitarian Law, specifically Article 3, which is common to the four Geneva Conventions, supplemented by Protocol II. The State, in this regard, states the following:

It is certain that, on principle, International Human Rights Law is applicable by governments, but in certain armed conflicts, as a result of the previously mentioned rules, International Humanitarian Law is binding on both sides, that is, for both the insurgents and government forces.....² [w]ith the above, although total enforcement [of International Humanitarian Law] probably cannot be guaranteed in practice, there was an abundance of regulations, which even if only minimally enforced did provide an indication of protection of human rights for all Salvadorans; because this legal framework did exist, in addition to the surveillance and support that was given in this process of protection of human rights, Professor Pastor Ridruejo concluded that the State did make available to the petitioners the guarantees and means to achieve an effective defense of their rights.”³

16. On the basis of this information, the State requests the IACHR to rule that there was “[n]o systematic practice involving the disappearance of children by the Armed Forces of El Salvador.”

17. Regarding the exhaustion of remedies under domestic law, the State contends that these remedies have not been exhausted. First, it notes that the petitioner filed a motion for the issuance of a writ of habeas corpus in 2002, that is, 22 years after the incident took place. The Constitutional Law Chamber of the Supreme Court of Justice issued a ruling on March 3, 2003, dismissing the proceedings, contending that the petitioning party did not submit enough elements on the alleged missing child. The State claims that, on the basis of that judgment, the Court departed from its previous case law rulings aimed at protecting the right to physical liberty of

² Response from the State of March 5, 2005 to the initial petition, p. 2.

³ In its response of March 5, the State cites the report submitted by professor José Antonio Pastor Ridruejo to the United Nations Commission on Human Rights, pursuant to the mandate granted by Resolution 1983/29 of that Commission, of January 19, 1984, in which the P.O.N. is determined to be in force [“Normal Operating Procedure for detentions by the Armed Forces”]. That procedure establishes that minors found should be taken to safe places.

missing persons, because the parties did not provide sufficient background information. It further adds that, if the motion had been filed earlier, it would have been possible to gather more information. That State notes that this judiciary ruling does not exhaust domestic deliberations, because if the parties present fresh evidence concerning the alleged crime, a motion for the issuance of a new writ of habeas corpus can be filed.

18. Regarding the criminal investigation, the Salvadoran State contends that the investigation phase continues in the Attorney General's Office, and it is being conducted by the attorney Daycel Marroquín. It indicates that, as part of the current investigation, on August 28, 2003, an investigator and the prosecutor in charge of the case, went to the place where the petitioner alleges that the incidents took place in order to gather information, but that it was not possible to gather any information because many of the inhabitants from that time had died whereas others had left the area. It adds that, since the Supreme Court's ruling on the issuance of a writ of habeas corpus, too little time has elapsed to finalize the investigation of the case, especially taking into consideration the time that has elapsed since the alleged disappearance.

19. Furthermore, the State contends that the petitioners could have benefited from a series of alternate remedies such as the Government Commission on Human Rights of El Salvador. They could also have appealed to the International Committee of the Red Cross (ICRC), which installed a permanent delegation in El Salvador during the conflict. The State adds that, on September 12, 1980, it signed a headquarters Agreement with the International Committee of the Red Cross to install a permanent delegation of this organization in El Salvador. By virtue of this agreement, the ICRC installed a search agency to record the requests made by relatives concerning persons who had supposedly been arrested or reported missing. Two of these offices were located in Santa Ana and San Miguel. It is argued that, in the document delivered by the ICRC on May 15, 1993 and compiling the reports received regarding disappearances from 1979 to 1992, there was no document reporting the disappearance of children. The State notes that the petitioners did not report the alleged incidents to any of these organizations. Because of this, the State requests the IACHR to declare the complaint inadmissible in accordance with the provisions of Article 31 of the Commission's Rules of Procedure.

