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**REPORT No. 53/21  
PETITION 729-13**

REPORT ON ADMISSIBILITY

ENRIQUE ROBERTO DUCHICELA HERNÁNDEZ AND HIS  
FAMILY  
PERU

Approved by the Commission electronically on March 29, 2021.

**Cite as:** IACtHR, Report No. 53/21, Petition 729-13. Admissibility. Enrique Roberto Duchicela Hernández y familia. Peru. March 29, 2021.

## I. INFORMATION ABOUT THE PETITION

<b>Petitioner:</b>	Marta Escobar Andrade, Human Rights Center of the Pontifical Catholic University of Ecuador, Regional Human Rights Advisory Foundation (INREDH)
<b>Alleged victim:</b>	Enrique Roberto Duchicela Hernández and his family
<b>Respondent State:</b>	Peru <sup>1</sup>
<b>Rights invoked:</b>	Articles 3 (right to juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 13 (freedom of expression) and 25 (judicial protection) in relation to its article 1.1 (obligation to respect rights) of the American Convention on Human Rights <sup>2</sup>

## II. PROCEEDINGS BEFORE THE IACHR<sup>3</sup>

<b>Filing of the petition:</b>	April 30, 2013
<b>Notification of the petition to the State:</b>	December 6, 2017
<b>State's first response:</b>	March 7, 2018
<b>Additional observations from the petitioner:</b>	June 22, 2018
<b>Additional observations from the State:</b>	November 8, 2018

## III. COMPETENCE

<b>Competence Ratione personae:</b>	Yes
<b>Competence Ratione loci:</b>	Yes
<b>Competence Ratione temporis:</b>	Yes
<b>Competence Ratione materiae:</b>	Yes, American Convention (deposit of the instrument of ratification made on July 28, 1978), Inter-American Convention to Prevent and Punish Torture <sup>4</sup> (deposit of the instrument made on March 28, 1991) and Inter-American Convention on Forced Disappearance of Persons (deposit of the instrument made on February 13, 2002) <sup>5</sup>

## IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

<b>Duplication of procedures and International res judicata:</b>	No
<b>Rights declared admissible</b>	Articles 3 (right to juridical personality), 4 (vida), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), and 25 (judicial protection) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) as well as articles I and IX of the IACFDP, and articles 1, 6, and 8 of the IACPPT

<sup>1</sup> As set forth in article 17.2.a of the Commission's Rules for Procedure, Commissioner Julissa Mantilla Falcón, a Peruvian national, participated neither in the discussion nor in the decision of the present matter.

<sup>2</sup> Hereinafter "the American Convention".

<sup>3</sup> The observations submitted by each party were duly transmitted to the opposing party.

<sup>4</sup> Hereinafter "IACPPT".

<sup>5</sup> Hereinafter "IACFDP".

<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, exception from article 46.2. c) of the Convention apply
<b>Timeliness of the petition:</b>	Yes, in the terms of section VI

## V. FACTS ALLEGED

1. The petitioners claim the illegal detention, torture, forced disappearance and extrajudicial execution of an agent of Ecuadorian Foreign Service, Mr. Enrique Roberto Duchicela Hernández (hereinafter "the alleged victim"), which occurred in the city of Lima, in May in 1988. They hold that the alleged victim was First Sergeant of Air Aviation of Ecuador and that on December 17, 1986 he was named Administrative Assistant in the Air Attaché office of Lima, a position he was to hold between January 11, 1987 and June 1988.

2. They affirm that although officially, the alleged victim was carrying out activities for such assigned position, in reality he was executing espionage at the request of the State of Ecuador, to gain access to classified and useful information of the Peruvian State. They describe that for such effect, during 1986 and 1987, he bought and leaked information from the Peruvian Army Intelligence Service (hereinafter "AIS"). They state that in 1987, authorities of the AIS learned about this data leak, discovered an espionage network financed by Ecuador, and that as part of their investigations they identified Second Lieutenant Marco Barrantes as the direct contact of the alleged victim. They hold that on March 18, 1988, Marco Barrantes went missing and in May that same year, he was trialed in absentia for crimes against national security.

