

**REPORT N° 91/06**  
PETITION 12.343  
ADMISSIBILITY  
EDGAR FERNANDO GARCÍA  
GUATEMALA  
October 21<sup>st</sup>, 2006

**I. SUMMARY**

1. On August 22, 2000, the Inter-American Commission on Human Rights (hereinafter the "Commission," the "Inter-American Commission," or the "IACHR") received a petition submitted by the *Grupo de Apoyo Mutuo (GAM)*, represented by Mario Alcides Polanco Pérez (hereinafter "the petitioners"), against the Republic of Guatemala (hereinafter "the State," "the Guatemalan State," or "Guatemala"). The petitioners request the Commission to declare the international responsibility of the State for the forced disappearance of Edgar Fernando García (hereinafter "the alleged victim"), who on February 18, 1984, was shot and then captured by the Special Operations Brigade of the Guatemalan National Police. To date, his whereabouts remain unknown.

2. With respect to admissibility, the petitioners argue that their petition is admissible because it meets the requirements set forth in Article 46 of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"). The Guatemalan State did not avail itself of the procedural opportunity provided for in the Convention to present arguments regarding admissibility requirements.

3. After an analysis of the petitioner's position and given the lack of response by the State from the outset of the processing of this case, the Commission decides that the case is admissible, in light of Articles 46 and 47 of the American Convention, in relation to the alleged violation of Articles 4, 5, 7, 8 and 25 and in accordance to Articles 1.1) and 2) of the American Convention and Article I of the Inter-American Convention on Forced Disappearance of Persons, in detriment of Edgar Fernando García and his next of kin. Finally, the Commission resolves to publish this report in its Annual Report to the OAS General Assembly, and to notify both parties.

**II. PROCESSING BEFORE THE INTER-AMERICAN COMMISSION**

4. On August 22, 2000, the Commission received the petition dated April 5, 2000, and assigned it number 12.343, in keeping with the regulations then in force. In a note dated November 21, 2000, sent the next day, the Commission forwarded the pertinent parts of the petition to the State, and asked that it submit its observations on the facts alleged and provide evidence that would enable the IACHR to determine whether domestic remedies had been exhausted, within 90 days. On February 13, 2001, in a note dated January 13, 2001, the State sought an extension, which was granted on February 14, 2001, for 90 days.

5. On February 23, 2004, the IACHR reiterated to the State its request for information, originally made in November 2001. On January 31, 2006, the petitioners submitted additional information, and on February 2, 2006, the IACHR asked that the State report on the status of the judicial investigations. On February 7, 2006, the petitioners submitted the updated information that had been requested, which was forwarded to the State on February 22, 2006, for its observations. The IACHR has not received any response from the State to its requests for information.

**III. POSITIONS OF THE PARTIES**

**A. The petitioners**

6. According to the information provided by the petitioners, in February 1984, Edgar Fernando García was 26 years old, was married to Nineth Montenegro, and had a 3-year-old daughter, Alejandra. They add that Edgar Fernando was an urban primary school teacher, a student at the school of engineering of the University of San Carlos, and an administrative worker at the company *Centroamérica de Vidrios S.A. (CAVISA)*, where he was a member of the union, with the position of recording secretary.

7. The petitioners state that on Saturday, February 18, 1984, the alleged victim left his home, located in Zone 7 of Guatemala City, early, to walk to work. They report that at approximately 10 a.m., he encountered Danilo Chinchilla, and that a checkpoint of the Special Operations Brigade (Brigada de Operaciones Especiales, BROE) and the National Police (PN) had been set up by the market known as El Guarda. The security agents are said to have demanded to see their documents, and subsequently shot both of them, as a result of which both were wounded, and then violently placed them in a vehicle of the security forces. Subsequently, Mr. Danilo Chinchilla was taken to the Hospital Roosevelt while the alleged victim was taken to the Fifth Corps of the National Police, located on the street known as calzada San Juan.

8. According to the petitioners, that same day, men in civilian dress who were driving vehicles without tags searched the alleged victim's home, took his belongings, and told his mother and wife that Edgar Fernando García would return the following Tuesday.

