

Institution:	Inter-American Commission on Human Rights
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Title/Style of Cause:	Jose Ruben Rivera v. El Salvador
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez. Commissioner Florentin Melendez, a Salvadoran national, did not participate in either the discussion of or vote on this case, in keeping with Article 17(2)(a) of the Rules of Procedure of the IACHR.
Dated:	12 October 2005
Citation:	Ruben Rivera v. El Salvador, Petition 880/01, Inter-Am. C.H.R., Report No. 53/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANTS: the Asociacion Pro-Busqueda de Ninas y Ninos Desaparecidos and the Center for Justice and International Law
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I. SUMMARY

1. On November 16, 2001, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a complaint filed by the Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos [Disappeared Children Search Association] (Asociación Pro-Búsqueda) and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”) alleging that the Republic of El Salvador (hereinafter “the State”) had incurred international responsibility for the forced disappearance of the child José Rubén Rivera and the subsequent failure to investigate and make reparations for these violations. The petitioners alleged that the facts denounced constituted violation of a number of rights enshrined in the American Convention on Human Rights (“the American Convention”): the right to humane treatment (Article 5); the right to personal liberty (Article 7); the right to a fair trial (Article 8); the rights of the family (Article 17); the rights of the child (Article 19), and the right to judicial protection (Article 25), all in violation of the general duty to respect and ensure the rights protected under the American Convention (Article 1(1)).

2. The petition states that on May 18, 1983, José Rubén Rivera, age 3, was abducted by military personnel from the Fifth Infantry Brigade of the Salvadoran Armed Forces, during an operation carried out on the “La Joya” Hacienda in San Vicente department. Almost 22 years have passed since then, but the child’s whereabouts are still unknown. All the efforts made to get

the authorities to investigate the facts, including a criminal complaint and a writ of habeas corpus, have come to naught.

3. The State, for its part, contends that internal remedies have not been exhausted. It argues that at the request of the child's mother, and in keeping with the laws in force, on November 15, 1996 the Second Examining Court of San Vicente opened criminal case No. 479-3 96, for the crime of forced disappearance. It explains that although the court ordered the case closed, that order was in the nature of a provisional administrative closure, which means that the case can be reopened if new information is discovered. The State also contends that another inquiry into the case is still in progress as a result of a petition that the petitioners filed in 2000 (although they could have filed at any time prior to that) seeking a writ of habeas corpus. In a ruling dated March 21, 2002, the Constitutional Law Chamber of the Supreme Court agreed to hear this petition and ordered the Office of the Attorney General of the Republic to take the necessary measures to effectively protect the child's personal freedom. The State points out that while no positive outcome has been forthcoming, this does not imply unwarranted delay. The investigation has been complicated by the passage of years and by the fact that the first complaint was not filed until eleven years after José Rubén Rivera's disappearance. The State is therefore requesting that the Commission declare the case inadmissible on the grounds of a failure to exhaust domestic remedies.

4. Without prejudging the merits of the case, in this report the Commission concludes that the case is indeed admissible, as it satisfies the requirements stipulated in Articles 46 and 47 of the American Convention. The Inter-American Commission decides to notify the parties of its decision and to proceed with the analysis of the merits of the alleged violations of the American Convention, to make its decision public and to include the decision in its Annual Report to the OAS General Assembly.

II. PROCESSING WITH THE COMMISSION

5. The Inter-American Commission assigned case number 880-01 to the petition and, on January 22, 2002, requested information from the Salvadoran State regarding the pertinent parts of the complaint. The State answered on July 1, 2002. On September 30, 2002 and August 10, 2004, the petitioners submitted their observations on the information supplied by the State. Those observations were duly forwarded to the State, which answered the petitioners' observations on February 10 and March 18, 2005. The petitioners presented still more observations on June 2, 2005, and the State responded on September 2, 2005.