3. They narrate that on Friday May 27, 1988, the alleged victim communicated for the last time with his wife, Mrs. Marta Escobar Andrade by telephone, and that since that day he did not attend the Ecuadorian embassy to work. They affirm that on May 30, 1988 his immediate supervisor informed the ambassador of the disappearance and that on May 31, the Ecuadorian Foreign Ministry also acknowledged the case. They claim that the investigations conducted started in Peru, with the participation of the Missing People Division of the Police of Investigations in total confidentiality. They indicate that on June 6, 1988 Ecuadorian authorities were informed that the case was known by the Peruvian president at the time, Alan García.

4. They inform that in return, Mrs. Escobar requested help from different authorities in Ecuador, even getting to meet with the President in office at the time. They affirm that the Ecuadorian Ministry of Defense informed her that her husband had left her letter stating that he would not return to Ecuador because he had begun an extramarital affair. They emphasize that the Ecuadorian Armed Forces maintained this version, despite the fact that such letter from the alleged victim never appeared.

5. They explain that due to this refusal to clearly inform or conducting an investigation, Mrs. Escobar decided to travel to Peru to inquire about what had happened to her husband, but she was detained at the border by three Peruvian military agents who, after intimidating and threatening her, returned her to Ecuador. They claim that for almost a decade the family of the alleged victim had no access to any sort of investigation or judicial remedies in the Peruvian jurisdiction, to clarify the facts and learn the whereabouts of Mr. Duchicela, and that they were even deprived from entering Peru.

6. They hold that in 2000 Peruvian journalist Ricardo Uceda contacted Mrs. Escobar saying he had information about what had happened and that he would publish a report on the matter. Thus, they claim that the book "Death in the Pentagonito. The secret graveyards of the Peruvian Army" was published in 2004, and its chapter VIII named "The spy who did not return to Quito" narrates the disappearance of Mr. Duchicela. They describe that the journalistic investigation discovered from the testimonies of Jesús Sosa, a member of the Peruvian army who participated in the events, that the alleged victim was abducted on May 27, 1988, after a tracking and capture operation ordered by AIS high military officials. They refer that said agent indicated that Marco Barrantes and the alleged victim were detained, interrogated for espionage activities, tortured and executed on June 10, 1988 in the basements of the AIS, and that their bodies were finally cremated and their ashes scattered in the gardens of the Pentagonito on July 11, 1988.

7. They state that a criminal investigation was initiated in Peru for the disappearance, and that the First Supraprovincial Criminal Prosecutor acknowledged the case on March 14, 2007. They hold that on August 29, 2012 the case was provisionally closed on the grounds that there was no merit to file a complaint.

They claim that the death of Mr. Duchicela has remained in impunity and that the criminal proceedings in Peru were conducted without his relatives being allowed to participate.

8. In turn, the State asserts that the petition is inadmissible because the petitioners, dissatisfied with the resolution to provisionally close the case ordered by the First Supraprovincial Criminal Prosecutor, intend that the IAC<sup>HR</sup> act as a fourth instance and rule on aspects that have already been assessed by the competent authority.

9. It also claims that the alleged facts do not constitute a violation of the rights enshrined in the American Convention. It points out that once the statements linking Jesús Sosa to the commission of crimes became known, the corresponding criminal investigation was initiated. It refers that authorities determined to close the case because the statements made by the former military agent were contradictory and, therefore, that he had not provided consistent information that had the capacity to generate certainty in the development of the facts.

10. It emphasizes that police personnel continued to carry out investigative actions which were reported to the First Supraprovincial Criminal Prosecutor who, on repeated occasions between 2014 and 2018, has held that there are no new evidentiary elements that would allow modifying the ruling of provisional archiving.

## **VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

11. The petitioners maintain that at the time of the facts, the family of the alleged victim had no effective remedies to report the forced disappearance. They also point out that the criminal investigation conducted years later in Peru, was closed on August 29, 2012 by the First Supraprovincial Criminal Prosecutor and the alleged victim's wife was notified on December 7, 2012. They report that to this date the situation remains in impunity. The State did not raise specific arguments concerning the exhaustion of domestic remedies, and indicated that the archiving is provisional which implies the possibility that once more evidence is gathered, it can be reopened and continue with the corresponding proceedings.

