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Session:	Hundred and Thirteenth Regular Session (9 – 17 October and 12 – 16 November 2001)
Title/Style of Cause:	Roberto Javier Hernandez Paz v. Venezuela
Doc. Type:	Decision
Decided by:	President: Claudio Grossman; First Vice President: Juan E. Mendez; Second Vice-President: Marta Altolaguirre; Commission members: Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Helio Bicudo.
Dated:	10 October 2001
Citation:	Hernandez Paz v. Venezuela, Case 12.258, Inter-Am. C.H.R., Report No. 91/01, OEA/Ser./L/V/II.114, doc. 5, rev. (2001)
Represented by:	APPLICANTS: Programa Venezolano de Educacion-Accion en Derechos Humanos and the Center for Justice and International Law
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## I. SUMMARY

1. On March 3, 2000 the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a complaint lodged by Programa Venezolano de Educación-Acción en Derechos Humanos [Venezuelan Program for Education and Action on Human Rights] (PROVEA) and the Center for Justice and International Law (CEJIL) alleging the illegal arrest, solitary confinement, and forced disappearance of Roberto Hernández Paz. The petitioners say that the alleged acts constitute violations of several provisions contained in the American Convention on Human Rights (hereinafter the “American Convention”), such as the general obligation to respect rights (Article 1(1)); right to life (Article 4); humane treatment (Article 5); personal liberty (Article 7), judicial guarantees (Article 8(1)) and judicial protection (Article 25); as well as Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

2. The State considers that the remedies under domestic law have not been exhausted because the facts are under investigation by the Ministerio Público [Justice Department], as well as the National Ombudsman in conjunction with Venezuelan courts; that a writ of habeas corpus is not the appropriate mechanism to investigate the alleged acts; and that the duty to investigate is not designed to attain a given end, and therefore, it is not breached just because the desired result is not achieved.

3. Without prejudging the merits of the matter, the IACHR concludes in this report that the case is admissible because it meets the requirements established in Articles 46 and 47 of the American Convention. Accordingly, the Inter-American Commission decides to notify the parties of its decision and to continue with its analysis of the merits regarding the alleged violation of Articles 1(1), 4, 5, 7, 8(1), and 25 of the American Convention, as well as of Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

## II. PROCESSING BY THE INTER-AMERICAN COMMISSION

4. The petition was lodged on March 3, 2000 and transmitted to the Venezuelan State on March 27, 2000, as Case N° 12.258, together with a request for information. On July 19, 2000, the IACHR reiterated its request for information to the Venezuelan Government. On August 24, 2000, the State submitted its comments, which were conveyed to the petitioners on September 8, 2000. The petitioners requested an extension on October 11, 2000, in order to respond to the comments contained in reply of the Venezuelan State; the Commission granted them 30 days starting from November 15, 2000. The petitioners presented their comments on January 17, 2001. On February 12, 2001, the IACHR sent the Venezuelan Government the additional comments on the State's reply. On February 27, 2001, at its 110th session, the Inter-American Commission held a hearing of the case with both parties present. On March 23, 2001, the petitioners sent the IACHR additional information, which was forwarded to the Venezuelan Government on May 7, 2001. On August 20, 2001, the Venezuelan State sent the report of the Ministerio Público of Venezuela on Case N° 12.307, José Francisco Rivas Fernández (disappeared in Vargas state), which contains a reference to the position of the Roberto Hernández Paz case.

## III. POSITIONS OF THE PARTIES REGARDING ADMISSIBILITY

### A. The petitioners

5. On December 15, 1999, the date of the referendum on the proposed new Constitution, the heaviness of the rains was giving rise to concern both in Vargas state and in other parts of the country. Over the days that followed Venezuela experienced the aftermath of the worst natural disaster in its modern history.

6. In these circumstances, the measures adopted by a significant number of State agents in an effort to restore the necessary public order to safeguard people's lives and security allegedly resulted in a number of human rights violations.