III. POSITIONS OF THE PARTIES

A. The petitioners

6. The complaint received at the IACHR alleges that José Rubén Rivera was the victim of a forced disappearance, presumably at the hands of members of the Salvadoran Army. The petitioners assert that the facts in this case are as follows:

At around 7 a.m. on May 17, 1983, members of the Fifth Infantry Brigade and troopers from the Cañas Battalion launched a military operation in the hamlet of La Joya. The people fled, seeking safety on the mountain known as El Mocholo. On the day of the operation, José Rubén Rivera was with his mother, Mrs. María de Dolores Rivera, who at the time was 24 years old and eight months pregnant. With them were José Rubén's brothers, Antonio, age one and a half, and Juan Carlos, age six.

After walking for some 15 hours to reach the mountain, Mrs. María de Dolores Rivera and her sons encountered her husband's nephew, José David Rivera, age 14. The teenager was on horseback and was with two other boys, one by the name of José Vidal Rivera Rivas and the other Dimas Rivas. José David told Mrs. María de Dolores Rivera that he could take one of the children with him, and she decided that it should be José Rubén. As exhausted as she was, however, she lost track of the route the boys had taken.

On the morning of May 18, the Armed Forces started up Mount Mocholo, firing their weapons. José David and the three boys with him were surrounded by the gunfire. According to the statement made by José David: "They fled the place; in other words, in fear for their lives, they were looking for somewhere to hide. José David testified that he was on horseback when the soldiers opened fire; he and José Dimas Rivera fell off the horse. The only one left on the horse was Rubén Rivera." [FN2] In the end, witness José David Rivera stated, the soldiers abducted José Rubén Rivera. In her testimony, Carlota Romero stated that she had seen 60 soldiers; they had a three-year-old child with them whom she recognized as being José Rubén Rivera. [FN3]

[FN2] Quoted in the complaint brief: "Statement given by witness José Vidal Rivera Rivas, dated November 29, 1996, at 7 of case file 479-3-96 in the Second Examining Court of San Vicente."

[FN3] Quoted in the complaint brief: "See statement given by Carlota Romero, November 27, 1996, at 6 of case file 479-3-96 in the Second Examining Court of San Vicente."

7. As for the investigation, the petitioners state that the various authorities to which they turned were ineffective and incompetent. On January 11, 1996, the mother turned to the Asociación Pro-Búsqueda, and on May 31 of that year, to the Office of the Attorney for the Defense of Human Rights. The latter's decision, dated March 30, 1998, was certified and sent to the Office of the Attorney General of the Republic, but with no result. On November 15, 1996, she filed a criminal complaint concerning her son's disappearance, with the Second Criminal Court of San Vicente in the department of that same name. This case was ordered provisionally closed on October 2, 1997, "there being no other measures to take." On November 10, 2000, Mrs. María de Dolores Rivera filed a petition with the Constitutional Law Chamber of the Supreme Court, seeking a writ of habeas corpus.

8. The petition states that the armed conflict made it impossible to file any complaint until 1996. The fear was that anyone who went to headquarters would be suspected of ties to the guerrilla movement and suffer reprisals. In a statement made before the Second Criminal Court of San Vicente, Mrs. Margarita Dolores Rivera said that she "was certain that her son was at the

Fifth Infantry Brigade [...] but that [...] she never went there [...] for fear that she would meet her death there.”[FN4] The Truth Commission for El Salvador observed that many human rights violations were committed against civilians merely on the suspicion that they were guerrilla collaborators. This was especially true during the early years of the conflict, all part of the campaign of “draining the pond to catch the fish.” Given the environment, the petitioners claim that people were mistrustful of the authorities, especially when the human rights violations committed were the work of the Salvadoran Army.

[FN4] Quoted in the brief of August 2004: “Statement by Dolores de Rivera before the Second Criminal Court of San Vicente, November 15, 1996.”