20. Finally, the Salvadoran State contends that, because of the reservations made by the State regarding its acceptance of the contentious jurisdiction of the Inter-American Court and regarding what was established by the Court in its judgment about preliminary objections in the case of the Serrano Cruz sisters, the case of the disappearance of José Adrián Rochac Hernández could not come under the jurisdiction of said court.

IV. ANALYSIS OF ADMISSIBILITY

A. Jurisdiction *ratione loci*, *ratione personae*, *ratione temporis* and *ratione materiae* of the Inter-American Commission

21. Under the terms of Article 44 of the American Convention, the petitioners are in their lawful right to address a petition to the Commission. The petition that is being examined indicates that the alleged victim was subject to the jurisdiction of the Salvadoran State at the time of the alleged incidents. Regarding the State, the Commission notes that El Salvador is a State Party to the American Convention, having duly deposited its instrument of ratification on June 23, 1978. As a consequence, the Commission has jurisdiction *ratione personae* to hear the complaints that were filed.

22. Furthermore, the Commission has jurisdiction *ratione materiae* because the petitioners claim violations of rights protected in the framework of the American Convention. The State argues that International Humanitarian Law was the applicable law during the domestic armed conflict. Regarding this, the Commission contends that it is not precluded from ruling on the

reported incidents merely because some of them might have occurred in the context of an armed conflict. Article 27 of the Convention entitles the State to derogate certain obligations in the context of armed conflicts but in no way does it suspend the force of the Convention in its entirety nor does it abridge the present Commission's powers. The foregoing notwithstanding, in the merits stage of the case, the IACHR must examine the State's obligations stemming from the Convention, in the light of the provisions of International Humanitarian Law, which shall serve to interpret the case partially as *lex specialis*.

23. The Commission has jurisdiction *ratione temporis* to examine the complaints. The petition is based on allegations about incidents taking place as of August 25, 1982, which is the date when José Adrián Rochac Hernández disappeared. The alleged incidents therefore took place after the entry into force of the obligations of the State as Party to the American Convention. In addition, as the petition alleges violations of rights protected in the framework of the American Convention in incidents taking place in the territory of a State Party, the Commission concludes that it has jurisdiction *ratione loci* to hear the petition.

B. Requirements for the petition's admissibility

1. Exhaustion of domestic remedies

24. The State alleges that the present case is inadmissible because domestic remedies in El Salvador have not been exhausted. It notes that, in this regard, there are criminal proceedings in the investigative stage, and therefore the resolution of domestic remedies is still pending. Likewise, it points out that available remedies were not exhausted on a timely basis, such as the writ of habeas corpus, complaint filed with the International Committee of the Red Cross and the Government Commission on Human Rights. In this regard, the State points out that a motion for the issuance of a writ of habeas corpus was filed in 2002, although this motion could have been filed at any earlier time, and that this motion was dismissed for lack of presentation of evidence by the complainants.

25. As for the petitioners, they claim that the domestic remedies are ineffectual, although despite this they have attempted all possible means, including a motion for the issuance of a writ of habeas corpus to determine the whereabouts of José Adrián Rochac Hernández. The petitioners emphasize that more than 25 years have elapsed since the disappearance of José Adrián Rochac Hernández and that Salvadoran authorities have done nothing to guarantee the effectiveness of the investigation, find those responsible for the incidents, punish them, and provide redress for the victims or their relatives. Regarding the criminal investigations, they claim that, although it is true that the case is not closed, Salvadoran authorities have not conducted an in-depth investigation to determine the whereabouts of the child. As claimed by the petitioners, the inactive role of the Attorney General's Office shows that available domestic remedies consist of mere formalities.