7. The petitioners allege that on December 23, 1999, Roberto Javier Hernández Paz was at the house of his uncle, Carlos Paz, located in the Tarigua area of Caraballeda, Vargas state. At 7:30 p.m. that day, a vehicle identified as belonging to the Dirección de Servicios de Inteligencia y Prevención [Directorate of Intelligence and Prevention Services] (DISIP) parked opposite the house and approximately five officials got out. Two of them, armed, entered the house without a search warrant and without identifying themselves. Roberto Hernández was in the lounge watching television with his uncle, whereupon the officials of the DISIP proceeded to arrest him using force and, dragging him, took him out of the house without explaining to him or his uncle

the reason for his arrest. Minutes later, while in the garden of the house in which Roberto Hernández was arrested, his uncle, Carlos Paz, heard a gunshot and his nephew cry out, “Chamo me mataste.” [“Man, you’ve killed me.”] Then he heard another shot. However, he was unable to observe these events because he suffers from cataracts, a complaint that affects sight. The alleged victim was dragged some 30 meters to the house entrance where, according to neighbors, he was put aboard the DISIP jeep, and taken away without any explanations given as to the reason for his arrest or the place of detention.

8. On December 30, 1999, citizen Aleidis Maritza Hernández, Roberto Hernández’s sister, went to the DISIP Headquarters located in the Helicoid of Caracas in order obtain information on her brother’s whereabouts. At the DISIP Headquarters a declaration was taken from her and she was told that they knew nothing about her brother. She also went to the National Guard Headquarters in Vargas state but neither was she given any information there on the whereabouts of her brother.

9. On January 21, 2000, a writ of habeas corpus was filed by PROVEA with the Second Court of First Instance [Tribunal Segundo de Control] of the Criminal Circuit for Vargas state. This court, in a written communication of January 21, 2000, addressed to the Director of the DISIP, requested information as to whether or not Roberto Hernández had been arrested by officials of that agency.

10. On January 24, 2000, Army Lieutenant Colonel Jesús Urdaneta, the then- Director of the DISIP, told the court that:

On December 23, 1999, no DISIP officials were in the Tarigua area of Caraballeda, Vargas state

That citizen Roberto Hernández Paz has not been arrested by DISIP officials

11. On January 25, 2000 the Second Court of First Instance of the Criminal Circuit for Vargas state found that there was no evidence on which to make a decision with respect to the application for a writ of habeas corpus filed as a result of the disappearance of Roberto Hernández Paz.

12. On February 4, 2000 the Court of Appeal of the Criminal Circuit for Vargas state upheld the decision of the Second Court of First Instance in which it found that it had no evidence on which to proceed with respect to a decision regarding the writ of habeas corpus filed on behalf of Roberto Javier Hernández Paz.

13. As to exhaustion of domestic remedies, in the case of the forced disappearance of Roberto Hernández Paz, the petitioners sought the opinion of Dr. Jesús María Casal, an expert in Venezuelan constitutional law, who said the following:

I- Scope of protection of habeas corpus in Venezuelan law.

In our legal system, habeas corpus, a term used by Article 43 of the Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales [Organic Law on Protection of Constitutional

Rights and Guarantees] (hereinafter Organic Law on Amparo) and a part of our legal tradition, is a manifestation of the right to protection provided in Article 27 of the Constitution. Its sphere of application is basically determined by its purpose: freedom and security of the individual.

The Venezuelan Constitution of 1999 ratified the applicability of protection of personal liberty, or habeas corpus, in cases of presumed forced disappearance of persons. The Constitution, immediately after recognizing the right to personal liberty, prohibits and punishes forced disappearance of persons, in keeping with international instruments on human rights.

The Organic Law on Amparo provides the possibility of appeal against the first instance ruling in an amparo proceeding. It also makes consultation obligatory in the event no appeal is forthcoming. There is no possibility in an amparo proceeding of nullification of the judgment in second instance.

It has been argued that before petitioning the Inter-American Commission on Human Rights an “appeal” for review provided in Article 336, section 10 of the Constitution should be attempted to dispute the rejection in second instance of the writ of habeas corpus filed in the amparo action. This thesis has no basis whatever in Venezuelan constitutional law, nor is it supported by inter-American jurisprudence on the rule of prior exhaustion of domestic remedies, since:

a) Article 336, section 10 of the 1999 Constitution does not provide for an “appeal”; rather it recognizes the power of the Constitutional Chamber to review non-appealable final judgments rendered by the courts of the Republic in amparo actions or in the framework of “diffuse control” of constitutionality.

