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Session:	Hundred and Thirteenth Regular Session (9 – 17 October and 12 – 16 November 2001)
Title/Style of Cause:	Jose Francisco Rivas Fernandez v. Venezuela
Doc. Type:	Decision
Decided by:	President: Claudio Grossman; First Vice-President: Juan E. Mendez; Second Vice-President: Marta Altolaguirre; Commissioners: Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Helio Bicudo.
Dated:	10 October 2001
Citation:	Rivas Fernandez v. Venezuela, Case 12.307, Inter-Am. C.H.R., Report No. 92/01, OEA/Ser./L/V/II.114, doc. 5, rev. (2001)
Represented by:	APPLICANTS: Vicaría Episcopal de Derechos Humanos of the Archdiocese of Caracas and the Center for Justice and International Law
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## I. SUMMARY

1. On July 5, 2000, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a complaint submitted by the Vicaría Episcopal de Derechos Humanos of the Archdiocese of Caracas (Archdiocesan Vicariate for Human Rights) and the Center for Justice and International Law (CEJIL) (“the petitioners”), in which it is alleged that the Venezuelan State (“the State”) is responsible for the illegal detention, incommunicado confinement, and forced disappearance of José Francisco Rivas Fernández. The petitioners argue that the facts alleged constitute violations of several provisions of the American Convention on Human Rights (hereinafter “the American Convention”), such as the general obligation to respect the 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 a fair trial (Article 8(1)); and the right to effective judicial protection (Article 25), and Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

2. The State is of the view that domestic remedies have not been exhausted, since the facts are being investigated by the Public Ministry and the Office of the Human Rights Ombudsman (Defensoría del Pueblo) along with the Venezuelan courts; that the habeas corpus remedy is not the adequate means to investigate the facts alleged; and that the investigation is an obligation of means and not of results, such that it is not violated when the desired results are not achieved.

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

## II. PROCESSING BEFORE THE INTER-AMERICAN COMMISSION

4. The petition was submitted July 5, 2000, and forwarded to the Venezuelan State on July 12, 2000, as petition number 12.307, with a request for information. The State presented its observations on August 27, 2000; these were forwarded to the petitioners on September 8, 2000. On October 13, 2000, the petitioners requested an extension for submitting their observations on the answer by the Venezuelan State; the Commission granted them 30 days counted from October 27, 2000. The petitioners submitted their observations on November 28, 2000. The additional observations to the State's answer were sent by the Commission to the State on December 5, 2000. The Inter-American Commission held a hearing on the case with both parties on February 27, 2001, during its 110th session. On March 23, the petitioners sent the IACHR additional information, which was forwarded to the Government of Venezuela on May 9, 2001. The Venezuelan State sent in the report by the Public Ministry of Venezuela on August 20, 2001.

## III. THE PARTIES' POSITIONS ON ADMISSIBILITY

### A. The petitioners

5. On December 15, 1999, the date of the referendum adopting the draft resolution of the Constitution, both in the state of Vargas and in other areas of the country, the magnitude of the rains was a matter of concern. During those days Venezuela experienced the consequences of the worst natural disaster of its contemporary history.

6. Under these circumstances, the action of a large number of state agents in the work of re-establishing the public order necessary for safeguarding the lives and security of persons allegedly resulted in several human rights violations.

7. The petitioners allege that on December 21, 1999, at approximately 7:30 p.m., José Francisco Rivas Fernández, 24 years of age, was seated at the door of the offices of the Acción Democrática (AD) political party, located in Caraballeda, state of Vargas, where some families who had lost their homes in the disaster, including his own, had taken shelter. At 7:30 p.m. a "curfew" went into effect that was not officially decreed by the Government of Venezuela, in which the troops of the Paratrooper Battalion began blowing whistles to indicate that everyone should take shelter in their homes.

