

REPORT Nº 66/08¹
PETITION 1072-03
ADMISSIBILITY
MANUEL ANTONIO BONILLA OSORIO AND RICARDO AYALA ABARCA
EL SALVADOR
July 25, 2008

I. SUMMARY

1. On December 8, 2003, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the IACHR") received a petition that the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos (Asociación Pro-Búsqueda)* (hereinafter "the petitioners") lodged against the Republic of El Salvador (hereinafter "the State", "El Salvador" or "the Salvadoran State"). The petition alleges the latter's international responsibility for the forced disappearance of two boys,² Manuel Antonio Bonilla and Ricardo Ayala Abarca,³ and for the subsequent failure to prevent, investigate, punish and redress the facts alleged. The petition asserts violations of the following rights: the right to humane treatment (Article 5); the right to personal liberty (Article 7); the right to a fair trial (Article 8); the right to protection of 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), protected by the American Convention on Human Rights (hereinafter "the Convention" or the "American Convention"), all in relation to the general obligation to respect and ensure the rights recognized in that international instrument (Article 1(1)).

2. The petitioners argue that Manuel Antonio Bonilla, age 11, and Ricardo Ayala Abarca, age 13, were the victims of a forced disappearance perpetrated by military troops with the Salvadoran Armed Forces' Fifth Infantry Brigade and the Atlacatl Rapid Deployment Infantry Battalion in the course of the "Lieutenant Colonel Mario Azenón Palma Operation" conducted in Quebrada Seca in August 1982. The petitioners assert that forced disappearance of persons was a pattern practiced by the State during the armed conflict in El Salvador. They allege further that even today, 26 years after the fact, the whereabouts of the children remain unknown, despite the steps taken with the authorities seeking to elucidate the facts, including the filing of two petitions of *habeas corpus*.

3. For its part, the Salvadoran State contends that during the period of the armed conflict, forced disappearance of persons, including children, was not Salvadoran State practice and if any children did fall victim to such crimes the State was not to blame. El Salvador observes further that 20 years after the events were alleged to have occurred the petitioners filed petitions of *habeas corpus*, which were dismissed because evidence and information relating to the alleged disappearances were lacking. The State notes that although the petitioners could have reinstituted the *habeas corpus* process or could have availed themselves of various other remedies at their disposal, they did not do so. Summarizing, the State asks that the Commission declare the petition inadmissible for failure to exhaust domestic remedies.

4. Without prejudging the merits of the case, in this report the Commission concludes that the petition is admissible based on Article 46(2) (b and c) of the American Convention. The Inter-American Commission therefore decides to notify the parties of its decision and to proceed with the analysis of the merits of the alleged violation of articles 5, 7, 8, 17, 19 and 25 of the American Convention, in relation to Article 1(1) of that international instrument. Furthermore, in application of the principle *jura novit curia*, in the merits phase the Commission will examine whether a violation exists of articles 3 and 4 of the Convention, in relation to the general obligation to respect and ensure the Convention-protected rights and the duty to adopt

¹ In accordance with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Florentín Meléndez, a Salvadoran national, did not participate in the discussion and decision of this report.

² Under the United Nations Convention on the Rights of the Child, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

³ The petitioner states that the child's name was entered incorrectly on his birth certificate as being Ricardo Abarca Ayala.

domestic legal measures, as prescribed in articles 1(1) and 2 of the American Convention, respectively. The Commission also decides to publish the present report and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING WITH THE COMMISSION

5. The petition was lodged with the Inter-American Commission on December 8, 2003, and filed as number 1072/03 on December 9, 2003.

6. On December 24, 2003, the IACHR asked the Salvadoran State to provide information on the pertinent parts of the petition.

7. The State sent its observations by a communication dated March 5, 2004, which was promptly forwarded to the petitioners on March 19, 2004. The petitioners were given one month in which to submit their observations.

8. The petitioners' observations on the information provided by the State were filed on April 22, 2004. The Commission forwarded those observations to the State on December 15, 2004.

9. On February 15, 2005, the Salvadoran State submitted additional observations; the IACHR forwarded the State's brief to the petitioners on April 26, 2005.

10. The petitioners submitted additional observations on November 10, 2006, which were forwarded to the State on March 2, 2007, with the request that it submit the pertinent observations within one month's time.

11. Finally, on August 28, 2007, the petitioners filed additional information with the Commission, which was sent to the State on September 24, 2007.

III. POSITIONS OF THE PARTIES

A. The petitioners

12. The petitioners contend that the boys Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca were the victims of forced disappearance, presumably perpetrated by troops attached to the Salvadoran Armed Forces' Fifth Infantry Brigade and Atlacatl Rapid Deployment Infantry Battalion. They allege further that the case *sub examine* fits a systematic pattern of forced disappearance of children during the armed conflict in El Salvador.⁴

13. As for the facts alleged in the case, the petitioners contend that a military incursion known as the "Operación Teniente Coronel Mario Azenón Palma"⁵ was conducted in the Department of San Vicente between August 19 and 24, 1982. With the operation imminent, the petitioners recount that dozens of families living in Cerro de San Pedro and other cantons close by were forced to flee to the mountains. This was how on August 19, 1982, Manuel Antonio Bonilla Osorio, his family and other persons living in that community fled, walking day and night in heavy rain.