9. The petitioners point out that the criminal case in the domestic courts was ineffective. A number of measures were taken, but then the case was closed in just under a year. According to the petitioners, the measures taken were as follows: a statement was taken from the aggrieved party; two witnesses were summoned; reports were requested from the Fifth Infantry Brigade, and the respective logs were examined. Once these measures were taken the case was closed, which is its current status. The facts in the case were not solved and José Rubén Rivera was never found. The petitioners allege that the judge failed to take such basic measures as establishing the identities of the members of the Fifth Infantry Brigade at the time these events occurred, or the identity of other persons who lived in that place, and others.

10. The petitioners also allege that the petition seeking a writ of habeas corpus, filed on November 10, 2000, was just as ineffective, again because of the inadequacy of the investigation. They note that the Supreme Court issued a ruling on this petition on March 21, 2002, acknowledging violation of José Rubén Rivera’s constitutional right to physical liberty. However, the Court wrote that a writ of habeas corpus was a procedural remedy, incapable of resolving the merits of the case. In its ruling, therefore, the Supreme Court called upon the Office of the Attorney General of the Republic “to conduct an inquiry to fully establish the condition and whereabouts of José Rubén Rivera, on whose behalf the petition was filed, so as to protect his fundamental right to freedom.”[FN5] The petitioners report that they have had no news of any steps the Attorney General’s Office might have taken to investigate the facts.

[FN5] Ruling by the Constitutional Law Chamber of the Supreme Court, March 21, 2002.

11. Summarizing, the petitioners argue that in the interim between the time of the events and until some time after the creation of the Truth Commission, the petitioners were unable to avail themselves of any domestic remedies in El Salvador. Since then, the petitioners argue, the domestic remedies available to them in El Salvador have been ineffective for purposes of investigating the facts, determining the whereabouts of José Rubén Rivera and redressing the consequences of the violations alleged. They argue that over nine years have passed since the case was reported and that, in that time, the State’s attitude has been grossly negligent and indifferent, even though the facts in this case constitute a criminal action of the type that must be

prosecuted at the initiative of the authorities (crime of public action). The petitioners are, therefore, requesting the exception to the rule requiring exhaustion of local remedies, as provided for in Article 46(2)(b) of the Convention.

12. As for the applicable rules, the petitioners argue that the Salvadoran State ratified the American Convention on June 23, 1978, and is therefore answerable for the violations of the Convention and of José Rubén Romero's Convention-protected rights.

B. The State

13. For its part, the Salvadoran State maintains that forced disappearance of persons, including boys and girls, was not systematic during the armed conflict; instead, the conflict itself created situations in which families were involuntarily separated; in many cases the consequences and ramifications of the separation are still unknown.[FN6]

[FN6] Brief of response, dated February 10, 2005.

14. The State also contends that the applicable international law during an armed conflict is International Humanitarian Law, specifically Article 3 common to all four Geneva Conventions and Article 4 of Protocol II. It points out that these were the standards of conduct for the Salvadoran Armed Forces throughout that conflict:

For effective application of International Humanitarian Law, the ICRC was there during the armed conflict to provide assistance to victims of the two opposing forces and to the civilian population directly affected by the conflict. The present case, therefore, is among those governed by International Humanitarian Law. The case law of the Inter-American Court of Human Rights (Las Palmeras case) is that the American Convention on Human Rights has given the Court jurisdiction to determine whether a given act or law of a State is compatible with the American Convention, but not to determine compatibility with the Geneva Conventions.

15. Based on this information, the State requests that the Commission find that "the Salvadoran Armed Forces did not have a systematic practice of forcibly disappearing minors."