9. The petitioners argue that from the very day of Edgar Fernando's detention, his family took many initiatives, before the judicial authorities and the authorities of the Executive branch, to determine his whereabouts; they even looked for him in detention centers, hospitals, and morgues, and took out paid ads in different press outlets. Mr. García's family reported the illegal detention to the courts, and filed writs of habeas corpus (*recursos de exhibición personal*). In addition, they met with the de facto president of Guatemala at that time, General Oscar Humberto Mejía Víctores, the Minister of Defense, the Director of the National Police, and personnel from the Army High Command, yet all these efforts were for naught. According to information that Mr. García's family received extra-officially, he was alive as of December 1984.

10. The petitioners add that on June 23, September 10, and October 15, 1997, the *Grupo de Apoyo Mutuo (GAM)* filed writs of habeas corpus before the Supreme Court on behalf of the alleged victim, which were declared inadmissible in 1998.

11. They further argue that on November 25, 1997, the Supreme Court of Justice was asked to initiate a Special Inquiry Procedure, which was admitted on December 4, 1997, thereby giving a legal mandate to the Office of the Human Rights Ombudsperson (Procuraduría de los Derechos Humanos) of Guatemala to undertake the investigation, pursuant to Article 467 of the Code of Criminal Procedure. That mandate expires every three months; accordingly, the Office of the Ombudsman must constantly seek extensions from the Supreme Court of Justice, the last extension known of having been granted on December 7, 2005. The investigation into the illegal detention and forced disappearance of Edgar Fernando García continues to be in the "Special Inquiry Procedure" under the Human Rights Ombudsman of Guatemala.

12. The petitioners report that a series of steps have been taken through the Grupo Justicia of Guatemala, and with other civil society organizations, resulting in meetings with the Attorney General and the President of the Supreme Court, who apparently showed interest in supporting the creation of a National Commission to Search for the Disappeared. Finally, the petitioners note that due to the appearance of the files of the former National Police, one of the largest in Latin America, work was proceeding in conjunction with the Human Rights Ombudsman of Guatemala to search for information on the forced disappearance of the alleged victim.

## **B. The State**

13. The Guatemalan State did not respond to the reiteration of the request for information from the Inter-American Commission, conveyed by note of February 23, 2004. The Commission confirms that the time periods established in the Commission's Rules of Procedure for the State to provide information on this petition lapsed long ago, without the Guatemalan State having controverted the facts set forth in the complaint.

#### **IV. ANALYSIS**

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

14. The petitioners are authorized by Article 44 of the American Convention to submit complaints before the IACHR. The petition indicates as the alleged victim an individual with respect to whom the Guatemalan State undertook to respect and guarantee the rights enshrined in the American Convention and other international instruments. Guatemala ratified the American Convention on May 25, 1978. Therefore the Commission has *ratione personae* competence to examine the petition.

15. The Commission is competent *ratione loci* to take cognizance of the petition insofar as it alleges violations of rights protected in the American Convention in the territory of a state party to that treaty. The IACHR is competent *ratione temporis* insofar as the obligation to respect and guarantee the rights protected by the American Convention had already come into force for the State on the date the facts alleged in the petition are said to have occurred.

16. The Commission is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention on Human Rights. In addition, the Commission is competent to take cognizance of this complaint pursuant to Articles III and XIII of the Inter-American Convention on Forced Disappearance of Persons, ratified by the Guatemalan State on February 25, 2000, which provides that the crime of forced disappearance shall be considered continuing and permanent so long as no determination is made as to the fate or whereabouts of the victim.

##### **B. Other requirements for admissibility of a petition**

###### **1. Exhaustion of domestic remedies**

17. Article 46.1.a of the American Convention provides that for a complaint submitted to the Inter-American Commission to be admissible in keeping with Article 44 of the Convention, domestic remedies must have been pursued and exhausted, in keeping with generally recognized principles of international law. The purpose of this requirement is to allow the domestic authorities to take cognizance of the alleged violation of a protected right, and, if appropriate, to resolve it before it is taken up by an international body or mechanism.

18. In the instant case, the petitioners have alleged that they exhausted domestic remedies, without these producing the effects hoped for. The State did not controvert or object to the arguments made in this respect.