8. Ten minutes after the whistles were blown, the troops returned and began to shoot into the air. José Francisco Rivas Fernández remained seated at the door. On seeing him, the soldiers asked if he had seen anyone running, and he answered that he had not. Immediately, a sergeant by the last name of Rondón, who directed the military group, accompanied by approximately

seven men, told him in a threatening tone that they were not hunting, threw him to the ground, and began kicking him. Later, they took off his shoes and, using the shoelaces, they tied his hands behind his back, while the sergeant was saying “kill him, kill him, he’s a scabies-infested dog,” “he’s a criminal,” and “hit him hard” while they continued beating him. At that moment, in the face of such circumstances, the victim’s parents intervened, as did others who were at that shelter, who asked that they not mistreat him, and that he be released; yet the members of the military did not stop pursuing their objective, and they took him away, while they told José Rivas’s parents, “if you want to rescue him, then rescue him later, when he’s been swallowed up by the darkness.”

9. One witness attests to having observed when he was taken by a military commission to a sector called Quebrada Seca, while being severely beaten, along with two others who were also detained.

10. On December 22, when the victim’s parents inquired about their son, the sergeant by the last name of Rondón, who had detained him, told them that he had been turned over to the Bureau of Intelligence and Prevention Services (DISIP: Dirección de Servicios de Inteligencia y Prevención).

11. The victim’s next-of-kin have searched for him in different places in the state of Vargas, and even in the Federal District, yet have had no results whatsoever.

12. On January 28, 2000, a writ of habeas corpus was filed by attorney Celia Méndez, representative of the Vicaría Episcopal de Derechos Humanos of the Archdiocese of Caracas, in keeping with Article 27 of the Constitution of the Bolivarian Republic of Venezuela, before the Sixth Judge of Control of the Criminal Judicial Circuit for the State of Vargas.

13. On February 11, 2000, the Sixth Court of Control of the State of Vargas declared that there was no subject matter on which to decide. Its decision was based on the report by Army Captain Eliécer Otaiza Castillo, Director General of the DISIP, in which he reports that “... based on a review of the files and incident reports of these services, the detention of citizen José Francisco Rivas Fernández is not reflected.”

14. On February 17, 2000, the Court of Appeals of the Criminal Judicial Circuit of the Judicial District of the State of Vargas affirmed the decision of the Sixth Court of Control by which it declared that there was no subject matter on which to decide in relation to the writ of habeas corpus filed on behalf of José Francisco Rivas Fernández.

15. In relation to the exhaustion of domestic remedies in the case of the forced disappearance of José Francisco Rivas, the petitioners sought the opinion of Mr. Jesús María Casal, expert in Venezuelan constitutional law, who indicated that:

I. Scope of protection of habeas corpus under Venezuelan law

In our legal system, habeas corpus, a term used by Article 43 of the Organic Law on the Protection (Amparo) of Constitutional Rights and Guarantees (hereinafter the Organic Law on

Amparo), and belonging to our legal tradition, is an expression of the right of amparo provided for in Article 27 of the Constitution. Its specificity lies first in its purpose: liberty and personal security.

Venezuela's 1999 Constitution corroborated the applicability of the protection, or amparo, of personal liberty, or habeas corpus, to the forced disappearance of persons. The Constitution, right after enshrining the right to personal liberty, prohibits and punishes the forced disappearance of persons, consistent with the international human rights instruments.

The Organic Law on Amparo provides that against any decision that resolves an amparo action in the first instance, one may bring an appeal, and it provides for a compulsory consultation (consulta) if there is no appeal. One may not pursue a cassation remedy to oppose an appellate decision on an amparo matter.

It has been suggested that against a decision denying a habeas corpus motion, handed down on appeal from the amparo proceeding that one must exercise the "remedy" of review provided for at Article 336(10) of the Constitution, prior to having recourse to the Inter-American Commission on Human Rights. This thesis has no basis whatsoever in the Venezuelan constitutional order, nor does it find support in the inter-American case law on the rule of exhaustion of domestic remedies, given that:

(a) Article 336(10) of the 1999 Constitution does not provide a "remedy"; it provides for a power of the Constitutional Chamber that entails the possibility of reviewing firm amparo judgments or decisions of other Venezuelan courts' judgments involving constitutional review.