16. As for exhaustion of domestic remedies, the State contends that those remedies have not been exhausted: first, because a criminal case is still pending with the Second Examining Court of San Vicente, which the mother of the alleged victim instituted on November 15, 1996. The State argues that because the case was only provisionally closed, it has not been permanently closed and can be reopened whenever fresh information comes forward. According to the State, the fact that nothing positive has as yet come out of this case does not imply an unwarranted delay in the proceedings; indeed, according to the State the judge acted diligently, ordering all available evidence, considering the length of time that passed between the child's disappearance and the filing of the complaint. Secondly, the State observes that by order of the Supreme Court, the investigation is still underway. When it ruled on the writ of habeas corpus, the Supreme

Court instructed the Office of the Attorney General of the Republic to take steps to establish the material situation of the missing person, in order to protect his basic right to freedom.

17. As for the allegation that the habeas corpus remedy has been ineffective, the State observes that the law on this subject makes no provision for forced disappearances and that the Supreme Court, whose function is to interpret the Constitution, has expanded upon it in order to broaden the scope of the protection afforded by this remedy. The State notes that the Supreme Court has presented a Constitutional Procedure bill to the Legislative Assembly, which features a section on special cases, in which provision is made for a procedure in cases of disappeared persons. The State emphasizes that in the case of the habeas corpus remedy filed by Margarita Rivera, the Court did find in her favor.

18. Finally, the Salvadoran State maintains that because of the reservation that it made when it accepted the contentious jurisdiction of the Inter-American Court and in light of the Inter-American Court's judgment on the preliminary objections in the case of the Serrano Cruz Sisters, the case of the forced disappearance of José Rubén Rivera does not come under that Court's jurisdiction.

19. Summarizing, the State is asking that the present case be declared inadmissible on the grounds that the remedies under domestic law have not been exhausted, in accordance with generally accepted principles of International Law. The State underscores the fact that an investigation launched years after the fact cannot be completed as swiftly as need be, as the passage of time takes its toll on both the investigation and the evidence. The State, however, insists that it has prosecuted this case diligently.

IV. ANALYSIS

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

20. Under the terms of Article 44 of the American Convention, the petitioners do have standing to lodge a petition with the Commission. The petition under examination states that the alleged victim was under the Salvadoran State's jurisdiction at the time of the alleged events. As for the State, the Commission notes that El Salvador is a State party to the American Convention, having deposited its instrument of ratification on June 23, 1978.

21. The Commission is also competent *ratione materiae* because the petitioners are alleging violations of rights protected under the American Convention. The State argues that International Humanitarian Law was the applicable law during the internal armed conflict. In the Commission's view, the Commission is not precluded from ruling on facts merely because those facts occurred against the backdrop of an armed conflict. Article 27 of the Convention allows for the suspension of certain rights in the context of armed conflicts, but by no means either suspends the application of the Convention in its entirety or deprives this Commission of its authorities. Then, too, the IACHR 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* providing a standard for interpretation pursuant to Article 29 of the Convention.

22. The Commission is competent *ratione temporis* to examine the complaints. The events that the petition alleges began on August 25, 1982, the date on which José Rubén Rivera's alleged forced disappearance began. Therefore, by the time the facts in this case were alleged to have occurred, El Salvador was already bound by its obligations as a State party to the American Convention. The State contends that because of the reservation it filed at the time it deposited its acceptance of the Court's contentious jurisdiction, the Inter-American Court of Human Rights does not have jurisdiction to take up this case. The Commission will not address this point in the present report, since the State's argument does not go to the issue of the Commission's competence.

23. Furthermore, because the petition alleges violations of Convention-protected rights that occurred within the territory of a State party, the Commission concludes that it is competent *ratione loci* to take up this case.

B. Requirements for the petition's admissibility

1. Exhaustion of domestic remedies

24. The State argues that the present case is inadmissible because the remedies under domestic law in El Salvador have not been exhausted. It observes that a criminal case is still in progress, as is an investigation ordered by the Supreme Court. It reasons, therefore, that the case is still pending settlement in domestic courts.[FN7] The State challenges the petitioners' contention that there has been an unwarranted delay. The State makes the case that the authorities have been diligent and that any delay is due to complications caused by the amount of time that passed between the events and the filing of a complaint.[FN8] The State further observes that the petition filed seeking a writ of habeas corpus was indeed effective, as the ruling went in the petitioner's favor and the Supreme Court instructed the Office of the Attorney General of the Nation to conduct an investigation into the facts.[FN9]

[FN7] See paragraphs 18 and 19 of this Report.