14. The petitioners go on to report that in a shoot-out in the vicinity of the village of Guayabillas, Manuel Antonio Bonilla's family had purportedly become separated from the others with whom they were fleeing, and ended up with two more children in their midst: Ricardo Abarca Ayala, 13, and his sister Ester Abarca, 6.

⁴ To support their claim, the petitioners observe that Pro-Búsqueda has documented a total of 696 cases of children who disappeared during the twelve-year conflict, and has succeeded in locating 255 of them.

⁵ The petitioners note that according to the Report of the Commission on the Truth for El Salvador, this operation involved some six thousand troops, and was designed to clear the area of guerrillas. United Nations, *Report of the Commission on the Truth for El Salvador*, p. 125.

15. The petitioners recount that after walking for three days, the Bonilla family and the Bonilla and Ayala children reached the outskirts of Quebrada Seca. Having no food, they decided to stop and eat some sugar cane and rest a while. In the meantime, the sister and parents of Manuel Antonio Bonilla opted to continue moving and told those who were resting that they would wait for them up ahead. As they advanced, however, they realized that they were walking in the direction of the soldiers, and decided to hide for a time. The petitioners report that the group that had stayed behind to eat sugar cane decided to hide in Quebrada Seca, where military troops found them. The troops surrounded them and opened fire, killing some of them. Others managed to escape. The troops captured six of them. They released three of the six but took away Mrs. María Esperanza Alvarado and the boys Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca. Since then, their whereabouts have been unknown.

16. The petitioners point out that the disappearance of Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca occurred amid a severe internal armed conflict in El Salvador, and specifically during the execution of a sweeping military operation. The petitioners report that in the wake of that military operation, Salvadoran military forces continued to persecute and oppress families living in the Department of San Vicente.

17. The petitioners point out that these people had no way to speak with an attorney because they were in hiding, struggling to save their own lives and those of the children still with them. They add that the victims' next of kin could not have reported the violations because they were still fleeing military operatives and insurgents and for fear that if they reported what happened they would be identified as guerrilla sympathizers. The petitioners also assert that the authorities themselves could not have acted on the complaints. Therefore, the petitioners contend, it was self-evident that at the time of the children's disappearance, a remedy suitable for determining their whereabouts was not available. Summarizing, the petitioners contend that the families could not have embarked upon a search for the disappeared children because those families were in fear for their lives.

18. The petitioners contend further that at the time, the justice system was oblivious to the protection of victims' rights, especially in cases in which the blame was directly attributable to the State.

19. The petitioners also allege that the names of Ricardo Ayala Abarca and Manuel Antonio Bonilla appear on the lists of victims identified by indirect sources, and classified as homicides that occurred on August 18, 1982;⁶ this indicates that while the next of kin did not go directly to the Truth Commission, they did approach other organizations to report that both children were the victims of actions taken by the Armed Forces of El Salvador.

20. The petitioners observe that, armed with additional information and having regained confidence in the Salvadoran courts, Mrs. Petronila Abarca Alvarado, mother of Ricardo Ayala Abarca, and Mrs. María de los Ángeles Osorio, mother of Manuel Antonio Bonilla, filed petitions of *habeas corpus* with the Constitutional Chamber of the Supreme Court on February 18 and 27, 2003, respectively.⁷ The petitioners observe that the *habeas corpus* petitions were dismissed, on the grounds that the evidence produced was not sufficient to enable the Chamber to establish probable cause regarding the alleged forced disappearances and on the

⁶ To support their argument, the petitioners sent Volume II, #6 "List of Victims Submitted to the Commission on the Truth, C. Indirect Source," pp. 16 and 20 (Spanish version) of the *Report of the Commission on the Truth for El Salvador*, United Nations, San Salvador, New York. The Commission notes that according to the Commission on the Truth, the Bonilla and Ayala boys were killed on August 18, 1982; however, the petitioners have consistently claimed that Manuel Antonio Bonilla Osorio, his family and others, among them Ricardo Ayala, had fled their community on August 19, 1982, as the military operation that would be carried out in the Department of San Vicente was about to begin.

⁷ The record in the case file shows that the first petition of *habeas corpus*, number 18-2003, was filed by Mrs. Petronila Abarca Alvarado on behalf of Ricardo Ayala Abarca; the second petition of *habeas corpus*, number 25-2003, was filed by the widowed Mrs. María de los Ángeles Osorio Bonilla. In both cases, the rulings on the petitions state that the petitioners produced birth certificates for both children, Manuel Antonio Bonilla and Ricardo Ayala Abarca, proving their existence.

grounds that the report that the presiding judge ordered from the authorities stated that the events in question never occurred. The petitioners add that the presiding judge did not act with the diligence necessary to establish the whereabouts of the disappeared children. The petitioners assert that the dismissal of these petitions and the failure to order other state agencies to investigate the whereabouts of Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca precluded any possibility of justice for the victims named in the two cases.