19. Based on a review of the record, it appears that since the illegal detention and forced disappearance of Edgar Fernando García, his family filed several writs of habeas corpus (*recursos de exhibición personal*), urged that the facts be investigated, made intense efforts before authorities of the Executive branch<sup>1</sup>, looked for him in detention centers, hospitals, and

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<sup>1</sup> In this respect, the record includes: letter of July 6, 1984 signed by the Chief of the High Command of National Defense, to Nineth Montenegro de García and María del Rosario Godoy de Cuevas; telegram dated July 17, 1984 signed by the de facto Head of State to Ms. Nineth Montenegro de García; letter dated August 29, 1984 signed by the Third Chief and Personal Inspector of the National Police to the Minister of Interior; letter dated August 31, 1984 signed by the Chief of the High Command of National Defense, informing Ms. Nineth Montenegro de García; letter of September 1984 signed by the Minister of Interior.

morgues, and published paid ads in press outlets<sup>2</sup> for the purpose of determining his whereabouts.

20. In addition, it appears that Mario Alcides Polanco Pérez filed writs of habeas corpus before the Supreme Court on behalf of the alleged victim on June 23, September 10, and October 15, 1997, which were declared inadmissible in 1998.

21. On November 25, 1997, Mr. Polanco went before the Supreme Court to request, pursuant to the provisions in Article 467 of the Code of Criminal Procedure of Guatemala, that a special inquiry procedure be instituted on behalf of Edgar Fernando García. That article provides:

If a writ of habeas corpus has been filed, and the person on whose behalf it was requested is not found, and there were sufficient motives to affirm that he or she has been detained or held illegally in detention by a public servant, by members of the State security forces, or by regular or irregular agents, without any information being given as to his or her whereabouts, the Supreme Court of Justice, at the request of any person, may:

(1) Order the Public Ministry to report to the court, within no more than five days, as to progress and results of the investigation, on the measures taken and sought, and on those pending. The Supreme Court of Justice may abbreviate this period when necessary.

(2) Entrust the inquiry (preparatory procedure), in excluding order: (a) To the Human Rights Ombudsperson. (b) To an entity or association legally established in the country. (c) To the victim's spouse or next-of-kin.<sup>3</sup>

22. The Supreme Court opened case 1-97 (Special Inquiry Procedure) and on April 17, 1998, ordered the Public Ministry to investigate, within no more than five days, what was set forth in the memorial presented by Mario Polanco, and to report the result. On March 3, 1999, the Supreme Court reiterated the order to the Public Ministry, which was answered on March 11, 1999. In the note, the Public Ministry reports that it took a statement from Mrs. María Emilia García, Edgar Fernando's mother, and that it would take a statement from the owner of the vehicle whose license plate was apparently identified during his detention.

23. On April 22, 1999, the Criminal Chamber of the Supreme Court of Justice received the request for a special inquiry procedure on behalf of Edgar Fernando García, and entrusted the inquiry to the Human Rights Ombudsman. In the resolution, the Supreme Court determined that in order to effectively carry out his mandate, the Ombudsman was considered to share the standing of the agents of the Public Ministry, enjoying all the powers and duties inherent in that position, and ordering the officers and employees of the State to duly cooperate with the Ombudsman. Finally, the Supreme Court ordered that the Ombudsman present the results of his inquiry no later than June 10, 1999, and designated the Fourth Criminal Judge of First Instance, Drug-trafficking, and Crimes against the Environment to oversee the investigation.

24. According to the information provided by the petitioners as of the date of this report, the Human Rights Ombudsman continues to take cognizance of the special inquiry procedure, without there being any results to date in the investigation into the illegal detention and forced disappearance of Edgar Fernando García.

25. It appears that the domestic remedies pursued since 1984 by the family of Edgar Fernando García and by the petitioners have not obtained satisfactory results. As has been stated, the many initiatives taken by the family and friends of Edgar Fernando García since the very day of his arbitrary detention and subsequent forced disappearance, for the purpose of determining his whereabouts, and to have the persons responsible investigated, prosecuted, and punished – including actions before the Judicial branch and the Executive branch – are a matter of record. In addition, since April 22, 1999, the investigation has been in the hands of the Human

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<sup>2</sup> The record includes a series of press notes, including paid ads, urging that information be provided as to the whereabouts of Edgar Fernando García.