[FN8] See paragraphs 18 and 21 of this Report.

[FN9] See paragraph 19 of this Report.

25. The petitioners, for their part, contend that the internal remedies have been ineffective and that they have exhausted every means possible to determine the whereabouts of José Rubén Rivera.[FN10] The petitioners point out that no complaint was filed prior to 1996 since the minimum conditions necessary to do so were not present.[FN11] The petitioners underscore the fact that over nine years have passed since the case was reported and 22 years since the events transpired, and still the Salvadoran authorities have done nothing to ensure the effectiveness of the investigation, determine the identity of those responsible, punish them and make reparations to the victims or their next of kin.[FN12] The petitioners point out that the writ of habeas corpus was equally ineffective in ascertaining the child's whereabouts. They are therefore requesting

application of the provisions of Article 46(2)(b) of the Convention, allowing an exception to the rule requiring exhaustion of local remedies.[FN13]

[FN10] See paragraphs 9, 10 and 11 of this Report.

[FN11] See paragraph 10 of this Report.

[FN12] See paragraph 13 of this Report.

[FN13] See paragraph 13 of this Report.

26. In this case, members of the Salvadoran Army are allegedly responsible for the forced disappearance of a child, against the backdrop of the full-blown internal armed conflict being waged in El Salvador at that time. That era was characterized by systematic human rights violations and impunity, in part due to the dysfunctional Salvadoran judicial system.[FN14] Given the particular circumstances of this case and the context in which the alleged facts occurred, the Commission considers that at the time of the alleged events no case could have been filed. Hence, exhaustion of domestic remedies was and is not required.

[FN14] In the annual reports the Commission published during the period of the armed conflict, on several occasions it addressed the violence and the lack of effective judicial protection of rights. For example:

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.

27. Even now, on the date of the adoption of this report, the remedies under domestic law are still not functioning as effectively as they should to investigate a case of forced disappearance. Indeed, almost nine years have past since the Salvadoran judicial authorities first looked into this case, in response to a criminal complaint filed by the child's mother on November 15, 1996.[FN15] Yet as of the date of this report, they have not yet definitively established how the events transpired.

[FN15] See paragraph 3 of this Report.

28. On May 31, 1996, the Asociación Pro- Búsqueda filed a complaint with the Office of the Attorney for the Defense of Human Rights in El Salvador (PDDH) concerning 145 cases of minors who had been the victims of forced disappearance, all of them during the country's armed internal conflict. The Office of the Attorney for the Defense of Human Rights selected 5 of these cases, one of which was that of José Rubén Rivera. In its report, it found the State culpable in the child's disappearance.[FN16]

[FN16] Report of the Office of the Attorney for the Defense of Human Rights – Case SS-0449-96, March 30, 1998.

29. The Office of the Attorney for the Defense of Human Rights in El Salvador delivered this report to the Attorney General of the Republic, “so that legal proceedings might be instituted to determine what crimes were committed and by whom.”[FN17] The State has not reported any measures taken by the Office of the Attorney General in 1998 to institute an investigation into the child's possible disappearance. And so, although in 1998 the competent Salvadoran authorities were again alerted to the fact that a forced disappearance had occurred, there has still been no reaction.

[FN17] Idem.