This power of the Constitutional Chamber may be exercised at the petition of the adversely affected party; however, it may also be applied *ex officio* or at the request of a third party, in keeping with constitutional jurisprudence. Since this is not an appeal, there is no time limit for any interested party to present the respective application.

b) In answer to the question posed, what matters most, however, is that the Constitutional Chamber in many judgments has had occasion to clarify the scope of the power of review, and has consistently and repeatedly maintained that it is exercised in “exceptional” circumstances and is of a “discretionary” nature. Furthermore, the Chamber has ruled that an individual who lodges an application for review of an amparo judgment with the Chamber cannot invoke any right as grounds for its admission. Admission of an application for review is a discretionary power of the Constitutional Chamber, in respect of which the individual cannot invoke any constitutional right.

c) The foregoing is confirmed by the consolidated opinion of the Constitutional Chamber, according to which it is not obliged to pronounce a decision on all applications for review of amparo judgments. It may “selectively” choose and admit for review such cases as might appear relevant to it. However, it is not required to explain its decisions, even when it flatly rejects an application for review.

Composed of these elements, a review is a unique mechanism that is not designed to place in the hands of the individual an instrument that enables them to demand justice before a court of law but, rather, one intended to empower the Constitutional Chamber to develop judicial policy, in the best sense of the expression. Concretely, the review mechanism allows the Chamber to

establish binding criteria on the interpretation of constitutional provisions, thus ensuring a certain uniformity of criteria.

Only in a some cases-those that happen to strike a chord with the Judges of the Constitutional Chamber-is an application for review admitted (in practice hardly ever), which is not to say that those that are admitted will definitely result in the nullification of the judgment.

This implies that the amparo or habeas corpus action, in both first and second instance, is a procedural mechanism that ensures the individual the possibility of demanding the cessation of violations of his constitutional rights, and the courts are required to remedy, via that process, the situations infringed by the violations of such rights. Review, on the other hand, is a wholly exceptional mechanism that is only set in motion when the Constitutional Chamber, in use of its discretionary power of selection, deems it appropriate.

The rule of prior exhaustion of domestic remedies cannot be applied to a procedural mechanism whose characteristics may be summarized as follows:

- a) It is not a remedy or an action that is available to a victim of human rights violation; it is a discretionary power of the Constitutional Chamber, which the latter may exercise *ex officio* or in response to the application of an interested party, there being no preclusive time limit on presentation.
- b) Persons who apply for a review of judgment in an amparo proceeding are not entitled to a decision on its admissibility or legal basis.
- c) Review is not the third instance of an amparo action; on the contrary, a review applies to non-appealable final judgments in amparo proceedings or on constitutionality, which have the authority of *res judicata*. Hence, it is a mechanism that is not only special but also exceptional in nature, and it is up to the Constitutional Chamber to exercise it by selectively deciding, at its own discretion, whether or not to admit or process cases submitted for review.

14. The petitioners consider that the domestic remedies of Venezuela were exhausted by the filing of the writ of habeas corpus on January 21, 2000 with the Second Court of First Instance of the Criminal Circuit for Vargas state, which found on January 25, 2000 that there was no evidence on which to proceed; together with the confirmation on February 4, 2000 of that court's decision by the Court of Appeal of the Criminal Circuit for Vargas state.

15. The petitioners hold that the facts alleged in the petition amount to the violation by the State of Venezuela of several provisions contained in the American Convention on Human Rights, such as the duty to respect and ensure rights (Article 1(1)); the right to life (Article 4); the right to humane treatment (Article 5); the right to personal liberty (Article 7); the right to judicial guarantees and judicial protection (Article 8(1) and 25); and Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

## B. The State

16. The State of Venezuela considers that domestic remedies have not been exhausted because procedures and investigations initiated by the Ministerio Público and by the National

Ombudsman in conjunction with the Venezuelan courts are currently underway with a view to clarifying the events that occurred in Vargas state.

17. Upon examination of the habeas corpus actions, the criminal courts requested information from the security agencies alleged to be holding the persons in custody. In all these cases, the Ministry of Defense, as well as the National Guard and the DISIP, reported that the citizens on whose behalf the writs of habeas corpus had been filed were not being detained on the orders of those security agencies.

18. In response to this information from the security agencies, the first instance criminal courts and the Courts of Appeal found that the procedural prerequisites to enable the habeas corpus action to proceed had not been met, because it was not the adequate mechanism to effectively investigate the allegations, since the appropriate way to proceed was to open a normal, formal inquiry, following the guidelines and rules set down in the Organic Code of Criminal Procedure, in order accurately to establish the true facts of the matter and the identities of the perpetrators and participants therein. Consequently the Superior Court Prosecutor for Vargas state was sent a written communication ordering him immediately to open the respective inquiries, which means that the remedies under domestic law were not exhausted with the aforesaid decision but, rather, it was necessary to pursue those indicated by the court.

19. The State of Venezuela mentions that the Inter-American Court of Human Rights has ruled that states have a legal duty to investigate human rights violations occurring in their jurisdiction, and further says, that this duty is not designed to attain a given end, and, therefore, it is not breached just because the desired result is not achieved. The State also says that said duty is breached when the state apparatus acts in such a way as to prevent the adequate investigation of the facts, with the result that the violation goes unpunished.

20. The State further says, in respect of the refusal of the writ of habeas corpus filed, that the appropriate procedure is a review by the Constitutional Chamber, which can nullify the decision in order for another habeas corpus proceeding to be instituted, as occurred in the case of the disappearance of Mr. Monasterios,[FN1] where the Constitutional Chamber first found inadmissible the amparo proceeding initiated by the Ombudsman of the Metropolitan Area of Caracas against a court decision to refuse habeas corpus in a case of presumed forced disappearance. The Chamber adduced that both instances of the amparo proceeding had been exhausted, for which reason there was no basis for another amparo action: the right to expeditious and effective judicial protection of constitutional rights should be considered complied with (Judgment of April 25, 2000). However, the Constitutional Chamber itself later decided to exercise its exceptional and discretionary power of review provided in Article 336, section 10 [of the Venezuelan Constitution of 1999].

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[FN1] Constitutional Chamber of the Supreme Court of Venezuela, Judgment of August 14, 2000.

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21. The State says that at the request of the Ministerio Público the Constitutional Chamber may conduct a review and criminal proceedings may be instituted to clarify the facts and establish the whereabouts of the missing person. The State further says that the investigation has not concluded since the missing person has not been found alive or his corpse located and, therefore, the remedies under domestic law have not been exhausted.

#### IV. ANALYSIS

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

22. The petitioners are entitled to lodge complaints with the IACHR under Article 44 of the American Convention. Those complaints cite as alleged victims individuals on whose behalf Venezuela undertook to respect and ensure the rights recognized in the American Convention. Insofar as the State is concerned, the Commission finds that Venezuela is a state party to the American Convention, having ratified it on August 9, 1977. Furthermore, the IACHR finds with regard to passive competence *ratione personae*, that it is a generally recognized principle of international law that the state is responsible for the acts of all its organs, including those of its Judiciary. Therefore, the Commission is competent to take up the instant petition.

23. The Commission has *ratione loci* competence to take up the petition because it claims violations of rights protected in the American Convention that allegedly took place in the territory of a state party to that treaty.

24. The Commission has *ratione temporis* competence inasmuch as the alleged violations contained in the petition are said to have occurred when the duty to respect and ensure the rights recognized in the American Convention was in force for the State of Venezuela. As regards the alleged violations of the Inter-American Convention on Forced Disappearance of Persons, the Commission finds that Venezuela ratified that Convention on January 19, 1999. Accordingly, the facts that are the subject matter of the instant petition allegedly occurred when said international instrument was in force in Venezuela.

25. Finally, the Commission has *ratione materiae* competence because the petition alleges violations of human rights protected by the American Convention and by the Inter-American Convention on Forced Disappearance of Persons.

Other admissibility requirements for the petition

a. Exhaustion of domestic remedies

26. Article 46(1)(a) and (b) of the American Convention require the exhaustion of remedies under domestic law.

27. The petitioners consider that the domestic remedies of Venezuela were exhausted by the filing of the writ of habeas corpus on January, 21, 2000 with the Second Court of First Instance of the Criminal Circuit for Vargas state, which found on January 25, 2000 that there was no

evidence on which to proceed; together with the confirmation on February 4, 2000 of that court's decision by the Court of Appeal of the Criminal Circuit for Vargas state.

28. On August 24, 2000 the State of Venezuela argued failure to exhaust domestic remedies on the basis that the petition under examination is currently the subject matter of an active and ongoing investigation, with the necessary procedures to clarify the facts being continuously carried out by the Ministerio Público, as well as by the National Ombudsman in conjunction with the Venezuelan courts.