This power of the Constitutional Chamber may be exercised upon the initiative of the person affected, but it may also be applied *sua sponte*, or at the request of a third person, as has been declared by the constitutional case-law. As it is not a remedy, no term is fixed for the eventual presentation of the request by an interested person.

(b) Most important, however, for the purposes of resolving the issue posed, is that the Constitutional Chamber, in numerous judgments, has had the opportunity to clarify the scope of this review power, and has held uniformly and repeatedly that its exercise is "exceptional" and "discretionary." Moreover, it has stated that a private person who requests of that Chamber that it review any amparo judgment cannot invoke any right whatsoever as a basis for admitting the review. Admitting the review is a discretionary power of the Constitutional Chamber, in response to which a person cannot invoke any constitutional right.

(c) The foregoing is borne out by the firm position of the Constitutional Chamber according to which it is not obligated to render decisions on all the requests for review of amparo judgments. It may "selectively" choose the cases that seem relevant, in which it allows the review procedure, without there being a duty to set forth the reasoning of its pronouncements, even when it rejects outright an application for review.

These elements make the review a *sui generis* mechanism without the propensity to place in the hands of the private person an instrument that would allow him or her to demand justice before a court; rather, it is geared to empowering the Constitutional Chamber to establish binding criteria on the interpretation of the constitutional provisions, thereby ensuring uniformity of criteria.

In just a few cases, those which are able to awaken the sensitivity of the justices of the Constitutional Chamber, the review is admitted--in practice almost never--which does not mean that the judgment will definitely be voided.

This implies that the first and second instance of amparo, or habeas corpus, is the procedural remedy that guarantees the private person the possibility of demanding the cessation of the violations of his or her constitutional rights, as the Judiciary is obligated to restore, through this process, the situations infringed by the violations of such rights. While the review is a completely exceptional mechanism, which only operates when it is deemed advisable to do so by the justices of the Constitutional Chamber, in the use of their discretionary power of selection.

The rule of exhaustion of domestic remedies cannot be applied to a procedural mechanism which, in summary, has the following characteristics:

- (a) It is not a remedy or an action available to the victim of human rights violations; it is a discretionary power of the Constitutional Chamber, which may be exercised *sua sponte*, or at the request of an interested person, with no term of preclusion.
- (b) One who requests the review of an amparo judgment has no right to obtain a pronouncement as to its admissibility or lawfulness.
- (c) The review is not a second appeal (third instance) of an amparo judgment; to the contrary, review applies to amparo judgments or judgments of constitutional review that are definitely firm, and that have the authority of *res judicata*. Hence, it is a mechanism that is not only special, but exceptional, and it is up to the Constitutional Chamber to determine, selectively, whether to admit or process the reviews in those cases in which they deem it pertinent.

16. With the filing of the habeas corpus remedy before the Fifth Circuit Court of Review of the State of Vargas, on January 28, 2000, which declared on February 1 that there was no subject matter on which to decide, and the affirmation of this decision on February 10, 2000, by the Court of Appeals of the Criminal Judicial Circuit of the Judicial District of the State of Vargas, the petitioners consider that they have exhausted domestic remedies in Venezuela.

17. The petitioners argue that the facts alleged constitute a violation by the Venezuelan State of several provisions of the American Convention on Human Rights, such as the right to respect and ensure the 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 rights to a fair trial and to judicial protection (Articles 8(1) and 25), and Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

## B. The State

18. The Venezuelan State considers that domestic remedies have not been exhausted, given that at present actions are being taken and investigations are under way by the Public Ministry and the Office of the Human Rights Ombudsman, together with the Venezuelan courts, aimed at clarifying the events that occurred in the state of Vargas.