21. As for the investigation, the petitioners contend that the various state offices that dealt with the case in El Salvador were ineffective and inadequate. Once the *Asociación Pro-Búsqueda* was established, the boys' mothers turned to it for assistance. In 1996, Pro-Búsqueda filed various cases with the Office of the Prosecutor for the Defense of Human Rights involving children disappeared as a consequence of the armed conflict. One of these cases was that of the boys Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca. The petitioners state that although recommended by the Office of the Prosecutor for the Defense of Human Rights in one of its reports,⁸ neither the Attorney General's Office nor any other competent state body launched an investigation to ascertain the whereabouts of the disappeared boys.

22. As for the State's argument that the Inter-American Commission does not have competence to take up the present case because the State accepted the competence of the Inter-American Court of Human Rights only with respect to juridical facts and acts that commenced after June 6, 1995, the petitioners contend that the argument is without merit inasmuch as El Salvador ratified the American Convention on June 23, 1978, and thus has been bound by the provisions of that treaty since then and is therefore answerable for the violations of the Convention committed to the detriment of Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca.

23. Summarizing, the petitioners contend that until the Truth Commission was created, no domestic remedy was available in El Salvador that the petitioners could have used to report disappeared children. The petitioners contend that since then, the domestic remedies available in El Salvador have been ineffective for purposes of investigating the facts, establishing the whereabouts of Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca, punishing those responsible and redressing the consequences of the violations alleged. They further argue that the *jurisprudence constante* of the Inter-American Court of Human Rights has been that a State that asserts the failure to exhaust domestic remedies must indicate which remedies remain to be exhausted and that they are effective.⁹ The petitioners therefore request that the exception, established in Article 46(2)(b) of the Convention, to the rule requiring exhaustion of domestic remedies be applied.

B. The State

24. The Salvadoran State contends that the applicable international law during an armed conflict is International Humanitarian Law, specifically Article 3, common to all the Geneva Conventions and Additional Protocol II. It adds that it has ratified the four Geneva Conventions and their two additional Protocols. It therefore concludes that the Inter-American Commission does not have competence to take up possible violations of those international instruments. The State notes further that when accepting the compulsory jurisdiction of the Inter-American Court, El Salvador entered a reservation pursuant to Article 62(2) of the Convention, to the effect that that it recognizes this jurisdiction solely and exclusively in cases involving subsequent juridical facts and acts, or juridical facts and acts which commenced after the declaration of recognition was deposited on June 6, 1995. The State therefore reasons that if

⁸ Office of the Prosecutor for the Defense of Human Rights (Procuraduría para la Defensa de los Derechos Humanos – PPDH), *"Informe de la Señora Procuradora para la Defensa de los Derechos Humanos sobre las desapariciones forzadas de las niñas Ernestina y Erlinda Serrano Cruz, su impunidad actual y el patrón de la violencia en que ocurrieron tales desapariciones"* [The Office of the Prosecutor's report on the forced disappearance of Ernestina and Erlinda Serrano Cruz, the current impunity and the context of violence in which this disappearance occurred], issued on September 2, 2004, p. 164.

⁹ I/A Court H.R., *Velásquez Rodríguez Case, Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, paragraph 88; *Fairén Garbí and Solís Corrales Case, Preliminary Objections*. Judgment of June 26, 1987. Series C No. 2, paragraph 87, and *Godínez Cruz Case, Preliminary Objections*. Judgment of June 26, 1987. Series C No. 3, paragraph 90.

the Commission follows the Court's jurisprudence, the instant case would remain within the jurisdiction of the national courts.

25. The State also rejects the petitioners' description of the war in El Salvador, as it induces *a priori* judgments. The State adds that during the armed conflict, some groups *orcampesino* populations lived with the guerrilla movement or helped it to survive. The State reasons, therefore, that it is only logical that the Army's operations should result in unfortunate fatalities.

26. The Salvadoran State contends that there was no pattern of forced disappearance during the period of the armed conflict, and that if the children were the victims of such disappearances, the State is not to blame since no such order was given to its Armed Forces; in fact, the State contends that an effort was made to get the children to safety. The State also asserts that it was not the policy of the government to change the children's identity and put them up for adoption; if private individuals were engaging in these criminal activities, there were and are mechanisms under the criminal justice system to establish blame. Based on this information, the State is requesting the IACHR to find that "forced disappearance of children was not systematic practice on the part of the Salvadoran Armed Forces."

27. As for the petitioners' allegations concerning the military operations during which the Bonilla and Ayala children were alleged to have disappeared, the State contends that it has no information that would enable it to corroborate these facts.