29. In the case sub lite the Commission finds that the writ of habeas corpus was rejected in first instance on January 25, 2000, a decision that was upheld by the Court of Appeal on February 4 of that year. Although the State affirms that the relatives of the victim have yet to exhaust the appeal for review, in the opinion of the Commission this is not an adequate remedy for establishing the whereabouts of the victim in a case of forced disappearance. As the Honorable Court has mentioned, based on the early contentious cases it heard:

Habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty.[FN2]

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[FN2] Inter-Am. Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C N°4, para. 65.

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30. The Venezuelan State further says that the Superior Court Prosecutor for Vargas state was sent a written communication instructing him immediately to order the respective inquiries, "which means that the remedies under domestic law were not exhausted with the aforesaid decision but, rather, it was necessary to pursue those indicated by the court." The Commission regards as important the efforts that the State is making to identify those responsible for the acts with which the instant case is concerned, since a criminal proceeding is indeed the adequate mechanism for that purpose. However, as the Court has found, "[T]he purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life".[FN3] Bearing in mind that the alleged victim disappeared on December 23, 1999, the Commission considers that the State has had more than enough time to determine the whereabouts of Roberto Hernández Paz. Furthermore, the Commission is compelled to say that once the writ of habeas corpus was rejected in both instances by the courts, the remedies under domestic law were fully exhausted. As provided in Article 10 of the Inter-American Convention on Forced Disappearance of Persons, to which Venezuela is a state party, "the right [of a victim] to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom." A year and nine months have elapsed and the status of the alleged victim remains that of disappeared.

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[FN3] Inter-Am. Ct.H.R., Castillo Páez Case, Judgment of November 3, 1997, para. 83.

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31. In respect of the State's argument that the victim's relatives are required to exhaust the criminal proceeding underway, the Commission should reiterate its doctrine, which is as follows:

In the case of crimes of public action, and even in those which may be prosecuted by a private actor, it is not valid to demand exhaustion of domestic remedies of the victim or the victim's relatives, for the state has a duty to maintain public order, and therefore it has an obligation to set the criminal law system into motion and to process the matter until the end. As the Inter-American Court of Human Rights has stated, the obligation to investigate "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government." [FN4]

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[FN4] Inter-Am. Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C N°4, para.177.

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The preceding statement is confirmed in those procedural regimes that deny the victim or victim's relatives any standing, as the state monopolizes the ability to press criminal charges. And where such standing is provided for, its exercise is not compulsory, but optional for the person who has suffered harm, and does not take the place of state action. [FN5]

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[FN5] IACHR, 1997 Annual Report, Arges Sequeira Mangas Case v Nicaragua, p. 735, para. 97.

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32. Accordingly, the Commission finds that the petitioners exhausted domestic remedies when the Court of Appeal rendered its decision on the writ of habeas corpus.

33. With respect to the citation made by the State of the Court's jurisprudence that the duty to investigate "is not designed to attain a given end, and therefore, it is not breached just because the desired result is not achieved", it should be mentioned that that court has also found that "[I]n certain circumstances, it may be difficult to investigate acts that violate an individual's rights. Nevertheless, [said investigation] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective." [FN6]

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[FN6] Inter-Am. Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C N°4, para. 177.

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b. Deadline for lodging the petition

34. The petition was lodged on March 3, 2000, within the time limit of six months provided in Article 46(1)(b) of the American Convention. Therefore, that requirement has also been met.

c. Duplication of proceedings and res judicata

35. The record in the instant case contains no information whatever that might indicate that the matter is pending in another international proceeding for settlement, or that it has been previously studied by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided in Articles 46(1)(d) and 47(d) of the American Convention do not apply.

d. Nature of the alleged violations

36. The IACHR finds that the allegations, if proven, would tend to establish violations of rights contained in Articles 1(1), 4, 5, 7, 8(1) and 25 of the American Convention, and Article 1 and related provisions of the Inter-American Convention on Forced Disappearance of Persons.

## V. CONCLUSIONS

37. The Inter-American Commission concludes that it is competent to examine the merits of the instant case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention. Based on the factual and legal arguments given above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible as regards the alleged violation of rights protected in Articles 1(1), 4, 5, 7, 8(1) and 25 of the American Convention, and Article 1 and related provisions of the Inter-American Convention on Forced Disappearance of Persons.
2. To notify the parties of its decision.
3. To continue with its analysis of merits in the case.
4. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 10th day of October, 2001. (Signed): Claudio Grossman, President; Juan E. Méndez, First Vice-President; Marta Altolaguirre, Second Vice-President; Commission members Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Hélio Bicudo.