19. The criminal courts that had the habeas corpus actions before them requested information from the security agencies that indicated that they had the persons detained. In all these cases, both the Ministry of Defense and the National Guard and DISIP reported that the citizens with respect to whom the writs of habeas corpus were filed were not detained under their orders.

20. In the face of this information supplied by the security agencies, the criminal courts--both the Criminal Court of Review and the Criminal Courts of Appeals--were of the view that the procedural requirements for the habeas corpus action to lie were not met. Accordingly, this was not the adequate means for effectively investigating the facts alleged, as the proper course of action was to begin a formal, regular investigation, following the guidelines and rules established in the Organic Code of Criminal Procedure, so as to determine precisely the real characteristics of the deed, and to identify the perpetrators and participants. Accordingly, the Senior Prosecutor for the state of Vargas was told to order immediately that the respective investigations begin, which means that with said decision, domestic remedies were not exhausted, but that it was necessary to pursue those indicated by the court.

21. The Venezuelan State mentions that the Court has established that the legal duty of each state is to investigate human rights violations that have taken place in its jurisdiction, noting that this is an obligation of means, but not of results, thus it is not breached when the desired result is not attained, and that the violation of this duty actually occurs when the state apparatus acts so as to impede an adequate investigation into the facts, such that the violation remains in total impunity.

22. It also notes that with respect to the decision to deny the writ of habeas corpus, review through the Constitutional Chamber is proper; the Constitutional Chamber may declare the nullity of the decision for a new habeas corpus proceeding to begin, as has occurred in the case of the disappearance of Mr. Monasterios[FN1], in which the Constitutional Chamber first declared admissible the amparo filed by the Human Rights Ombudsman for the Caracas Metropolitan Area against the judicial decision denying the habeas corpus, in a case related to an alleged forced disappearance. The Chamber adduced that the two appeals allowed in the case of an amparo action had already been exhausted, thus there was no place for a new constitutional amparo: the right to prompt and effective judicial protection of constitutional rights should have been considered satisfied (judgment of April 25, 2000). Yet later the same Constitutional Chamber decided to exercise the exceptional and discretionary power of review provided for at Article 336(10).

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

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23. The State further notes that at the initiative of the Public Ministry, one can accede to a constitutional review and then initiate criminal actions for the purpose of clarifying the facts and determining the whereabouts of the disappeared person; and that so long as the person has not been found alive and the corpse has not been found, the investigation has not concluded, and, accordingly, domestic remedies have not been exhausted.

#### IV. ANALYSIS

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

24. The petitioners are authorized by Article 44 of the American Convention to submit complaints to the IACHR. Those complaints name as alleged victims individuals with respect to whom Venezuela undertook to respect and ensure the rights enshrined in the Convention. As regards the State, the Commission observes that Venezuela is a state party to the American Convention, having ratified it on August 9, 1977. In addition, the IACHR observes that as regards passive competence *ratione personae*, it is a general principle of international law that the State must answer for the acts of all its organs, including those of its Judiciary. Accordingly, the Commission is competent to take up this petition.

25. The Commission is competent *ratione loci* to take cognizance of this petition insofar as it alleges that rights protected in the American Convention were violated in the territory of a state party to that Convention.

26. The Commission is competent *ratione temporis*, as the facts set forth in the petition are alleged to have taken place when the obligation to respect and ensure the rights established in the Convention were already in force for the Venezuelan State. With respect to the arguments on possible violations of the Inter-American Convention on Forced Disappearance of Persons, the Commission observes that Venezuela ratified it on January 19, 1999. Consequently, the facts that are the subject matter of this case are alleged to have taken place when this international instrument was in force in Venezuela.

27. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected in the American Convention and in the Inter-American Convention on Forced Disappearance of Persons.