28. As for the exhaustion of domestic remedies, the State argues that the petitioners have not exhausted remedies responsive to their complaint. The State observes that the Salvadoran legal system had and has various mechanisms by which one can assert one's rights. The State makes specific mention of one such mechanism, i.e., a criminal complaint. It argues that the next of kin of the disappeared children never filed such a criminal complaint, which was always available to them since the courts were everywhere in the country and had jurisdiction in each of the departments, municipalities, towns, villages and cantons.

29. The State observes that the petitioners decided to avail themselves of the remedy of *habeas corpus* 20 years after the facts occurred. It notes that the Constitutional Chamber of the Supreme Court dismissed the two petitions of *habeas corpus* on March 6 and May 26, 2003, on the grounds that evidence and information regarding the alleged disappeared children were lacking.¹⁰ The State adds that the earlier decisions did not constitute *res judicata* for the regular courts, so that nothing prevents the petitioners or any other interested party from requesting a new *habeas corpus* proceeding to have the court authorities grant protection of the right to liberty; nor is there anything to prevent them from turning to the courts through a criminal or constitutional action.¹¹

30. The State adds that had the petitions of *habeas corpus* been filed earlier, more information could have been gathered. The State also believes that the arguments and evidence that the petitioners introduced to make their case with the Supreme Court seeking a finding on the disappearance of the boys Manuel Antonio Bonilla and Ricardo Ayala Abarca were not very clear.

31. The State alleges further that the petitioners could have filed a series of alternative remedies, either with El Salvador's Governmental Human Rights Commission or the International Committee of the Red Cross (ICRC), which established a permanent delegation in

¹⁰ In this regard, according to the State, the Constitutional Chamber held that "since none of the evidence -- circumstantial or otherwise-- typically associated with forced disappearance has been shown, the court has no crime on which to rule; forced disappearance consists of an unlawful or arbitrary restriction of personal liberty."

¹¹ In this regard, the IACHR observes that in decisions dated March 3, 2003 and May 26, 2003, the Constitutional Chamber of the Supreme Court wrote that "the foregoing does not prevent the petitioner or any other interested party armed with the evidence referred to in this resolution, from requesting a new *habeas corpus* proceeding to petition the court seeking protection of the right to physical liberty of the person on whose behalf the petition is filed."

El Salvador during the armed conflict. The State observes that the petitioners did not notify either of these organizations of the facts now being alleged.

32. Summarizing, the State asserts that the petitioners had various options to pursue to bring the alleged facts to its attention; it also contends that El Salvador had routine procedures available in either the criminal or constitutional courts that the petitioners could have pursued to assert their claims. According to the State, those avenues were not exhausted. It is therefore asking the Commission to declare the case inadmissible.

IV. ANALYSIS

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

33. Under Article 44 of the American Convention, the petitioners have standing to file a petition with the Commission. The petition *sub examine* states that the alleged victims were under the jurisdiction of the Salvadoran State at the time the facts alleged were said to have occurred. The State, for its part, is party to the American Convention, having deposited its instrument of ratification, in due and proper form, on June 23, 1978. The Commission therefore has competence *ratione personae* to examine this petition.

34. The Commission has competence *ratione materiae* because the petition alleges possible violations of human rights protected by the American Convention. The State's contention is that the applicable law during a domestic armed conflict is international humanitarian law. The Commission's understanding, however, is that the mere fact that some of the facts denounced were alleged to have occurred in the midst of an armed conflict does not preclude the Commission from exercising its authority to issue its finding on those facts. Indeed, under Article 27 of the American Convention a State party may derogate from its obligations with respect to some rights in the context of an armed conflict; however, the Convention does not allow suspension of all Convention obligations, nor does it strip this Commission of its authority. It is worth noting that the rights of the child are among the international obligations that cannot be suspended under any circumstance. The foregoing notwithstanding, in the merits phase of the case the Commission will have to examine the State's obligations under the Convention in light of the provisions of international humanitarian law, which will serve as *lex specialis* pursuant to Article 29 of the Convention.

35. The Commission has competence *ratione temporis* to examine the complaints. The petition is based on allegations of facts said to have commenced on August 19 1982, the date on which the disappearance of the children Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca allegedly began. The facts alleged, therefore, occurred subsequent to June 23, 1978, the date on which El Salvador undertook the obligations of a State party to the American Convention, i.e., to respect and ensure the rights protected therein.

36. In relation to what the State of El Salvador states regarding the acceptance of the litigious competence of the Inter-American Court, it placed a reservation against it pursuant to Article 62.2 of the American Convention. However, it is necessary to point out that the State is a signatory State of the American Convention since June 23, 1978; accordingly on the date of the events referred in the instant petition, the obligations to protect the rights contemplated by the Convention were in force. In addition, the reservation to the jurisdiction of the Court is unrelated to the jurisdiction of the Commission.

37. The American Convention does not contain a definition of the term "child" or "children". Therefore, under Article 31 of the Vienna Convention on the Law of Treaties, the inter-American human rights system applies the concept established in international law in the United Nations Convention on the Rights of the Child, which defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

38. Moreover, inasmuch as the petition alleges violations of rights protected under the American Convention and said to have occurred within the territory of a State party, the Commission concludes that it has competence *ratione loci* to take cognizance of the petition.

B. Admissibility requirements

1. Exhaustion of local remedies

39. Article 46(1)(a) of the American Convention provides that the admissibility of a petition is directly contingent upon whether the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The Convention also provides that this requirement shall not apply when internal remedies are not available in fact or by law. Specifically, Article 46(2) sets forth exceptions to the general rule requiring exhaustion of domestic remedies, when the domestic laws do not afford due process of law for the protection of the rights whose violation is alleged; when the party alleging violation of his rights has been denied access to the remedies under domestic law or prevented from exhausting them; or when there has been an unwarranted delay in rendering a final judgment under those remedies.

40. The State alleges that the present case is inadmissible because remedies under domestic law in El Salvador remain to be exhausted. It argues that routine procedures are available in the criminal and constitutional justice systems that the petitioners could have used to assert their rights but did not. Specifically, it argues that the petitioners could have brought a criminal case, but did not, even though the courts were everywhere in the country and had jurisdiction in each of the departments, municipalities, towns, hamlets and cantons. The State adds that the petitioners also failed to exhaust other remedies available to them, such as complaints with the International Committee of the Red Cross or the Governmental Human Rights Commission. The State acknowledges that petitions of *habeas corpus* were filed on behalf of each disappeared child in 2003, but adds that these petitions could have been filed earlier rather than 20 years after the facts alleged. It also observes that if the petitions were dismissed, it was because the parties filing the petitions failed to produce evidence.

41. For their part, the petitioners contend that the remedies under domestic law are ineffective. Even so, they argue, they did attempt to get their cases examined. The petitioners observe that it has been 26 years since the disappearances of the two boys –Manuel Antonio Bonilla Osorio and Ricardo Ayala Abarca–, yet the Salvadoran authorities have done absolutely nothing to ensure the effectiveness of the investigation, to find those responsible and punish them, and to make reparations to the victims or their next of kin. They assert that at the time of the boys’ disappearance, no remedy suitable for establishing their whereabouts was accessible and that thereafter, the problems in the institutions charged with administering justice were notorious. The petitioners allege that once armed with a little more information and confidence in the Salvadoran courts, each of the mothers of the disappeared boys filed a petition of *habeas corpus*, one on February 18 and the other on February 27, 2003. But those petitions were dismissed and when no other state body was ordered to conduct an investigation into the children’s whereabouts, any possibility of justice for their next of kin was precluded. Summarizing, the petitioners insist that they are not required to exhaust any other domestic remedy, since the facts denounced fit the premise set forth in Article 46(2)(b) of the American Convention.

42. The Commission observes that in the present case, members of the Salvadoran Army are alleged to be implicated in the forced disappearance of two children during the internal armed conflict in El Salvador. That period was one of systematic violations of human rights and impunity, facilitated in part by the inefficacy of the Salvadoran judicial system.¹² The

¹² In the annual reports the Commission published during the years of the armed conflict, it addressed the violence and lack of effective judicial protection of rights on a number of occasions. For example:

Commission finds that the petitioners were prevented from accessing the domestic remedies during the period of armed conflict, since El Salvador did not have an independent judiciary during that period. Complaints of human rights were notoriously ineffective, especially considering the egregious nature of the violations committed in this case.¹³ At times, merely reporting the facts could prove dangerous to the person filing the report. Furthermore, the facts in this case occurred at a time when domestic legal remedies were dysfunctional, particularly petitions of *habeas corpus*.¹⁴

43. Even after the period of internal armed conflict was over, *habeas corpus* continued to be an ineffective remedy to seek investigations into forced disappearances, since the court authorities required that petitioners show proof of detention.¹⁵ The Commission finds that the cases of forced disappearance reported during this period did not lead to any clarification of the facts or to investigation and punishment of those responsible.¹⁶ The State itself admits that it was not until March 2002 that the Supreme Court changed its standard of jurisprudence. Whereas theretofore the Supreme Court had routinely denied protection in cases involving forced disappearance, in a March 20, 2002 ruling on a petition of *habeas corpus* brought in a case of forced disappearance, the Supreme Court acknowledged that the case involved a violation of the right to physical liberty, even though no evidence of arrest or detention was shown; it also recognized that petitions of *habeas corpus* can be filed to request investigations into forced disappearances.¹⁷

44. Following this change in the case law and after more than 20 years of impediments obstructing access to justice, on February 18 and 27, 2003 the disappeared boys' next of kin filed petitions of *habeas corpus*; but in both cases, the courts denied the petitions in decisions delivered on March 6 and May 26, 2003. In the rulings, the court held that the next of kin

The right to justice has also been deeply affected by the state of emergency that governs in El Salvador. The statement of the Commission in its previous Annual Report should be reiterated: The American Convention on Human Rights does not authorize suspension of the judicial guarantees necessary to protect fundamental rights, even less so when that suspension is in force for unduly long periods, as has happened in El Salvador. To this should be added the lack of independence and authority of its judiciary, against whose members criminal acts have also been practiced. The extreme restrictions on judicial guarantees have led, as stated earlier, to the failure to conclude of many trials, leading to a lack of confidence in the judicial system among the population. IACHR, *Annual Report 1983-1984*, Chapter IV "Situation of human rights in several states: El Salvador," paragraph 6.

¹³ In the Annual Report it published at the end of El Salvador's armed conflict, the IACHR recounted the situation that the country experienced during the previous twelve years. The Commission wrote that:

El Salvador does not now enjoy --nor has it in the recent past-- the kind of efficient, impartial administration of justice that is the best safeguard against impunity and an effective deterrent against crime. Throughout the armed conflict, and once it was over, human rights organizations and experts of all leanings and origins concurred on this one point.

IACHR, *Annual Report 1992*, OEA/Ser.L/V/II.83 Doc. 14, March 12, 1993, Chapter IV, "Situation of human rights in several states: El Salvador," paragraph 10.

Similarly, in 1984 the Inter-American Commission recommended to the State that "the Government should urgently proceed to reform the judiciary, in order to guarantee the punishment of those responsible for human rights violations." IACHR, *Annual Report 1983-1984*, OEA/Ser.L/V/II.83 Doc. 14, March 12, 1993, Chapter IV, "Situation of human rights in several states: El Salvador," OEA/Ser.L/V/II.63 Doc. 10, September 28, 1984, paragraph 15.e.

¹⁴ In describing what El Salvador experienced during its internal armed conflict, the Commission wrote that "the remedy of *amparo* or of *habeas corpus* were rendered null since the state of emergency indefinitely suspends such remedies." IACHR, *Annual Report 1983-1984*, Chapter IV, paragraph 4.

¹⁵ See IACHR, *Case 12,132 Ernestina and Erlinda Serrano Cruz*, Report No. 31/01, in which the Commission declared the case admissible and applied the exception to the rule requiring exhaustion of domestic remedies, allowed under Article 46(2)(c) of the Convention, based on the fact that "As of the date this report was adopted, domestic remedies had not operated with the effectiveness required to investigate a complaint of forced disappearance" and indicated that "nearly eight years ha[d] passed since the first complaint was lodged with the authorities in El Salvador, with no definitive finding of how the events transpired." See also Report No. 11/08, Admissibility, *Emelinda Lorena Hernández*, El Salvador, March 5, 2008, par. 36, and Report No. 10/08, Admissibility, *Santos Ernesto Salinas*, El Salvador, March 5, 2008, paragraph 26.

¹⁶ The Prosecutor for the Defense of Human Rights issued a report on forced disappearances. In the commentary on the issue of access to justice in the postwar period, the report reads as follows:

Since the war's end, there has been no appreciable change as regards victims' complaints. The clearest evidence that Salvadoran justice has not worked for the victims is that not one of those responsible for these atrocities is behind bars and no disappeared detainee—or his/her remains—has been found.

Prosecutor for the Defense of Human Rights in El Salvador, *Special Report of the Prosecutor on the practice of forced disappearance of persons in the context of the armed internal conflict that occurred in El Salvador from 1980 to 1992*, report of March 8, 2005.

¹⁷ Cf. *Constitutional Chamber of the Supreme Court, March 20, 2002, in habeas corpus proceeding No. 379-2000*, Ana Julia and Carmelina Mejía Ramírez.

would have to show proof that the children's disappearance did in fact occur.¹⁸ In this regard, the Commission notes that this conduct on the part of the State had the effect of denying the petitioners access to the remedy, inasmuch as the State laid upon the shoulders of the alleged victims' next of kin the investigative obligations that are the duty of the State itself.¹⁹ It is worth noting that in earlier reports on admissibility, the Inter-American Commission pointed out the kinds of impediments that the next of kin of disappeared victims in El Salvador encountered when attempting to use the remedy of *habeas corpus* to establish the disappeared' whereabouts.²⁰

45. The Inter-American Court has held that the remedy of *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.²¹ The IACHR considers further that in principle *habeas corpus* is an effective remedy for locating the whereabouts of a person even when many years have passed since the disappearance.²² However, the remedy of *habeas corpus* has not functioned effectively in El Salvador in cases of forced disappearances, even after the conflict ended in 1992.²³

46. The Commission finds no information –either from the parties or in the case file– about any measures taken to investigate the facts denounced. As of the date on which this report was adopted, the domestic remedies have not worked with the effectiveness necessary to investigate a complaint of forced disappearance. In fact, almost 26 years have passed since the facts occurred. The Commission therefore concludes that the State has offered no evidence to indicate that it has taken any measure to investigate the facts denounced and ascertain the whereabouts of the alleged victims. Quite the contrary, the State denies justice by arguing that the case cannot be solved because so much time has passed since the events transpired; yet that time has passed precisely because no remedy or means was available to the victims' next of kin to report the facts.