<sup>3</sup> Article 467 of the Code of Criminal Procedure of Guatemala.

Rights Ombudsman of Guatemala, who, pursuant to Article 467 of the Code of Criminal Procedure, was entrusted by the Supreme Court to pursue the inquiry into the forced disappearance of Edgar Fernando García, without his work, to date, having produced any result.

26. In view of the foregoing, based on Article 46 of the Convention and Article 31 of the IACHR's Rules of Procedure, the Commission concludes that the exception provided for at Article 46.2.c of the American Convention applies here.

## **2. Time period for submission**

27. According to Article 46.1.b of the Convention, for a petition to be admitted it must be submitted within six months from the date on which the complainant was notified of the final decision issued at the national level. The six-month rule guarantees legal certainty and stability once a decision has been adopted.

28. Pursuant to Article 32.2 of the IACHR's Rules of Procedure, in those cases in which the exceptions to the prior exhaustion rule apply, the petition must be submitted within a time that is reasonable, in the Commission's judgment. According to this article, in its analysis, the Commission "shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

29. As for the petition under study, the Commission has established that exception (c) of Article 46.2 applies, and therefore it must evaluate whether the petition was submitted within a reasonable time based on the specific circumstances of the situation submitted for its consideration.

30. In this regard, in the petition it is alleged that Edgar Fernando García was the victim of a forced disappearance, a criminal offense that is considered continuing and permanent so long as the victim's fate or whereabouts are not determined, without the persons responsible having been investigated, prosecuted, and punished to date, and without the State having controverted the admissibility requirements. In the instant case, the petition was filed on August 22, 2000, while the inquiry promoted by the petitioners themselves was pending before the Human Rights Ombudsman of Guatemala, a procedure which to date is still pending.

31. Based on the foregoing, the Commission concludes that the complaint under study was submitted within a reasonable period of time.

## **3. Duplication of procedures and international *res judicata***

32. It does not appear from the record that the subject matter of the petition is pending before any other international procedure, or that it reproduces a petition already examined by this or any other international body. Accordingly, the requirements established in Articles 46.1.c and 47.d of the Convention have been met.

## **4. Characterization of the facts alleged**

33. Article 47.b of the Convention notes that a petition should be found inadmissible when it "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." From the information supplied by the petitioners, and considering the principle of *jura novit curia*, which grants the power to determine the law applicable to the specific case, the Commission decides, without prejudging on the merits, that the acts described, if proven, tend to establish violations of the right to life, the right to humane treatment, the right to personal liberty, the right to judicial guarantees, and the right to judicial protection, enshrined in Articles 4, 5, 7, 8, and 25, respectively, of the American Convention, in relation to Articles 1.1) and 2) thereof. In addition, the Commission considers that the facts alleged tend to

establish a violation of the commitments assumed by the Guatemalan State at Articles 1 and 2 of the Inter-American Convention on Forced Disappearance of Persons when it ratified that instrument. Accordingly, the IACHR considers that this requirement has been met.

## **V. CONCLUSION**

34. The Commission concludes that the case is admissible, and that it is competent to examine the claim submitted by the petitioners in relation to the alleged violation of Articles 4, 5, 7, 8, and 25 in conjunction with Articles 1.1) and 2) of the American Convention, as well as in relation to Article I of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Edgar Fernando García and his next of kin.

35. Based on the arguments of fact and law set forth above, and without prejudging on the merits issues,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS DECIDES:**

1. To find this petition admissible based on Articles 4, 5, 7, 8, and 25 of the American Convention, in conjunction with its Articles 1.1) and 2), and based on Article I of the Inter-American Convention on Forced Disappearance of Persons.
2. To notify the State and petitioners of this decision.
3. To initiate its consideration on the merits.
4. To publish this decision and include it in the Annual Report to be submitted 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 21<sup>st</sup> day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President, Paulo Sérgio Pinheiro, First Vice-president; Florentín Meléndez, Second Vice-president, Freddy Gutiérrez, Paolo Carozza and Víctor Abramovich, members of the Commission.