##### Other requirements for the admissibility of the petition

##### a. Exhaustion of domestic remedies

28. The issue of exhaustion of domestic remedies is addressed in Article 46(1)(a) and (b) of the American Convention.

29. The petitioners consider that domestic remedies were exhausted in Venezuela with the filing of the writ of habeas corpus on January 28, 2000, before the Sixth Circuit Court of the State of Vargas--which decided that there was no subject matter on which to decide upon--and the affirmation of this decision on February 17, 2000, by the Court of Appeals for the Criminal Judicial Circuit of the Judicial District of the State of Vargas.

30. The Venezuelan State alleged failure to exhaust domestic remedies on August 24, 2000, considering that the petition before us is the subject of an active and ongoing investigation,

through the constant holding of proceedings necessary to clear up the facts, by the Public Ministry and the Office of the Human Rights Ombudsman, together with the Venezuelan courts.

31. In the instant case, the Commission observes that the writ of habeas corpus was rejected in the first instance on February 11, 2000, and that this decision was affirmed by the Court of Appeals on February 17, 2001. While it is true that the State asserts that the victim's next-of-kin have yet to exhaust the remedy of review, in the opinion of the Commission this remedy is not adequate for determining the whereabouts of the victim in the case of a forced disappearance. As the Honorable Court has pointed out from its first contentious cases:

[H]abeas 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] I/A Court HR, Case of Velásquez Rodríguez, Judgment of July 29, 1988, Series C, No. 4, para. 65.

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32. The Venezuelan State also argues that Senior Prosecutor for the State of Vargas was told to immediately order that the respective inquiries begin, "which means that with that decision, domestic remedies were not exhausted, but rather it was necessary to pursue those indicated by the court." The Commission attributes importance to the work being done by the State to identify the persons responsible for the facts that are the subject matter of this case, since, in effect, a criminal trial is the appropriate proceeding for this purpose. Nonetheless, as the Court has indicated: "The 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 December 21, 1999, the Commission considers that the State has had more than reasonable time to determine the whereabouts of José Francisco Rivas Fernández. In addition, the Commission must state that once the habeas corpus is denied in the first instance and on appeal, by the Judiciary, domestic remedies have been fully exhausted. As indicated by 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." One year and nine months have passed, and the alleged victim remains disappeared.

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[FN3] I/A Court HR, Case of Castillo Páez, Judgment on the merits, para. 83.

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33. With respect to what the State has indicated to the effect that the next-of-kin must exhaust the criminal proceeding under way, the Commission must reiterate its doctrine according to which:

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 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] I/A Court HR, Case of Velásquez Rodríguez, Judgment of July 29, 1988, 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] Annual Report 1997, Case 11.218, Arges Sequeira Mangas v. Republic of Nicaragua, para. 97.

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34. Accordingly, the Commission considers that the petitioners exhausted domestic remedies with the decision of the Court of Appeals denying the writ of habeas corpus.

35. With respect to the State's cite to the case-law of the Court according to which the duty to investigate is one "of means, but not of results, accordingly there is no violation when it does not produce the desired result," it should be noted that the Inter-American Court has also stated that "In certain circumstances, it may be difficult to investigate acts that violate an individual's rights.... Nevertheless, [the investigation] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective." [FN6]

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[FN6] I/A Court HR, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 177.

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b. Time period for submission

36. The petition was submitted on July 5, 2000, within the six-month period established by Article 46(1)(b) of the American Convention, thus that requirement has also been met.

c. Duplication of procedures and res judicata

37. The record in this case contains no information whatsoever that might lead to a determination that this matter is pending before another international organization or that it has

been previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the objections provided for at Article 46(1)(d) and Article 47(d) of the American Convention do not apply.

d. Characterization of the facts alleged

38. The IACHR considers that the facts alleged, if true, tend to establish violations of the rights guaranteed at Articles 1(1), 4, 5, 7, 8(1), and 25 of the American Convention, and Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

V. CONCLUSIONS

39. The Inter-American Commission concludes that it is competent to take cognizance of the merits of this case, and that the petition is admissible under Articles 46 and 47 of the American Convention. Based on the arguments of fact and of law set forth above, and without prejudging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

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

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