30. In response to the State's silence, on November 10, 2000 a petition was filed with the Constitutional Law Chamber of the Supreme Court of El Salvador seeking a writ of habeas corpus. In its ruling of March 21, 2002, the Supreme Court granted the writ, acknowledging a violation of the constitutional right to physical freedom and urging the Office of the Attorney General of the Republic “to exercise its constitutional authorities and take the necessary measures to fully establish the condition and whereabouts of the child José Rubén Rivera, so as to safeguard his right to liberty.”[FN18] Thus far, however, the Commission has no news of any investigation launched by the Attorney General's Office.

[FN18] Ruling of the Supreme Court of El Salvador, March 21, 2002, in habeas corpus case number 215-2002.

31. The Commission is of the view that given the time that has passed since the original events occurred (1983) or since the dates on which the judicial authorities took cognizance of the case (1996, 1998 and 2000), one can make the case that an unwarranted delay has occurred that exempts the petitioners from the requirement to exhaust domestic remedies. The Commission further considers that the State has presented no evidence whatever to show that habeas corpus was or is now an effective remedy to establish the whereabouts of children. The State has

reported no information to show that a writ of habeas corpus has succeeded in locating or establishing the whereabouts of a disappeared person.

32. Based on the foregoing, the Inter-American Commission will apply to this case the exception set forth in part two of Article 46(2)(c) of the American Convention. As a result, the requirements set forth in the Convention regarding exhaustion of domestic remedies and the six-month deadline for lodging a petition are not applicable.

33. Finally, it should be noted that the invocation of the exceptions to the rule on exhaustion of domestic remedies set forth in the American Convention is closely linked to the finding of possible violations of rights enshrined in the Convention, such as effective judicial protection. Article 46(2) of the American Convention, however, is independent of other substantive provisions of that instrument. The issue of whether the exceptions to the rule requiring exhaustion of domestic remedies are also a function of violations of the American Convention in the instant case, must be examined separately, during the merits phase of the case. This is because standards for assessing those exceptions are different from those used when assessing possible violations of Articles 8 and 25 of the American Convention.

2. Timeliness of the petition's filing

34. Article 32 of the Commission's Rules of Procedure states that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition is to be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission will consider the date on which the alleged violation of rights occurred and the circumstances of each case.

35. Considering the date on which the facts in this case were alleged to have occurred and the possibility that this case may suggest the presence of a situation of continuing violation of human rights, and given the situation as regards the various domestic remedies available in El Salvador, the Commission is persuaded that the petition was filed within a reasonable period of time.

3. Duplication of international proceedings and res judicata

36. The Salvadoran State has not challenged admissibility on the grounds of Articles 46(1)(d) or 47(d) of the American Convention, nor is there anything in the present case file to suggest that the petition does not meet those tests.

4. Characterization of the facts being alleged

37. In keeping with the principle of *iura novit curia* and the jurisprudence constante of the Commission and the Court that if proved, a forced disappearance is a violation of the right to life,[FN19] the Commission is also admitting the present case on the grounds of a presumed violation of Article 4.[FN20]

[FN19] See, for example, IACtHR, Castillo Páez Case, Merits, Judgment of November 3, 1998, Series C No. 34, par.66.

[FN20] See Report No. 11/05, Admissibility, Gregoria Herminia, Serapio Cristián, Julia Inés Contreras, El Salvador, 23 February 2005.

38. The IACHR considers that if true, the facts alleged would tend to establish violations of the rights protected under Articles 4, 5, 7, 8, 17, 18, 19 and 25, all in relation to Article 1(1) of the American Convention.

V. CONCLUSIONS

39. The Commission concludes that it is competent to take cognizance of this case and that the petition is admissible under Articles 46 and 47 of the American Convention.

40. Based on the arguments of fact and of law herein set forth and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible inasmuch as it concerns alleged violations of the rights protected under Articles 1(1), 4, 5, 7, 8, 17,19 and 25 of the American Convention.
2. To notify the parties of this decision.
3. To proceed with its examination of the merits of the case.
4. To make this decision public and include it in the Commission's 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 the 12th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sergio Pinheiro, Second Vice-President; and Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez.