

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 11/08; Petition 732-03
Session: Hundred Thirty-First Regular Session (3 – 14 March 2008)
Title/Style of Cause: Emelinda Lorena Hernandez v. El Salvador
Doc. Type: Decision
Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Victor E. Abramovich.
Commissioner Florentin Melendez Padilla, a Salvadoran national, did not participate in the discussion and decision of this report, pursuant to Article 17(2)(a) of the IACHR Rules of Procedure.
Dated: 5 March 2008
Citation: Lorena Hernandez v. El Salvador, Petition 732-03, Inter-Am. C.H.R., Report No. 11/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by: APPLICANT: the Association for the Search for Disappeared Children
Terms of Use: Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On September 11, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a complaint lodged by the Association for the Search for Disappeared Children [Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos (Asociación Pro-Búsqueda)], (hereinafter “the petitioners”), which alleges the international responsibility of the Republic of El Salvador (“the State,” “El Salvador,” or the “Salvadoran State”) for the alleged forced disappearance of the child Emelinda Lorena Hernández and for the subsequent lack of investigation of and reparations for said act. The petition alleged the following violations: right to humane treatment (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); and right to judicial protection (Article 25) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) all in connection with the general duty to respect and ensure the rights in (Article 1(1)) of the same treaty.

2. According to the petitioners, the minor Emelinda Lorena Hernández was the victim of forced disappearance at the hands of members of the Salvadoran army, and disappeared on December 12, 1981, in La Joya canton, Meanguera district, in Morazán Department, during a military operation carried out by members of the Atlacatl Rapid Response Infantry Battalion of the Salvadoran armed forces. The petitioners say that when the town was attacked, the girl, then

11 months and 15 days old, was in the care of Ms. Marta Ramírez, a family acquaintance. That same night, a group of people, including Emelinda's father, went to the town to see what happened, and found that Ms. Marta Ramírez and her four children had been assassinated; they say that Emelinda's body was not found, and they only found her shoes and a shawl. The complaint says that after these facts, many witnesses saw soldiers carrying children. The petitioners say that during the armed conflict in El Salvador the forced disappearance of persons was a pattern followed by the State. They add that more than 26 years after the facts, the whereabouts of Emelinda remain unknown; and all measures taken with the authorities to clarify the facts, including a habeas corpus petition, were fruitless, so they consider that the State is unwilling to fulfill its respective obligations.

3. For its part, the State maintains that in El Salvador there was no systematic practice of disappearance or extermination of children by the Salvadoran armed forces; and it is not the State's responsibility if children were victims of forced disappearance. El Salvador says that in 2002 the petitioners filed a habeas corpus motion that was stayed for lack of elements and information about the child who was allegedly disappeared; however the State says that the petitioners had the opportunity to reinstate this remedy, or use various remedies at their disposal, but did not do so. Therefore, it asks the IACHR to find the petition inadmissible for lack of exhaustion of domestic remedies.

4. Without prejudging the merits of the case, the IACHR concludes in this report that the petition is admissible in the light of Article 46.2.b and c of the American Convention. The Inter-American Commission therefore decides to transmit this decision to the parties and continue with its analysis of the merits with regard to the alleged violation of Articles 5, 7, 8, 17, 19, and 25 of the American Convention, in connection with Article 1.1 of the same treaty. In addition, in application of the *iura novit curia* principle, the Commission will analyze, in the merits phase, if there is a possible violation of Articles 3 and 4 of the Convention in relation to the general obligation to respect and ensure the rights and the duty to adopt domestic legislative measures that is established in Articles 1.1 and 2 of the American Convention, respectively. The Commission further decides to publish this report and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. The petition was presented to the IACHR on September 11, 2003; and on October 22, 2003, the Inter-American Commission assigned it number 732/03 and requested information from the Salvadoran State on the pertinent parts of said petition.

6. The State submitted its observations on March 5, 2004, which were duly forwarded to the petitioners on March 19, 2004.

7. On April 22, 2004, the petitioners presented their comments on the State's information, which were duly transmitted to the State on December 15, 2004.