47. A complaint filed with the International Committee of the Red Cross (ICRC) or the Governmental Human Rights Commission is not one of the remedies that the Convention requires be exhausted. Those institutions are not judicial bodies. In either case, a complaint with the Red Cross or the Governmental Human Rights Commission is not one of the remedies that must be exhausted under Article 46 of the American Convention.

¹⁸ In rulings dated March 6, 2003 and May 26, 2003, the Constitutional Chamber wrote that "the petitioner does not provide any element to suggest that this is a case of forced disappearance; instead, the petitioner merely recounts events associated with what the petitioner alleges is a case of forced disappearance."

¹⁹ See, I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000, Series C No. 70, paragraph 152, in which the Court rules 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."

²⁰ See Report No. 31/01, Case 12,132, Admissibility, *Ernestina y Erlinda Serrano Cruz*, El Salvador, February 23, 2005, paragraph 23; Report No. 56/05, Admissibility, *Ana Julia and Carmelina Mejía Ramírez*, El Salvador, October 12, 2005, paragraphs 33 and 34; Report No. 53/05, Admissibility, *José Rubén Rivera*, El Salvador, October 12, 2005, paragraphs 30 and 31; Report No. 11/05, Admissibility, *Gregoria Herminia, Serapio Cristián and Julia Inés Contreras*, El Salvador, February 23, 2005, paragraph 32; Report No. 11/08, Admissibility, *Emelinda Lorena Hernández*, El Salvador, March 5, 2008, paragraph 39, and Report No. 10/08, Admissibility, *Santos Ernesto Salinas*, El Salvador, March 5, 2008, paragraph 27.

²¹ I/A Court H.R., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paragraph 35.

²² I/A Court H.R., *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, paragraph 79: "... among essential judicial guarantees, judicial guarantees, *habeas corpus* represents the appropriate means of guaranteeing liberty, controlling respect for a person's life and integrity, and preventing his disappearance or ignorance about his place of detention, and also to protect the individual from torture or other cruel, inhuman or degrading punishment or treatment. The Court considers that *habeas corpus* can be an effective remedy for discovering the whereabouts of a persons or clarifying whether a situation that harms personal liberty has occurred, even though the person in favor of whom it is filed is no longer in the State's custody, but has been handed over into the custody of an individual or even though considerable time has passed since a person disappeared."

²³ Report No. 11/08, Admissibility, *Emelinda Lorena Hernández*, El Salvador, March 5, 2008, paragraph 38, and Report No. 10/08, Admissibility, *Santos Ernesto Salinas*, El Salvador, March 5, 2008, paragraph. 26.

48. It is important to point out that the analysis of this case follows the findings in previous cases by both the Inter-American Court²⁴ and the Inter-American Commission²⁵, which indicate that relatives of allegedly disappeared children in El Salvador have not been able to access the available and effective remedies in the terms stated in Article 46 of the American Convention.

49. Based on the foregoing analysis, the Commission concludes that the exceptions allowed under articles 46(2) (b and c) of the American Convention to the rule stipulated in Article 46(1) thereof apply in the present case. Finally, invoking the exceptions to the Convention's rule requiring exhaustion of local remedies is closely connected to the determination of possible violations of certain Convention-protected rights, such as effective judicial protection. However, Article 46(2) of the Convention, by its nature and purpose, has a content that is independent of and separate from the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the domestic remedies rule apply to the case in question must be made prior to and separate from the examination of the merits, since it hinges on a standard of assessment different from the one used to establish the violation of Articles 8 and 25 of the Convention.

2. Deadline for presentation of the petition

50. In the case of the petition under study, the Commission has established that the exception allowed under Convention Article 46(2)(b and c) applies, so that the Article 46(1)(a) rule requiring exhaustion of local remedies does not apply. The rule requiring that the petition be lodged within six months is also not applicable. The Commission, then, must determine whether the petition *sub examine* was lodged within a reasonable period of time based on the provisions of Article 32(2) of the Commission's Rules of Procedure, i.e., taking into account the date on which the alleged violation was said to have occurred and the circumstances of each case.

51. Taking into account the date on which the facts alleged occurred and the possibility that the case may be one of a continuing violation of human rights in the form of the forced disappearance being alleged, and considering the question of various domestic remedies in El Salvador, the Commission finds that the petition under study was lodged within a reasonable time period.

3. Duplication of proceedings and *res judicata*

52. Challenges based on the requirements set forth in Article 46(1)(d) and Article 47(d) of the Convention have not been brought by the State and are not suggested by the information in the case file.

4. Characterization of the facts alleged

53. The Commission observes that the petition alleges the forced disappearance of children. The petitioners contend that their case of forced disappearance was not an isolated incident but part of a systematic practice of forced disappearance of children during the internal conflict in El Salvador between 1980 and 1992. In examining the context in which the alleged facts occurred, one of the IACHR's considerations is that the Commission on the Truth for El Salvador has examined the consequences of the forced disappearances in that country. The IACHR therefore concludes that the petitioners' complaint describes acts that, if proven, could constitute violations of rights protected by articles 5, 7, 8, 17, 19 and 25 of the American

²⁴ I/A Court H.R., *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120;

²⁵ IACHR, Report No. 31/01, Case 12,132, Admissibility, *Ernestina y Erlinda Serrano Cruz*, El Salvador, February 23, 2005; Report No. 56/05, Admissibility, *Ana Julia and Carmelina Mejía Ramírez*, El Salvador, October 12, 2005; Report No. 53/05, Admissibility, *José Rubén Rivera*, El Salvador, October 12, 2005; Report No. 11/05, Admissibility, *Gregoria Herminia, Serapio Cristián and Julia Inés Contreras*, El Salvador, February 23; Report No. 11/08, Admissibility, *Emelinda Lorena Hernández*, El Salvador, March 5, 2008 and Report No. 10/08, Admissibility, *Santos Ernesto Salinas*, El Salvador, March 5, 2008.

Convention, in relation to articles 1(1) and 2 thereof. Thus, the requirements under Article 47(b) of the Convention have been met. The Commission should note here that the information supplied by the petitioners does not state facts that tend to establish a violation of the right to a name, protected by Article 18 of the Convention.

54. If a forced disappearance is proven, then this would also constitute violations of the right to recognition before the law and the right to life.²⁶ Therefore, in application of the principle *jura novit curia*, in the merits phase the IACHR will examine whether the rights protected under articles 3 and 4 of the American Convention have been violated, in relation to the general obligation to respect and ensure the protected rights, provided for in Article 1(1) of the American Convention, inasmuch as those articles are implied by the description of the facts set forth in the complaint, although not explicitly invoked by the petitioners.²⁷

55. It is worth noting that on previous occasions,²⁸ the Inter-American Commission has commented on the impediments that the next of kin of disappeared victims encounter in seeking the kind of investigation that will establish the whereabouts of the disappeared. These obstacles are evidence of a general pattern that El Salvador follows where cases of this nature are involved.

V. CONCLUSIONS

56. The Commission concludes that this petition is admissible based on Article 46.2 (b and c) of the American Convention; that the Commission has competence to examine the complaint for possible violations of articles 5, 7, 8, 17, 19 and 25, in relation to articles 1(1) and 2 of the American Convention, in accordance with articles 28 to 37 and 39 of the Commission's Rules of Procedure; by virtue of the principle *jura novit curia*, the Commission will also examine the case for possible violations of articles 3 and 4 of the Convention, in relation to articles 1(1) and 2 thereof. The Commission also concludes that the petition is inadmissible in relation to the alleged violation of Article 18 of the Convention.

57. Based on the foregoing arguments of fact and of law and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:

1. To declare the present petition admissible with respect to articles 5, 7, 8, 17, 19 and 25 of the American Convention, in relation to Article 1(1) thereof.

2. To declare the petition admissible, in application of the *jura novit curia* principle, as regards Articles 3 and 4 of the American Convention, in relation to articles 1(1) and 2 of the same treaty.

3. To declare that the present petition is inadmissible with respect to Article 18 of the American Convention.

²⁶ See Report No. 101/01, Case 10,247 *et al.*, *Extrajudicial executions and forced disappearances*, October 11, 2001, paragraph 230, and I/A Court H.R., *Castillo Páez Case*, Judgment of November 3, 1998, Series C No. 34, paragraph 66.

²⁷ See Report No. 11/05, Admissibility, *Gregoria Herminia, Serapio Cristián, Julia Inés Contreras*, El Salvador, February 23, 2005.

²⁸ See Report No. 31/01, Case 12,132, Admissibility, *Ernestina and Erlinda Serrano Cruz*, El Salvador, February 23, 2005; Report No. 56/05, Admissibility, *Ana Julia and Carmelina Mejía Ramírez*, El Salvador, October 12, 2005; Report No. 53/05, Admissibility, *José Rubén Rivera*, El Salvador, October 12, 2005; Report No. 11/05, Admissibility, *Gregoria Herminia, Serapio Cristián and Julia Inés Contreras*, El Salvador, February 23, 2008; Report No. 11/08, Admissibility, *Emelinda Lorena Hernández*, El Salvador, March 5, 2005, and Report No. 10/08, Admissibility, *Santos Ernesto Salinas*, El Salvador, March 5, 2008.

4. To notify the State and the petitioners of this decision.

5. To begin the examination of the merits of the case.

6. To publish the present report and include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 25th day of the month of July, 2008.
(Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Víctor E. Abramovich, members of the Commission.