12. The Commission recalls that, in situations as the one addressed herein which includes crimes against life, that must be taken into account for the purposes of the petition's admissibility are those related to the criminal investigation and punishment of the persons responsible. In the specific case, the IAC<sup>HR</sup> observes that from the date of the alleged victim's disappearance in Lima, his family has had no access to effective and appropriate judicial remedies in the Peruvian jurisdiction to investigate the facts or to find the whereabouts of the alleged victim. It also takes into account, that a criminal investigation was only initiated in 2007, was provisionally shelved in 2012 and since then the First Supraprovincial Criminal Prosecutor, has not modified such decision on the grounds of not having further evidence. On this matter, the Commission emphasizes that the State has the obligation to immediately investigate the possible commission of an enforced disappearance, which is a crime that can be prosecuted ex officio, even more so when state agents are implicated in the alleged facts. This burden is to be assumed by the State as its own legal duty, and not as a management of private interests or that depends on the initiative of the latter or the provision of evidence by them<sup>6</sup>.

13. On the other hand, the IAC<sup>HR</sup> notes the allegation that the criminal investigation was prolonged without reaching a precise determination of the facts nor an individualization of those responsible, situation that would result in the impunity of the reported situation. In light of the above, the IAC<sup>HR</sup> concludes that, concerning this aspect of the petition, the exception to the exhaustion of domestic remedies provided for in article 46.2.c of the American Convention applies.

14. Finally, in view of the fact that the petition was received on April 30, 2013, the alleged facts which originated the petition took place on May 27, 1988 and their effects persist until the present, as well as the nature of the claim, the Commission considers that it was filed within a reasonable time and considers the requirement of article 32.2 of the IAC<sup>HR</sup>'s Rules for Procedure as met.

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<sup>6</sup> IAC<sup>HR</sup>, Report No. 159/17, Petition 712-08. Admissibility. Sebastián Larroza Velázquez and family. Paraguay. November 30, 2017, para. 14.

## VII. ANALYSIS OF COLORABLE CLAIM

15. In view of the elements of fact and law presented by the parties and the nature of the matter before it, the Commission considers that the petitioner's allegations are not manifestly unfounded and require a study of the merits, since if the alleged arbitrary detention of the alleged victim by State agents, without taking into account his status as a member of a diplomatic mission, followed by mistreatment and torture, the alleged extrajudicial execution and disappearance of his remains, the alleged lack of judicial protection for the facts, as well as the alleged mistreatment suffered by his family, are proven it could characterize possible violations of the rights recognized in Articles 3 (recognition as a person before the law), 4 (life), 5 (personal integrity), 7 (personal liberty), 8 (judicial guarantees) and 25 (judicial protection) of the Convention, in connection with its Article 1. 1, to the detriment of the alleged victim and his family. As well as articles I and IX of the Inter-American Convention on Forced Disappearance of Persons due to the extended nature of the crime of forced disappearance and its alleged lack of investigation; and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, concerning the lack of investigation of the alleged facts after the dates of the respective ratifications and deposits.

16. As for the allegations for the violation of article 13 (freedom of thought and expression) of the American Convention, the Commission observes that the petitioner does not raise sufficient allegations or elements to identify or determine, *prima facie*, the violation of this provision. In this sense, the Commission understands that the fact that the family had no access to any kind of investigation nor judicial remedies in Peru to clarify the facts and locate the alleged victim would be encompassed within articles 8 and 25.

17. Finally, in regard to allegations from the State concerning the "fourth instance" formula, the Commission reiterates that, for purposes of admissibility, it must decide whether the alleged facts may characterize a violation of rights, as stipulated on article 47(b) of the American Convention, or whether the petition is 'manifestly unfounded' or its 'total inadmissibility is evident', according to subsection (c) of such article. The criterion to assess these requirements differs from the one used to decide on the merits of a petition. Likewise, within the scope of its mandate it is competent as to declare a petition admissible if it refers to domestic proceedings which may violate rights guaranteed by the American Convention. This means, that according to the abovementioned norms of the Convention, in accordance with article 34 of its Rules for Procedure, the admissibility analysis centers in verifying such requirements, which refer to the existence of elements.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8 and 25 of the American Convention in connection to its article 1.1; articles I and IX of the Inter-American Convention on Forced Disappearance of Persons; and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

2. To find the instant petition inadmissible in relation to Article 13 of the American Convention.

3. To notify the parties of this decision; to proceed with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 29<sup>th</sup> day of the month of March, 2021. (Signed): Antonia Urrejola, President; Flávia Piovesan, Second Vice-President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.