8. The State sent its observations on February 15, 2005, which were forwarded to the petitioners on October 5, 2006.

9. On November 29, 2006, the petitioners submitted their comments, which were transmitted to the State on March 1, 2007.

III. POSITIONS OF THE PARTIES

A. The Petitioners

10. The petitioners allege that Emelinda Lorena Hernández was the victim of forced disappearance by members of the Salvadoran army. The petitioners state that from December 8 to 16, 1981, members of the Atlacatl Rapid Response Infantry Battalion of the Salvadoran armed forces conducted a military operation in the northern zone of Morazán Department, specifically in Guacamaya, La Joya and Cerro Pando cantons of Meanguera district, and in the village of Los Toriles, in Arambala district.

11. The petitioners then state that in view of the imminent military incursion, the Hernández Sánchez family left its home in La Joya canton, Morazán Department, and headed for the woods to seek protection. They state that after about 12 days in the woods, since they were exhausted and running out of food, and Emelinda “had cried a lot during the time when her family was in hiding,” Ms. Adela Hernández and her husband, Juan de la Cruz, decided to take her to La Joya canton, where they met Marta Ramírez, an acquaintance who was willing to care for the child.

12. The petitioners say that on December 12, 1981, the day after Emelinda’s parents left her in Ms. Marta Ramírez’s house, they heard many shots. That same night the group of persons hiding in the woods, including Emelinda’s father, went to the canton to see what happened. The petitioners state that Ms. Marta Ramírez, who was taking care of Emelinda, was assassinated along with her four children. According to Mr. de la Cruz’s report, they found the body of an eight-month-old baby, but not that of Emelinda, so they combed the entire area, finding only her shoes and a shawl.

13. The petitioners indicate that a relative of Ms. Adela Hernández saw soldiers going through the town carrying many children, but she could not see them clearly. In this regard, the petitioners state that at the time Emelinda Lorena Hernández disappeared El Salvador had a clearly defined pattern of forced disappearance that was recognized by the Inter-American Court when it said that “From approximately 1980 to 1991, El Salvador was engaged in an internal armed conflict during which forced disappearances occurred.”[FN2]

[FN2] I/A Court H.R., Case of the Serrano-Cruz Sisters, Judgment of March 1, 2005, Series C. No. 120, para. 48.1.

14. The petitioners state that at the time it was not possible to file a complaint with the authorities because during the armed conflict there was a fear that anyone who went to the barracks would be seen as linked to the guerrillas and would suffer reprisals. In this connection, El Salvador’s Truth Commission noted that many human rights violations were committed

against the civil population simply because they were thought to be guerrilla sympathizers, during the campaign, especially in the first years of “drain the water from the fish.” Under these circumstances, the petitioners say that they did not trust the authorities, especially when the Salvadoran army carried out the human rights violations.

15. As for the investigation, the petitioners state that all measures pursued in El Salvador have been ineffective and insufficient; and that although the Prosecutor for the Defense of Human Rights called for an investigation, none was conducted by the Attorney General’s Office or any other competent state entity to determine the whereabouts of the disappeared girl. On this point, the petitioners say that Emelinda’s mother first denounced the facts to the Truth Commission in 1993, after peace was restored in El Salvador; however, owing to the short duration of the Truth Commission’s mandate, it could not open a chapter on disappearance of children, and decided to lump them under the general heading of forced disappearance of persons. The petitioners say that in 1994 Emelinda’s family also resorted to the Association for the Search for Disappeared Children to seek help in finding out what happened to their daughter.

16. Furthermore, the petitioners say that habeas corpus as an effective and appropriate remedy formally existed at the time of the disappearance of the minor Emelinda, but it was pointless to pursue it given the inability of the legal system to investigate cases or rule in favor of victims, and the circumstances of the family members, who were generally protecting themselves from military raids in areas far from the courts. Therefore, say the petitioners, it was not until November 15, 2002, that Ms. Adela Hernández filed a habeas corpus motion with the Constitutional Chamber of the Supreme Court.[FN3] In a resolution of March 3, 2003 (notified on March 11 of the same year), the Court suspended the remedy based on the lack of minimum evidence to give the court a reasonable presumption of the alleged forced disappearance, so it limited itself to the information by the defendant.

[FN3] According to the habeas corpus petition, the plaintiff documented the existence of the girl Emelinda Lorena Hernández by presenting her birth certificate.

17. As for the applicable regulations, the petitioners say the Salvadoran State ratified the American Convention on June 23, 1978, and is therefore responsible for violations of it to the detriment of Emelinda Lorena Hernández.

18. In addition, concerning the argument of the State that it accepted the jurisdiction of the Inter-American Court after the facts in the instant petition, the petitioners say that argument is not pertinent because the petition is in the phase of admissibility by the Inter-American Commission.

19. In summary, the petitioners hold that initially, and until the establishment of the Truth Commission, there was no possibility in El Salvador for the petitioners to have access to any domestic remedy. They allege that since that time domestic remedies available in El Salvador have been ineffective for investigation of the facts, determination of the whereabouts of Emelinda Hernández, and making reparation for the consequences of the alleged violations. They

also argue that more than 12 years have elapsed since the case was lodged with the Truth Commission during which the State's attitude has been extremely negligent and disagreeable in the proceeding, notwithstanding that the facts justify a public criminal action. The petitioners therefore consider that the investigation has been foreordained to fail; and in this regard they invoke application of the exception to exhaustion of domestic remedies established in Article 46.2.b of the Convention.

B. The State

20. For its part, the State says there was no systematic practice in the Salvadoran armed forces for disappearances or killing of minors; and although the numerous regulations on the subject do not guarantee total application in practice, even minimal application afforded a degree of protection of human rights for all Salvadorans. It says that if children were victims of forced disappearances, that were not the State's responsibility because it did not give a mandate to its armed forces to conduct forced disappearances of children. To the contrary, says the State, the armed forces tried to take the children they found to safe locations. In addition, El Salvador says that if children were taken and their identities were changed or they were given for adoption, this was not a government policy; if individuals acting in their personal capacity engaged in this criminal behavior, there were and are penal procedures for determining their responsibility

21. According to the Salvadoran State the petitioner filed a habeas corpus motion in 2002, but could have done so earlier at any time. On this point, State says the motion was suspended for lack of sufficient evidence to establish that the child had in fact disappeared. It indicates that the Constitutional Chamber of the Supreme Court, in its resolution of March 3, 2003, clarified that the resolution was not *res judicata*, and that it "did not prevent the petitioner or any other interested party from using the elements discussed in this resolution to file a new habeas corpus petition so that this Court can grant the party protection for the right to personal liberty."

22. Concerning the declaration that the writ of habeas corpus was out of order, the State says that this does not establish *res judicata* status concerning the ordinary instance, and that if the writ had been filed in a timely manner it would have been possible to gather more information; since habeas corpus is a remedy for protection, it cannot produce the desired result when presented so many years after the alleged violation.

23. Concerning the exhaustion of domestic remedies, the State argues that the petitioner has failed to do so, because El Salvador's legal system offers many possibilities for exhausting them, and the petitioners could file action in any of the courts all around the country, with jurisdiction in each of the departments, municipalities, towns, villages, and cantons. However, according to the State, the petitioners did not exhaust these avenues.

24. Moreover, notes the State, the proceeding is currently open in the Attorney General's Office, and little more than a year has passed since the Court's resolution of March 3, 2003, which is little time for the necessary investigations taking into account the time elapsed since the child's disappearance; it notes that said investigation becomes more difficult over time because it is harder to gather evidence, locate and cite the witnesses, and conduct the inquiries, so the case becomes increasingly more complex through no fault of the authorities involved.

25. The Salvadoran State maintains that the law applicable to this case is international humanitarian law, specifically Article 3 in all four Geneva Conventions, supplemented by Protocol II, so the Commission would not be competent to consider the instant case. Furthermore, the State says that when El Salvador accepted the jurisdiction of the Inter-American Court, it did so with a reservation in accordance with Article 62.2 of the Convention, and it recognizes the jurisdiction of the Court only with regard to facts or acts that began after the date on which the State deposited the instrument recognizing the Court's jurisdiction, i.e., June 6, 1995, and the State argues that if the Commission follows the jurisprudence of the Court, the instant case will remain in domestic jurisdiction.

26. In summary, the State holds that the petitioners had various options for reporting or denouncing to the State the alleged facts that occurred, and that the State offered ordinary mechanisms in the penal and constitutional jurisdiction that were placed at the disposal of the petitioners; however, since these were not exhausted, the Inter-American Commission should declare the case inadmissible.

IV. ANALYSIS OF ADMISSIBILITY

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

27. The petitioners are eligible under Article 44 of the American Convention to submit a petition to the Commission. The petition under study indicates that the alleged victim was under the jurisdiction of the Salvadoran State at the time of the alleged facts. As regards the State, the Commission notes that El Salvador is a State party to the American Convention, having duly deposited its instrument of ratification on June 23, 1978. The Commission therefore has *ratione personae* competence to examine the petition.

28. The Commission also has *ratione materiae* competence because the petitioners allege violations of rights protected in the framework of the American Convention. The State holds that applicable law during the domestic armed conflict should be international humanitarian law. In this regard, the Commission considers that the circumstance that some of the alleged facts occurred in the context of an armed conflict does not prevent the Commission from having competence to decide on them. Article 27 of the Convention does permit the suspension of the State's international obligations concerning some rights in the context of armed conflicts, but in no way does it suspend the force of the whole Convention or strip this Commission of its authority. Nevertheless, in the merits phase, the IACHR must analyze the State's obligations arising from the Convention, in the light of rules of international humanitarian law that will be used as part of the interpretation insofar as they have the status of *lex specialis*.

29. The Commission has *ratione temporis* competence to examine the case. The petition is based on allegations of facts that occurred starting on December 12, 1981, the date on which the disappearance of Emelinda Lorena Hernández was said to have begun. The alleged facts thus occurred after the entry into force of the obligations of the State as a party to the American Convention. Furthermore, inasmuch as the petition alleges violations of rights protected in the

framework of the American Convention that took place in the territory of a State party, the Commission concludes that it has *ratione loci* competence to consider it.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

30. Article 46(1)(a) of the American Convention stipulates that admission of a petition requires “that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” The same Convention provides that this provision shall not apply when domestic remedies are not available for reasons of fact or law. Specifically Article 46(2) establishes exceptions to the general principle of exhaustion of domestic remedies when the domestic legislation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated; when the alleged victim has been denied access to the remedies under domestic law; or when there has been an unwarranted delay in rendering a final judgment.

31. The State argues that the instant case is inadmissible because domestic remedies in El Salvador have not been exhausted. It notes in this regard the existence of a proceeding open in the Attorney General’s Office, in the investigative phase, so a domestic resolution is said to be pending. In addition, it holds that available remedies were not exhausted in a timely manner, such as those for habeas corpus, the complaints to the International Committee of the Red Cross and the Governmental Human Rights Commission. Concerning the writ of habeas corpus, the State says it was filed on October 17, 2002, but could have been filed any time earlier; it adds that this remedy was rejected for lack of evidence supplied by the plaintiffs.

32. For their part, the petitioners maintain that the domestic remedies are ineffective, but nevertheless they have attempted by all possible means to have their case addressed, including a habeas corpus motion to determine the whereabouts of Emelinda Lorena Hernández. The petitioners emphasize that 26 years have passed since the disappearance of Emelinda Lorena Hernández, and authorities have done nothing to guarantee the effectiveness of the investigation, identify those responsible for the facts, punish them, and compensate the victims or their families.

33. On the matter of habeas corpus, they add that this motion was suspended on the grounds that there was insufficient evidence to prove the forced disappearance; and that for this resolution, the Constitutional Chamber based its ruling on the official report required by the Executive Judge of the Ministry of National Defense, which stated that the facts did not occur, and the Executive Judge did not exercise due diligence to determine the whereabouts of Emelinda Lorena Hernández. In addition, the petitioners say that rejection of this writ foreclosed any possibility of justice for the family, because the Constitutional Court ordered the case shelved and did not instruct other state agencies to investigate the girl’s whereabouts. Similarly, the recommendations of the Prosecutor for the Defense of Human Rights to the Attorney General’s Office to investigate the case have been ignored.

34. Concerning the criminal investigations allegedly underway by the State, the petitioners maintain that they have no information concerning any open case in the Attorney General's Office, as the State contends, and that it has not identified said proceeding nor any specific steps that have been taken in it, which reflects "an unwillingness to comply effectively with its duty to investigate, punish, and try the responsible parties." According to the petitioners, the inactivity of the Attorney General's Office shows that available domestic remedies exist only on paper.

35. For its part, the Commission notes that in this case members of the Salvadoran army were allegedly responsible for the forced disappearance of a girl during the domestic armed conflict in El Salvador. That period was marked by systematic violations of human rights and impunity, fostered in part by the ineffectiveness of the Salvadoran judicial system.[FN4] In this regard, the Commission considers that the petitioners were denied access to remedies under domestic law during the time of the armed conflict because at that time El Salvador lacked an independent judiciary; denunciations of human rights violations were notoriously ineffective, especially given the seriousness of the violations in this case.[FN5] At times, filing denunciations of facts could endanger the complainant. Also, the facts occurred when domestic legal remedies were inoperative, especially habeas corpus.[FN6]

[FN4] In its annual reports published during the armed conflict, the IACHR issued statements on several occasions about the violence and lack of effective judicial protection of rights. For example:

The right to justice has been profoundly affected by the state of emergency that reigns in El Salvador, as indicated earlier. Here it is worth reiterating the Commission's remarks from its last Annual Report: the American Convention does not authorize the suspension of judicial guarantees that are essential for protecting basic rights; particularly not for prolonged periods, as has been the case in El Salvador. In addition, there is a lack of judicial independence and authority; members of the judiciary have themselves been the target of criminal acts.

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

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

[FN5] In its annual report published at the end of the Salvadoran armed conflict, the IACHR recalled the situation experienced by that country during the preceding 12 years. It said:

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, "Status of Human Rights in Several Countries: El Salvador," para. 10.

In the same vein, the Inter-American Commission had recommended to the State in 1984 "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.63 Doc. 10, September 14, 1984, Chapter IV, "Situation of Human Rights in Several States: El Salvador," para. 15.e.

[FN6] Referring to the situation experienced in El Salvador during the domestic armed conflict, the Commission found that “The remedy of “amparo” or of habeas corpus were [sic] rendered null since the state of emergency indefinitely suspends such remedies.” IACHR, Annual Report 1983-1984, Chapter IV, para.4.

36. After this period, habeas corpus motions continued to be ineffective for the investigation of forced disappearances, because judicial authorities required complainants to prove the detention.[FN7] The Commission finds that cases of forced disappearance of persons presented during this period did not elicit due clarification of the facts or the investigation and punishment of the responsible parties.[FN8] The State itself recognizes that it was not until March 2002 that the Supreme Court amended its criteria—which previously denied protection in cases of forced disappearance—through jurisprudence to accept the violation of the right to personal liberty even lacking proof of detention, and that the remedy could be used to start investigations of forced disappearances.[FN9] This case therefore was the first opportunity for effective use of the habeas corpus remedy in cases of disappeared persons in El Salvador.

[FN7] See IACHR, Case of Ernestina and Erlinda Serrano Cruz, Report N° 31/01, para. 24, in which the Commission decided the case was admissible, and applied the exception to exhaustion of domestic remedies specified in Article 46.2.c of the Convention because “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 nearly eight years have passed since the first complaint was lodged with the authorities in El Salvador, with no definitive finding of how the events transpired.”

[FN8] The Prosecutor for the Defense of Human Rights has issued a report on forced disappearances, and in its comments on access to justice during the postwar period it stated: After the war, the situation has not changed substantially as regards the victim’s complaints. The clearest evidence that Salvadoran justice has not worked for the victims is that no party responsible for these atrocities is behind bars and no disappeared detainee—or their remains—have 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.

[FN9] See Constitutional Chamber of the Supreme Court, March 20, 2002, in habeas corpus proceeding No. 379-2000, Ana Julia and Carmelina Mejía Ramírez.

37. For this reason on November 15, 2002, the mother of the child Emelinda filed a writ of habeas corpus with the Constitutional Chamber of the Supreme Court, which that chamber said was suspended because “...this Chamber could base its ruling only on what the petitioner said—and as already established, she did not provide any type of information on the alleged breach of the Constitution—and on the report by the Executive Judge, which denied that the abovementioned facts occurred, hence it is necessary to stay the instant habeas corpus proceeding for lack of elements that would permit an analysis of the constitutionality of the alleged restriction of liberty of the individual involved.”[FN10]

[FN10] Constitutional Chamber of the Supreme Court. Habeas corpus proceeding No. 238-2002, of March 3, 2003. Page 2.

38. The Inter-American Court has established that 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.[FN11] On this matter, the IACHR notes that the habeas corpus remedy has not been effective in El Salvador in cases of forced disappearance, even since the conflict ended in 1992.

[FN11] I/A Court H.R., Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87, January 30, 1987, Series A, No. 8, para. 35.

39. The ruling of the Constitutional Chamber of the Supreme Court of March 3, 2003, which rejected this remedy, required the family to provide evidence to determine the occurrence of the forced disappearance. The Commission observes that this State conduct blocks the petitioners' access to this remedy, because the State transfers the obligation to investigate—which in principle is its own—to the relatives of the alleged victims.[FN12] It should be emphasized that in previous Admissibility Reports, the Inter-American Commission has seen the obstacles faced by the relatives of the disappeared victims in El Salvador to be able to establish the whereabouts of those victims, using the habeas corpus motion. [FN13]

[FN12] See I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C, No. 70, para. 152, in which the Court established 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.”

[FN13] See, Report N° 31/01, Case 12.132, Admissibility, Ernestina and Erlinda Serrano Cruz, El Salvador, February 23, 2005, para. 23; Report N° 56/05, Admissibility, Ana Julia and Carmelina Mejía Ramírez, El Salvador, October 12, 2005, paragraphs 33 and 34; Report N° 53/05, Admissibility, José Rubén Rivera, El Salvador, October 12, 2005, paragraphs 30 and 31, and Report N° 11/05, Admissibility, Gregoria Herminia, Serapio Cristián and Julia Inés Contreras, El Salvador, February 23, 2005, para. 32.

40. The IACHR deems that habeas corpus in principle constitutes an effective remedy for determining the whereabouts of a person even though substantial time has passed since his or her disappearance.[FN14] In the instant case, Salvadoran legislation[FN15] further establishes that

the “executive judge” in charge of complying with the writ of habeas corpus has broad authority to require information from state authorities and private parties, and Article 74 of said law, on “responsibility of officials for the writ of habeas corpus,” stipulates that “no authority, court, or instance is exempt from this provision.” As established in the ruling on this habeas corpus motion, the efforts undertaken by the executive judge were limited to determining whether the military operation had been conducted on the specified day and hour.[FN16] Moreover, the Commission has no information on measures taken to investigate the specific facts of the complaint.

[FN14] I/A Court H.R., Case of the Serrano-Cruz Sisters. Judgment of March 1, 2005. Series C, No. 120, para. 79: “[H]abeas corpus presents 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, human or degrading punishment or treatment. The Court considers that habeas corpus can be an effective remedy for discovering the whereabouts of a person 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.”

[FN15] Articles 38 to 40 of the Salvadoran Constitutional Procedures Law.

[FN16] Constitutional Chamber of the Supreme Court. Habeas corpus proceeding No. 238-2002, of March 3, 2003. Page 2.

41. The IACHR considers that as of the date of approval of this report domestic remedies have not operated with the necessary effectiveness to investigate a complaint of forced disappearance. More than 26 years have passed since the facts occurred, and to date the family of Emelinda Lorena Hernández has had no knowledge of the whereabouts of the then minor Emelinda Lorena Hernández, or of any results of the respective investigation, much less of any punishment of the responsible parties.

42. Furthermore, as regards the still-open investigation of the Attorney General’s Office adduced by the State, the Commission concludes that it does not have the necessary information to be able to issue an opinion on that judicial proceeding.

43. At the same time, the IACHR does not find that a complaint to the International Committee of the Red Cross or the Governmental Commission on Human Rights is one of the remedies that must be exhausted according to the Convention. Neither entity is a judicial organ. In any case, a complaint to the International Committee of the Red Cross or the Governmental Commission on Human Rights is not one of the remedies that must have been pursued and exhausted according to Article 46 of the American Convention.

44. Based on the foregoing analysis, the Commission concludes that the exceptions to the requirement of Article 46(1) of the American Convention, as set forth in Articles 46(2)(b) and c), are applicable in the instant case. Finally, it should be noted that invocation of the exceptions to the rule for exhaustion of domestic remedies established in the American Convention is closely

linked to a determination of possible violations of certain rights guaranteed in that treaty, such as effective judicial protection. However, Article 46(2) of the American Convention is an autonomous provision with respect to the other substantive provisions of the instrument. To determine whether the exceptions to exhaustion of domestic remedies also constitute violations of the American Convention in the instant case there must be a separate analysis when considering the merits of the petition. This is because the analysis of said exceptions uses different provisions than those used to determine violations of Articles 8 and 25 of the American Convention.

2. Deadline for presentation of the petition

45. In the petition examined, the Commission has established that the exception contemplated in the Convention's Article 46(2)(b) and c) applies, so the exhaustion of domestic remedies required by Article 46(1)(a) of the American Convention is waived. In addition, the requirement to present the petition within six months is inapplicable, and the Commission must decide whether the petition was lodged within a reasonable period of time, as established in Article 32(2) of the Commission's Rules of Procedure, i.e., considering the date on which the alleged violation of rights occurred and the circumstances of each case.

46. On this matter, taking into account the date on which the alleged facts occurred, and the possibility that it may be found—as alleged—that the alleged disappearance constitutes a continuous violation of human rights, and the circumstances of El Salvador's various domestic remedies, the Commission finds that the petition under study was presented within a reasonable period of time.

3. Duplication of proceedings and international res judicata

47. The Commission understands the subject of the petition is not pending in another international proceeding for settlement, and is not substantially the same as one previously studied by the Commission or by another international organization. Therefore the requirements of Articles 46(1)(c) and 47(d) of the Convention have also been met.

4. Nature of the allegations

48. The Commission notes that the petition alleges the forced disappearance of a child,[FN17] which according to the petitioners' pleading, was not an isolated fact, but part of a systematic pattern of forced disappearance of children during the armed conflict in El Salvador between 1980 and 1992. Concerning the context in which the alleged facts occurred, the Commission notes that the consequences of the phenomenon of forced disappearances of persons have been studied by the Truth Commission of El Salvador. The Commission therefore concludes that the petitioners' complaint describes facts that, if proved, would be violations of the rights protected in Articles 5, 7, 8, 17, 19, and 25 of the American Convention in connection with the obligations of Articles 1(1) and 2, so the requirements of Article 47(b) have been satisfied. In this regard, the Commission finds that information furnished by the petitioners does not tend to establish violation of the right to a name, established in Article 18 of the Convention.

[FN17] According to 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.”

49. In addition, in application of the *iura novit curia* principle, in the sense that if a forced disappearance is proved this would be a violation of the right to juridical personality and the right to life,[FN18] the Commission will analyze, in the merits phase, whether there is a possible violation of the rights in Articles 3 and 4 of the American Convention in connection with the general obligation established in Article 1(1) of the Convention to respect and ensure the rights, given that these articles are implied in the description of the petition’s facts, although they were not explicitly cited by the petitioners.[FN19]

[FN18] See, IACHR Report No. 101/01, Case 10.247 et al. Extrajudicial Executions and Forced Disappearances. October 11, 2001, para. 230. See, I/A Court H.R., Castillo Páez Case. Judgment of November 3, 1997. Series C, No. 34, para. 66.

[FN19] See Report N° 11/05, Admissibility, Gregoria Herminia, Serapio Cristián, Julia Inés Contreras, El Salvador, February 23, 2005.

V. CONCLUSIONS

50. The Commission concludes that this petition is admissible, and therefore it is competent to consider the complaint presented by the petitioners as regards the alleged violation of Articles 5, 7, 8, 17, 19, and 25, in connection with Articles 1(1) and 2 of the American Convention; and, by virtue of the *iura novit curia* principle, as regards the alleged violation of Articles 3 and 4 in relation to Articles 1(1) and 2, as provided in Articles 46(1)(c) and d), and 46(2)(b) and c) of the same treaty, and consistent with Articles 28 to 37 and 39 of the Commission’s Rules of Procedure. However, the petition is inadmissible as regards the alleged violation of Article 18 of the Convention.

51. By virtue of the foregoing arguments of fact and law, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present petition admissible as regards Articles 5, 7, 8, 17, 19, and 25 in connection with Article 1(1) of the American Convention.
2. To declare the petition admissible, in application of the *iura novit curia* principle, as regards Articles 3 and 4 of the American Convention in connection with Articles 1(1) and 2 of the same treaty.

3. To declare the present petition inadmissible as regards Article 18 of the American Convention.
4. To transmit this report to the State and the petitioners.
5. To begin its analysis of the merits of the case.
6. To publish this decision 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 5th day of the month of March, 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, Commissioners.