26. The present case alleges the presumed responsibility of the members of the Armed Forces of El Salvador in the forced disappearance of a child in the midst of a domestic armed conflict in El Salvador. This period was characterized by systematic violations of human rights and impunity, facilitated in part by the ineffectiveness of El Salvador's judiciary system.⁴ In view of the

⁴ In its annual reports published during this conflict, the IACHR issued statements on several occasions about the violence and lack of due process of law for the enforcement of rights. For example:

The right to justice has been profoundly affected by the state of emergency that reigns in El Salvador, as indicated earlier. Here it is worth reiterating the Commission's remarks from its last Annual Report: the American Convention does not authorize the suspension of judicial guarantees that are essential for protecting basic rights, particularly not for prolonged periods, as has been the case in El Salvador. In

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particular circumstances of the case and the above-mentioned context, the Commission deems that, at the time the alleged incidents took place, it was not possible or necessary to file any motion, which serves as grounds for the exception to the rule of exhaustion of internal remedies, as provided for by Article 46.2 of the American Convention.

27. The IACHR considers that, up to the date of the adoption of the present report, domestic remedies have not functioned effectively as required to investigate a report of forced disappearance. Indeed, almost 26 years have elapsed since the incidents took place, and since then the family of José Adrián Rochac Hernández has used various mechanisms that have turned out to be ineffective to determine his whereabouts: the child's father went to the only existing institution to investigate cases of missing children, the nongovernmental organization *Asociación Pro-Búsqueda*, in 1996. On May 31, 1996, the *Asociación Pro-Búsqueda* filed a complaint with the Office of the Public Prosecutor for the Defense of Human Rights of El Salvador (Procuraduría para la Defensa de los Derechos Humanos de El Salvador—PDDH) regarding 145 cases of children victims of forced disappearance, all of them in the context of the country's domestic armed conflict. From these cases, the Office of the Prosecutors selected five to conduct investigations; nevertheless, the case of José Adrián Rochac was not among them. Likewise, on April 10, 2002, the father of the alleged victim filed a request for the investigation of the whereabouts of his son José Adrián Rochac, with the Soyapango Subregional Office of the Attorney General's Office, as well as a motion for the issuance of a writ of habeas corpus on October 17, 2002.

28. Regarding the motion for the issuance of a writ of habeas corpus filed by the father of the alleged victim, the IACHR concludes that, although it is the suitable remedy, it did not function adequately to determine the whereabouts of José Adrián Rochac Hernández. The Inter-American Court has ruled that the remedy of habeas corpus is essential to guarantee the life and integrity of arrested persons to prevent their disappearance or uncertainty about where they are being detained.⁵ In this regard, the IACHR observes that the remedy of habeas corpus has not functioned effectively in El Salvador in cases of forced disappearance, even after the end of the conflict in 1992. The IACHR has received information provided by both parties that it is only recently, on March 20, 2002, by means of a judgment issued in the proceedings of Ana Julia and Carmelina Mejía Ramírez, that the Supreme Court changed its previous case law rulings when it accepted the violation of the right to physical liberty, even when there was no evidence of detention. This case therefore represented the first possibility of effectively using of the remedy of habeas corpus in cases of disappeared persons in El Salvador.⁶

29. After this modification in case law, the father of José Adrián filed a motion for the issuance of a writ of habeas corpus in October 2002, which was dismissed by the courts. The ruling of the Constitutional Law Chamber of the Supreme Court on March 3, 2003, which dismissed the motion, requires relatives to provide evidence to determine whether a forced disappearance had occurred. The Commission observes that this State approach prevents the petitioners from gaining

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addition, there is a lack of judicial independence and authority; members of the judiciary have themselves been the target of criminal acts.

The marked limitations on judicial guarantees, as stated previously, have left many proceedings unresolved, causing the population to lose confidence in the judicial system.

IACHR, Annual Report 1983-1984, Chapter IV "Human Rights Situation in Several States: El Salvador", para. 6.

⁵ I/A Court H.R., OC-8/87 of January 30, 1987, "Habeas Corpus with Suspension of Guarantees," para. 44.

⁶ Resolution of the Supreme Court of Justice of El Salvador, March 20, 2002, in the habeas corpus issuance proceedings No. 379-2000, Ana Julia and Carmelina Mejía Ramírez.

access to this remedy, because the State passes on the obligation to investigate to the alleged victims.⁷

30. To deny access to jurisdiction by means of a writ of habeas corpus, the State claims that the facts cannot be clarified because much time has elapsed since they occurred. In this regard, the IACHR considers that the writ of habeas corpus constitutes an efficient remedy to determine the whereabouts of a person although a long time has elapsed since that person's disappearance.⁸ In this specific case, Salvadoran legislation⁹ also provides that the "executing judge" in charge of enforcing the writ of habeas corpus has broad powers to request information from state authorities and individuals, and Article 74 of this law on the "responsibility of officials in the writ of habeas corpus" provides that there is "[n]o authority, court or privileged jurisdiction in this matter." According to the provisions of the judgment issued on this motion for a writ of habeas corpus, the steps taken by the executing judge were confined to observing whether there was a record of the child's detention.¹⁰ On the basis of these characteristics and powers, the Commission considers that the Salvadoran State had the mechanisms available to take steps aimed at locating the whereabouts of José Adrián Rochac Hernández by a procedure of habeas corpus, despite the time that has elapsed since his disappearance.

31. As a consequence, the IACHR concludes that the habeas corpus was the suitable remedy in this case and that it was duly exhausted. The IACHR therefore considers that said requirement as provided for in Article 46 of the Inter-American Convention has been met.

32. Despite the above, regarding the ongoing criminal investigation, the Commission concludes that it does not have any information that would enable it to conclude that progress has been made in determining the whereabouts of the child José Adrián Rochac. In this regard, the information provided by both parties to the IACHR establishes that the two inquiries that were made during these proceedings involve requesting information from the *Asociación Pro- Búsqueda* on April 10, 2002, and the inquiry conducted on August 28, 2003, in which the investigator and prosecutor in charge of the case went to the place where the petitioner claims the incident took place in order to gather information, which turned out to be fruitless. The IACHR considers that this does not constitute evidence that all the steps needed to locate the whereabouts of the child José Adrián Rochac have been taken, especially since the father of the alleged victim provided names of the persons allegedly responsible for the raid that led to the death of the mother of the alleged victim, in addition to his disappearance, and there is no evidence that they have ever been contacted. The IACHR concludes that the fact that there are current judicial proceedings, demonstrating that there

⁷ See, I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, para. 152, where the Court establishes that "[I]n cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence."

⁸ I/A Court H.R., *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, para. 79: "Among the indispensable judicial guarantees, habeas corpus represents the suitable means to guarantee liberty, monitor respect for the life and integrity of persons, and prevent their disappearance or the uncertainty of the whereabouts of their detention, to protect individuals against torture or other cruel treatments or penalties. In this regard, a writ of habeas corpus may be an effective remedy to determine the whereabouts of a person or clarify whether there are grounds for qualifying a situation as undermining personal liberty, although the person for the benefit of whom the request if being filed is no longer in the custody of the State, but has been given to the custody of an individual or although a long period of time has elapsed since the disappearance of a person."

⁹ Articles 38 to 40 of the Constitutional Procedures Act of El Salvador.

¹⁰ Judgment issued by the Constitutional Law Chamber of the Supreme Court of Justice of El Salvador, of March 3, 2003, in proceedings number 216-2002, of José Adrián Rochac Hernández.

is a legal activity aimed at making progress in the investigation during four years, provides grounds for the exception envisaged in the second part of Article 46.2 of the American Convention.

33. Therefore, subsidiarily and regarding this criminal investigation, the Inter-American Commission decides to apply the exception envisaged in the second part of Article 46.2 of the American Convention. As a result, the requirements envisaged in said international instrument on the exhaustion of domestic remedies or the time-limits of six months for the submittal of the petition are not applicable.

34. At the same time, the IACHR does not consider that a complaint lodged with the International Committee of the Red Cross is one of the remedies that must be exhausted according to the Convention. Said Committee is a humanitarian organization and does not constitute a judiciary body.

35. Finally, it should be pointed out that citing the exceptions to the rule on exhaustion of domestic remedies set forth in the American Convention is closely tied to the finding of possible violations of certain rights enshrined in the Convention itself, such as effective judicial protection. Article 46.2 of the American Convention, however, is a standard that is independent of other substantive provisions of the same instrument. To determine whether the exceptions to the exhaustion of domestic remedies also result in violations of the American Convention in the present case, a different review must be conducted in the merits stage of the case. This is because standards for assessing those exceptions are different from those used when assessing possible violations of Articles 8 and 25 of the American Convention.

2. Deadline for filing the petition

36. According to Article 46.1.b of the Convention, the petition should be lodged within certain time-limits to be admitted, namely, within six months following the date on which the complainant has been notified of the final judgment. In the present case, the Commission has determined that the remedy of habeas corpus was duly exhausted. The ruling on this motion was notified on March 11, 2003. The petition was lodged on September 11, 2003, and therefore it was lodged within the time-limits.

37. The Commission has subsidiarily reviewed the situation stemming from the criminal investigation currently under way, and has ruled that, regarding this, the exception provided for in the second part of Article 46.2 of the American Convention is applicable. Regarding this, Article 32 of the Rules of Procedure of the IACHR provides that, in cases where the exceptions to the requirement of exhaustion of domestic remedies are applicable, the petition must be lodged within a reasonable time, in the Commission's opinion, taking into account the date of the alleged violation and the circumstances of each case.

38. Regarding this, taking into account the date of the alleged incidents, the possibility of facing a situation of continued violation of human rights and the absence of elements that would make it possible to determine whether an efficient criminal investigation has taken place, the Commission considers that, regarding the present criminal procedures, the petition being examined was lodged within a reasonable lapse of time.

3. Duplication of proceedings and *res judicata*

39. The exceptions provided for in Article 46.1.d and in Article 47.d of the American Convention have not been objected by the Salvadoran State nor do they stem from the information contained in the file of the present case.

4. Characterization of the alleged events

40. The petitioners allege that the incidents that were reported point to the violation of various rights enshrined in the American Convention on Human Rights ("the American Convention"): right to personal integrity (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8); right to protection of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); and right to judicial protection (Article 25), all in violation of the general duty to respect and guarantee rights (Article 1.1).

41. By virtue of the principle *iura novit curia* and the repeated rulings based on case law issued by the Commission and the Court to the effect that, if a forced disappearance is proven, it would constitute a violation of the right to life,¹¹ the IACHR is also admitting the present case on the grounds of a presumed violation of Article 4.

42. Therefore, the IACHR considers that the alleged incidents, if proven, would constitute violations of the rights protected by Articles 4, 5, 7, 8, 17, 18, 19, and 25, all in connection with Article 1 of the American Convention.¹²

V. CONCLUSIONS

43. The Inter-American Commission concludes that it is competent to hear this case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention.

44. On the basis of the factual and legal arguments indicated above and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare that the present case is admissible in regard to the alleged violations of the rights protected by Articles 1.1, 4, 5, 7, 8, 17, 18, 19 and 25 of the American Convention.

2. To notify the parties of this decision,

3. To continue examining the merits of the case, and

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 21st day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Freddy Gutiérrez, Paolo G. Carozza and Víctor E. Abramovich, Commissioners.

¹¹ See, for example, the I/A Court H.R., *Castillo Páez Case*. Judgment of November 3, 1998. Series C No. 34, para. 66.

¹² The Commission puts on record that, although an account has been given of the grave incidents that were reported regarding the alleged execution of Mrs. Silverio, mother of José Adrián Rochac Hernández, and his brother, Sergio Antonio Rochac Hernández, they have not been the object of any specific complaint, nor has any information been given about any proceedings being filed to exhaust domestic remedies about it. The Commission therefore shall not be reviewing the alleged responsibility of the State for these incidents in the present case.